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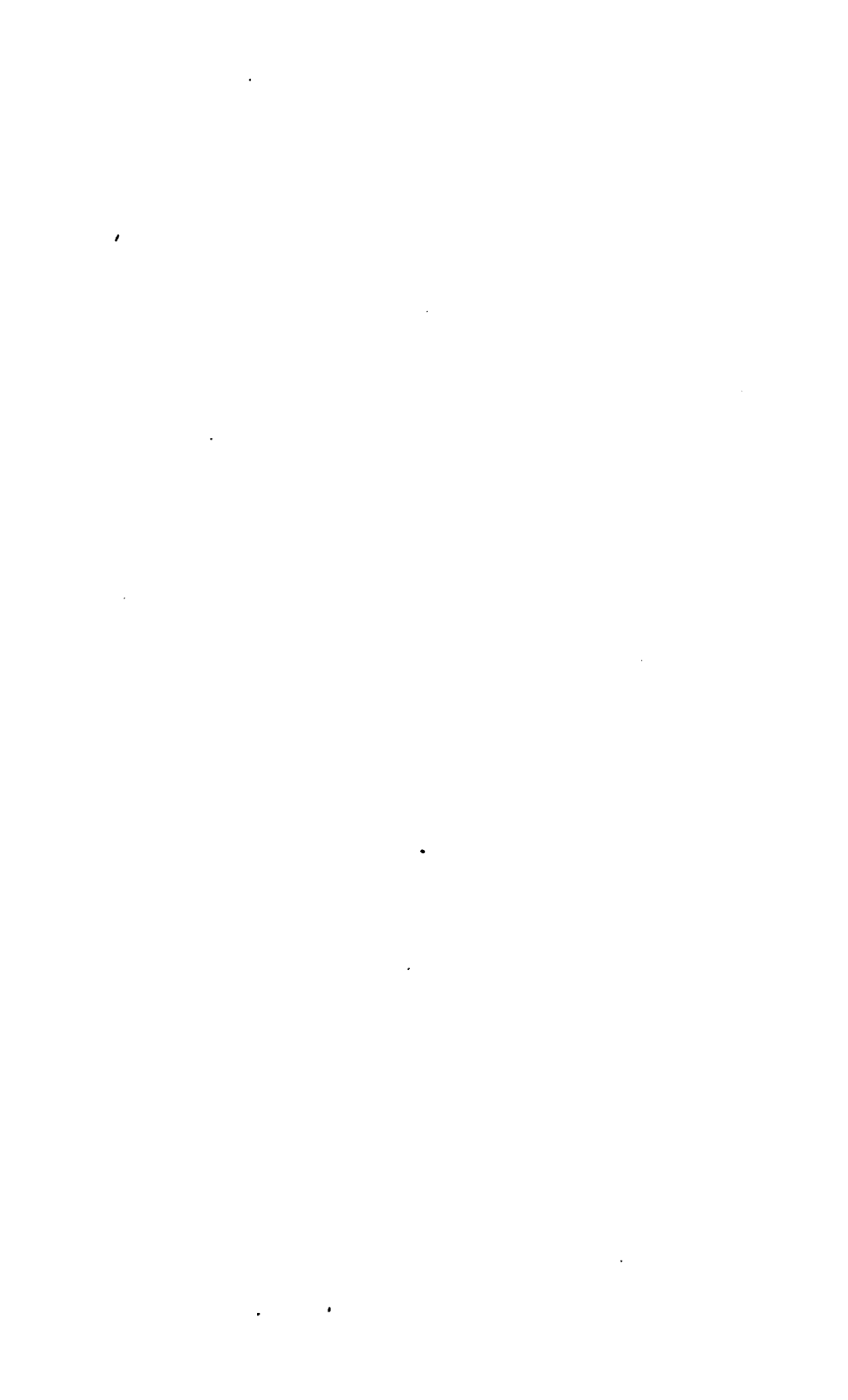
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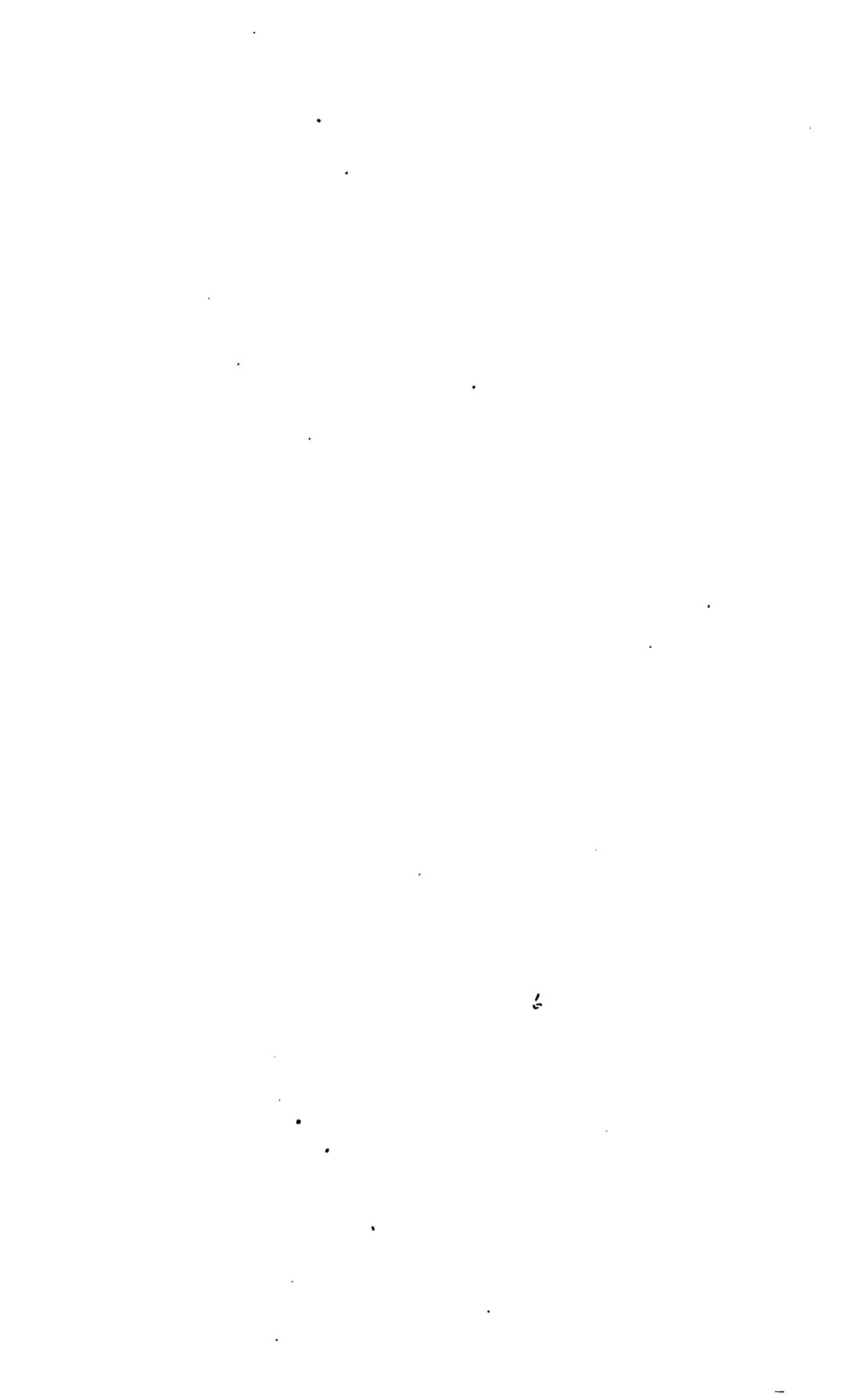


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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

TIDAL RIVERS.¹—(See also **NAVIGABLE WATERS**, vol. 16, p. 236; **WATERS AND WATERCOURSES**.)

TIDE.—See note 2.

1. In order that a river may be tidal at a certain spot, it is not necessary that the water should be salt, but the spot must be one where the tide, in the ordinary and regular course of things, flows and reflows; and hence where, in case of exceptionally high tides, some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide; the river cannot, on that account, be called tidal at that point. *Reece v. Miller*, 8 Q. B. Div. 630. But if the water rises and falls regularly with the ebb and flow of the tide, it is tide water, although the fluctuation is caused by the meeting of the sea water with the river water. *Atty. Gen'l v. Woods*, 108 Mass. 436; 11 Am. Rep. 380. And see, to the same effect, *Rex v. Smith*, 2 Dougl. 441; *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Lapish v. Bangor Bank*, 8 Me. 85. But the flowing and reflowing of the waters of a lake into a river, caused by the occasional swell and subsidence of the lake, and not by the ebb and flow of the regular tides, do not constitute such river a "tidal river." *Hooker v. Cummings*, 20 Johns. (N. Y.) 98; 11 Am. Dec. 249.

2. **Tidal Waters.**—(See also **BEACH**, vol. 2, p. 159; **BOUNDARIES**, vol. 2, p. 504; **NAVIGABLE WATERS**, vol. 16, p. 236; **SEAWEED**, vol. 21, p. 981; **SHORE**, vol. 22, p. 778.)

Tide waters, whether salt or fresh, are waters where the ebb and flow of the tide from the sea is felt. *Com. v. Vincent*, 108 Mass. 447. Where land lying along the seashore is conveyed by boundary to "tide water," the "sea" or "seashore," or any other similar expression, the law gives effect to it, and extends it to the low-water mark. *Doane v. Willcutt*, 5 Gray (Mass.) 336; 66 Am. Dec. 369.

Tide Lands.—Within the *California* statute providing for the sale of tide lands belonging to the state, the term "tide lands" means such lands as are covered and uncovered by the flow of ordinary tides. It does not include lands permanently submerged. *Walker v. Marks*, 2 Sawy. (U. S.) 152; *Rondell v. Fay*, 32 Cal. 354; *People v. Davidson*, 30 Cal. 379.

In *Elliott v. Stewart*, 15 Oregon 259, it was held that the act providing for the purchase from the state of "tide lands," did not authorize the acquisition of a private title to a sand bar several miles from the shore, only exposed at low tide and covered by six feet of water at high tide; that such a bar was not an "island," a "shore," or a "beach," within the definitions of those terms, and no purchaser thereof from the state, as "tide land," could acquire an exclusive right to fish on said bar.

TILL—(See also TIME (COMPUTATION OF), vol. 26, p. 3; UNTIL).—See note 1.

TILLAGE.—Husbandry; the cultivation of land, particularly by the plow.²

TIMBER—(See LOGS AND LUMBER, vol. 13, p. 1018; TREES, vol. 26).—The term timber includes the body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the framework of a building, excluding the planks, boards, shingles, or laths used to complete the structure.³

1. "Till" includes the day to which it is prefixed. *Bunce v. Reed*, 16 Barb. (N. Y.) 352; *Dakins v. Wagner*, 3 Dowl. P. C. 535.

"Till Next Term" does not include any part of said term. *DeHaven v. DeHaven*, 46 Ind. 296.

2. *U. S. v. Williams*, 18 Fed. Rep. 478. In this case, it was held that a settler on public land under the pre-emption and homestead acts, after clearing the same of timber for the purpose of "tillage" or actual cultivation, could dispose of the timber to the best advantage to himself, but the timber could not be cut for the purpose of disposing of it by sale or otherwise.

In *Vigar v. Dudman*, L. R., 7 C. P. 72, *aff'g* L. R., 6 C. P. 470, it was held that where a house was built upon a portion of an acre field, and the other portion, to the extent of twenty-two perches, converted into a garden by the owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard, the manner in which the field had been dealt with did not amount to a conversion of it or any part of it, into "tillage."

Land sown to clover, with corn, is not thereby restored to a state of permanent pasture, but is still in tillage. *Birch v. Stephenson*, 3 Taunt. 469.

3. *Babka v. Eldred*, 47 Wis. 189; *Kollock v. Parcher*, 52 Wis. 393.

In *Battis v. Hamlin*, 22 Wis. 669, it seems to have been assumed that shingles are lumber and not timber. And see *Gross v. Eiden*, 53 Wis. 343. In *Babka v. Eldred*, 47 Wis. 189, laths were also held not to be timber but lumber.

In *Kollock v. Parcher*, 52 Wis. 393, railroad ties were held to be timber.

In *McCauley v. State*, 43 Tex. 374, it was held that an indictment for cutting, destroying, and carrying away

fence rails did not lie under *Texas* Penal Code, art. 717, punishing or imposing a penalty for knowingly cutting down or destroying any "timber" without the consent of the owner.

In *U. S. v. Stores*, 14 Fed. Rep. 825, it was said that the particular meaning of the term depends upon the connection in which the word is used, or the calling of the person making use of it, and where parties were indicted for cutting "timber" on government land in violation of the act of congress, the term was held to apply not alone to large trees fitted for house or ship building, but to include trees of any size of a character or sort that could be used in any kind of manufacture, or the construction of any article. In this case, it was also held that selling the timber for fire wood, or burning it into charcoal, would be no defense or excuse for cutting or removing it, nor could it be sufficient evidence of the worthlessness of the timber cut, to justify the act. But in *Nash v. Drisco*, 51 Me. 417, it was held that the purchaser, under a contract for the purchase of all the "timber" growing on a certain place, acquired no title to trees suitable only for fire wood.

In *U. S. v. Shuler*, 6 McLean (U. S.) 28, it was said: "Unless the contrary clearly appears from the context, it will be presumed that the word was employed in its ordinary popular sense. It is not the interpretation of an artistic or technical word, or a word of equivocal meaning. It is a word in common use, and has an enlarged or restricted sense, according to the connection in which it is employed. . . . As a generic term, it properly signifies only such trees as are used in building—either ships or dwellings. But its signification is not limited to trees; it applies to the wood, or the particular form which the tree assumes when no longer growing or standing in the

TIME (COMPUTATION OF).—See also MONTH, vol. 15, p. 712; REASONABLE TIME, vol. 19, p. 1089; SPECIFIC PERFORMANCE, vol. 22, p. 908.)

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I. DEFINITION.—Time is the system of those relations which any event has to any other, as past, present, or future.¹ It is, also, defined as the measure of duration.²

II. GENERAL RULE FOR COMPUTATION—1. *From Time of an Act Done.*—The old rule was that where computation was to be made from the time of an act done, the day on which the act was done should be included,³ unless a right would be divested, an estoppel created, or a forfeiture incurred, when the computation would

ground. Strictly speaking, a tree is that which is growing or standing in the ground, whether alive or dead.

... When the trunk is severed from the root, and felled to the earth, it is no longer, properly speaking, a tree. It becomes timber or lumber, according to the use to which it can be applied.⁴

Cross-references.—Sale of—Within Statute of Frauds.—See LOGS AND LUMBER, vol. 13, p. 1020.

Timber Culture and Timber Lands.—See PUBLIC LANDS, vol. 19, pp. 310, 331 and 364. A statute giving a bounty for planting trees, to be paid by the county in which they are planted, is void, under *Missouri* Const., art. 4, § 47, and also because the giving of such bounties is an abuse of the power of taxation. *Deal v. Mississippi County*, 107 Mo. 464; 14 L. R. A. 622.

License to Cut.—See LOGS AND LUMBER, vol. 13, p. 1030.

Trespass for Cutting.—See TRESPASS.

Restraining Cutting.—See INJUNCTION, vol. 10, p. 883.

Replevin for Timber Cut.—See REPLEVIN, vol. 20, pp. 1061–1063.

Measure of Damages.—See DAMAGES, vol. 5, p. 36.

Waste in Cutting.—See WASTE.

1. Century Dict.

2. Black's Law Dict.; Bouvier's Law Dict.

3. *Arnold v. U. S.*, 9 Cranch (U. S.) 104; *Priest v. Tarlton*, 3 N. H. 93; *Wheeler v. Bent*, 4 Pick. (Mass.) 167; *Adams v. Cummiskey*, 4 Cush. (Mass.)

420; *Butler v. Fessenden*, 12 Cush. (Mass.) 78; *Blake v. Crowinshield*, 9 N. H. 304; *Wayne v. Duffy*, 1 Phila. (Pa.) 367; *Snyder v. Warren*, 2 Cow. (N. Y.) 518; 15 Am. Dec. 519; *Griffith v. Bogert*, 18 How. (U. S.) 158; *Mooar v. Covington City Nat. Bank*, 80 Ky. 305; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392; *Northrop v. Cooper*, 23 Kan. 432; *English v. Ozburn*, 59 Ga. 392; *Brown v. Buzan*, 24 Ind. 194.

In *Chiles v. Smith*, 13 B. Mon. (Ky.) 461, *Simpson, J.*, citing *Bellaris v. Hester*, 1 Ld. Raym. 280, said: "The rule in regard to the computation of time seems to be, that when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done." (*Overruling Smith v. Cassity*, 9 B. Mon. (Ky.) 192; 48 Am. Dec. 420.) See also *Perry v. Provident L. Ins. Co.*, 99 Mass. 162; *Handley v. Cunningham*, 12 Bush (Ky.) 401; *Hampton v. Erenzeller*, 2 P. A. Browne (Pa.) 18; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *White v. Crutcher*, 1 Bush (Ky.) 472; *Wood v. Com.*, 11 Bush (Ky.) 220; *Glassington v. Rawlins*, 3 East 407; *Rex v. Adderley*, 2 Dougl. 463; *Lebus v. Wayne-Ratterman Co.* (Ky. 1893), 21 S. W. Rep. 652; *Thrower v. Brandon*, 89 Ala. 406.

In *Pearpoint v. Graham*, 4 Wash. (U. S.) 232, *Washington, J.*, said: "Where the computation of time is to

be made exclusive of such day.¹ But the general tendency of the modern authorities, where an act is required to be done within

be made from an act done, the day on which the act is performed is included, because the act is the *terminus a quo* the computation is to be made; and there being in contemplation of law no fraction of a day, unless when an inquiry as to priority of acts done in the same day becomes necessary, the *terminus* is considered as commencing on the first moment of that day;" citing *Clayton's Case*, L. R., 5 Ch. 15; *Castle v. Burditt*, 3 T. R. 623; *Norris v. The Hundred of Gaustin*, 2 Roll. Ab. 520.

In *Thomas v. Afflick*, 16 Pa. St. 14, it was held that the rule of common law as to the computation of time is to include the first day and exclude the last, and, therefore, where notice to a justice of the peace of an intended suit, given in pursuance of *Pennsylvania Act of March 21, 1772*, § 1, was served on May 19, and suit brought on June 18, the notice was given thirty days before the suit. The rule laid down in *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200, was disapproved in the above case; but the court, in *Cromelin v. Brink*, 29 Pa. St. 522, said that *Goswiler's Case* was overthrown without an attempt at either reason or authority, and, *overruling* *Thomas v. Afflick*, 16 Pa. St. 14, adhered to the modern doctrine.

Under the *Delaware* statute for discharging debtors after five days imprisonment, the first and last days are to be included. *Fortner's Case*, 2 Harr. (Del.) 461.

In computing the time for the limitation of actions against a person from the day of his coming of age, the day he attained his majority is to be counted; in computing his majority, the day of his birth is to be included. *Ross v. Morrow*, 85 Tex. 172. See also *Phelan v. Douglass*, 11 How. Pr. (N. Y. Supreme Ct.) 193.

Under the *Connecticut* Gen. Sts., p. 83, § 2, requiring notice to be given of town meetings, by a warning sign set on a post at least five days, inclusive, before the meeting, it was held that the term "five days, inclusive," means five days inclusive of the day on which the notice is posted, but exclusive of the day on which the meeting is to be held. *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22.

Where a lease was made for one year from the first day of April, the term

was held to expire at the close of the 31st day of March next. But in this case the decision is put expressly on the understanding of the country respecting the end of a tenant's term. *Marys v. Anderson*, 24 Pa. St. 272.

In computing the time between the *teste* of an execution and the return, the day of the *teste* is to be included and the day of the return excluded. *Ogden v. Redman*, 3 A. K. Marsh. (Ky.) 234.

In applications for a new trial under the *Kentucky* Civ. Code, § 371, where the requirement is that the motion be made within three days after the decision, the day of the decision and the day of the motion must both be computed. *Long v. Hughes*, 1 Duv. (Ky.) 387.

The day on which an execution issues is included in the time which it has to run. *Ryman v. Clark*, 4 Blackf. (Ind.) 329.

In *Indiana*, the day fixed by a justice of the peace for the trial of the right of property in goods taken in execution, must be within five days after the claim to the goods is filed. In reckoning the time, the day on which the claim was filed must be counted. *Long v. McClure*, 5 Blackf. (Ind.) 319.

When a statute requires service for a fixed number of days, the mode of computation is to include the day of service and to exclude the other. But when it requires a number of entire days, both must be excluded. *Garner v. Johnson*, 22 Ala. 494.

1. In the computation of time, whether the day on which an act is done or an event happened, is to be included or excluded, must depend upon the circumstances and the reason of the thing, so that the intention of the parties may be effected. Such a construction should be given as would operate most to the ease of the parties entitled to favor, and by which rights would be secured and forfeitures avoided. *O'Connor v. Towns*, 1 Tex. 107. See also *Dowling v. Foxall*, 1 B. & B. 193; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Lester v. Garland*, 15 Ves. 248; *Blaymire v. Hayley*, 6 M. & W. 49; *Taylor v. Brown*, 147 U. S. 640.

In the computation of time from an act done, the day on which the act is done will be excluded, whenever such

a limited period, from or after a particular time or event, is to exclude the day thus designated, and include the last day of the specified period.¹

exclusion will prevent an estoppel or save a forfeiture. *Windsor v. China*, 4 Me. 208; *Flint v. Sawyer*, 30 Me. 226; *Moore v. Bond*, 18 Me. 142; *State v. Gasconade County Ct.*, 33 Mo. 102; *State v. Schnierle*, 5 Rich. (S. Car.) 299; *Williamson v. Farrow*, 1 Bailey, (S. Car.) 611; 21 Am. Dec. 492; *McElwee v. White*, 2 Rich. (S. Car.) 95.

In cases of forfeiture, the day of the event, after which in a specified number of days the forfeiture occurs, will be excluded. And in applying this doctrine to a *quasi* forfeiture, a court of equity should lean against the construction which favors forfeiture. *Thorne v. Mosher*, 20 N. J. Eq. 257.

In *Blake v. Crowninshield*, 9 N. H. 304, Wilcox, J., said: "The tendency of the more recent decisions, undoubtedly, is to exclude the day of the act, unless to save a forfeiture, or for some other special reason, it becomes necessary to reckon it inclusive."

1. *Dutcher v. Wright*, 94 U. S. 553; *Farwell v. Rogers*, 4 Cush. (Mass.) 460; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Buttrick v. Holden*, 8 Cush. (Mass.) 233; *Fuller v. Russell*, 6 Gray (Mass.) 128; *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Dec. 470; *Swift v. Tousey*, 5 Ind. 106; *Krohn v. Templelin*, 2 Ind. 146; *Hathaway v. Hathaway*, 2 Ind. 513; *Womack v. McAhren*, 9 Ind. 6; *Faure v. U. S. Exp. Co.*, 23 Ind. 48; *Vogel v. State*, 107 Ind. 374; *Hill v. Pressley*, 96 Ind. 447; *Catterlin v. Frankfort*, 87 Ind. 45; *Reigelsberger v. Stapp*, 91 Ind. 311; *Kerr v. Haverstick*, 94 Ind. 178; *Cornell v. Moulton*, 3 Den. (N. Y.) 12; *Homan v. Liswell*, 6 Cow. (N. Y.) 659; *Matter of Carhart*, 2 Den. (N. Y.) 627; *Ex p. Dean*, 2 Cow. (N. Y.) 605; 14 Am. Dec. 521; *Hoffman v. Duel*, 5 Johns. (N. Y.) 232; *Judd v. Fulton*, 10 Barb. (N. Y.) 117; *Commercial Bank v. Ives*, 2 Hill (N. Y.) 355; *Magnusson v. Williams*, 111 Ill. 450; *Chicago, etc., R. Co. v. Evans*, 39 Ill. App. 261; *Roan v. Rohrer*, 72 Ill. 582; *Bowman v. Wood*, 41 Ill. 203; *Ewing v. Bailey*, 5 Ill. 420; *Higgins v. Halligan*, 46 Ill. 173; *Harper v. Ely*, 56 Ill. 179; *Pugh v. Reat*, 107 Ill. 440; *Waterman v. Jones*, 28 Ill. 55; *People v. Hatch*, 33 Ill. 14; *Richardson v.*

Ford, 14 Ill. 332; *Vairin v. Edmonson*, 10 Ill. 270; *Zimmerman v. Cowan*, 107 Ill. 631; 47 Am. Rep. 476; *Brown v. Chicago*, 117 Ill. 21; *Prior v. People*, 107 Ill. 628; *Weld v. Barker*, 153 Pa. St. 465; *Browne v. Browne*, 3 S. & R. (Pa.) 496; *Sims v. Hampton*, 1 S. & R. (Pa.) 411; *Weeks v. Hull*, 19 Conn. 376; *Sands v. Lyon*, 18 Conn. 18; *Evans v. Bowers*, 13 Colo. 511; *Wright v. Maus*, 111 Ind. 422; *Kimm v. Osgood*, 19 Mo. 60; *White v. Haworth*, 31 Mo. App. 439; *Deere v. Hucht*, 32 Mo. App. 153; *St. Louis v. Bambrick*, 41 Mo. App. 648; *Smith County v. Labore*, 37 Kan. 486; *Beckwith v. Douglas*, 25 Kan. 229; *Conklin v. Marshalltown*, 66 Iowa 122; *Lang v. Phillips*, 27 Ala. 311; *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; *Loosse v. Vogel*, 80 Ala. 308; *White v. Mounts*, 36 W. Va. 179; *Wing v. Davis*, 7 Me. 31; *Peables v. Hannaford*, 18 Me. 106; *Ward v. Walters*, 63 Wis. 39; *Elder v. Bradley*, 2 Sneed (Tenn.) 247; *Gorham v. Wing*, 10 Mich. 486; *Chaddock v. Barry*, 93 Mich. 542; *Warren v. Slade*, 23 Mich. 1; 9 Am. Rep. 70; *Shelton v. Gillett*, 79 Mich. 173; *Anderson v. Baughman*, 6 Mich. 298; *Burr v. Lewis*, 6 Tex. 76; *Hill v. Kerr*, 78 Tex. 213; *White v. German Ins. Co.*, 15 Neb. 660; *State v. Weld*, 39 Minn. 426; *Spencer v. Haug*, 45 Minn. 231; *Hall v. Cassidy*, 25 Miss. 48; *Howbert v. Heyle*, 47 Kan. 58; *State v. Winter Park*, 25 Fla. 371; *Sheldon Bank v. Royce*, 84 Iowa 288; *Backer v. Pyne*, 130 Ind. 288; *Baltimore, etc., R. Co. v. Flinn*, 2 Ind. App. 55; *Montgomery v. Souder*, 8 Lanc. L. Rev. (Pa.) 185; *Pellew v. Wonford*, 9 B. & C. 134; 17 E. C. L. 343.

In *Lester v. Garland*, 15 Ves. 248, the Master of the Rolls said: "It is not necessary to lay down any general rule upon this subject, but, upon technical reasoning, I rather think it would be more easy to maintain that the day of an act done or event happening ought, in all cases, to be excluded than that it should in all cases be included."

In *Carothers v. Wheeler*, 1 Oregon 194, the court said: "We hold upon authority, as well as in accordance with the rule laid down in our statute, that the time within which an act is to be done, shall be computed by excluding

the first day and including the last." See also *Hahn v. Dierkes*, 37 Mo. 574.

Under a statute requiring that certain penalties incurred by railroad companies shall be sued for within ten days, the day on which the penalty is incurred is to be excluded. *People v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 284.

In computing the time in which a debtor, who has been arrested on execution, and given bond, must apply and be admitted to take the oath prescribed for poor debtors, the statute fixes the method of computation, which is to be exclusive of the day of the arrest. *Bell v. Adams*, 10 N. H. 181. See also *Odiorne v. Quimby*, 11 N. H. 224.

By the *New Hampshire* Rev. Sts., ch. 1, § 25, one uniform rule is established excluding the day of the date in all cases not otherwise provided for. *Scovell v. Holbrook*, 22 N. H. 269; *LaFavour v. Bartlett*, 42 N. H. 555; *Soldiers' Voting Bill*, 45 N. H. 613.

The day on which judgment is rendered is not to be included in the computation of the two years within which a writ of error may be sued out. *Lubbock v. Cook*, 49 Tex. 96.

A proper construction of the *Texas* Act of 1846, to regulate proceedings in the district courts, requires that the day of the meeting of the court should be excluded, in the computation of the time in which a defendant is allowed to file his answer. *Hollis v. Francois*, 1 Tex. 118.

In *Cromelien v. Brink*, 29 Pa. St. 522, the doctrine formerly held by the courts that the first day of the computation is to be excluded, was reaffirmed, and the reason supporting the cases of *Bigelow v. Willson*, 1 Pick. (Mass.) 485, and *People v. Sheriff*, 19 Wend. (N. Y.) 87, adopted. It was held that land sold for taxes on the 10th of June, 1850, was redeemed in time on the 10th of June, 1852; the law requiring the redemption to be made within two years after the sale. See also *Marks v. Russell*, 40 Pa. St. 372, *aff'g* *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200; *Duffy v. Ogden*, 64 Pa. St. 240.

Where a contract recited that defendants conveyed to plaintiff certain real estate by deed dated November 25, 1848, and covenanted "that if at the expiration of one year from the date of said deed, said O. shall prefer to reconvey said land and house, and shall offer to do the same, that the undersigned shall accept such reconveyance

of said land and house, and shall pay to said O. therefor the sum of sixteen hundred dollars," it was held that an offer made by the plaintiff on November 26, 1849, was made on the proper day, and entitled him to recover the money. *Oatman v. Walker*, 33 Me. 67.

Where a lien claim required by statute to be filed at or before the expiration of six months after materials were furnished, it was held that a claim filed for record on the 9th of July was in sufficient time; the last item in the account for materials furnished having been delivered on the 9th of January preceding, this day being excluded in the calculation. *Trustees v. Heise*, 44 Md. 453.

In *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200, it was held that whenever by a rule of court, or an act of the legislature, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision made, is excluded.

In computing the time within which an action of account is barred by the Statute of Limitations, the day on which the cause of action arose is to be excluded. *Menges v. Frick*, 73 Pa. St. 137; 13 Am. Rep. 731. See also *Cascade v. Lewis*, 148 Pa. St. 334; *McCulloch v. Hopper*, 47 N. J. L. 189; 54 Am. Rep. 146; *State v. Jackson*, 4 N. J. L. 323; *Den v. Drake*, 8 N. J. L. 303; *Day v. Hall*, 12 N. J. L. 203.

In *Evans' Case*, 29 N. J. Eq. 571, the question was as to the computation of the ten days from the death of the testator, after which time a will might be proved before a surrogate. It was held that where the testator died on the 19th of the month, the admission of his will to probate on the 29th of the month was contrary to law; the statute declaring in explicit terms that the will should not be admitted to probate until after ten days.

The thirty days' grace allowed by a mortgage for the payment of interest after it has become due and payable, are to be counted exclusive of the day on which the interest becomes due. *Serrell v. Rothstein*, 49 N. J. Eq. 385.

In *Nebraska*, the rule of computation excluding the first day and including the last, is prescribed by statute. *Monell v. Terwilliger*, 8 Neb. 360.

In *Chapman v. Allen*, 33 Neb. 129, it was held that proceedings in error commenced July 9, 1891, where judgment had been rendered July 8, 1890,

2. From the Date, or from the Day After the Date.—The words "from the date," or "from the day after the date" have the same meaning, and are to be construed as they may best effectuate the presumed intention of the parties who employ them;¹ but, in the

were not within one year from the rendition of the judgment in the court below; the year expiring on the 8th of July, 1891.

In *Camm v. Warren*, 1 Houst. (Del.) 188, under a rule of court requiring ten days' notice of the time of laying down pretensions to land, it was held that a notice dated and served on the fifth, where the survey was made on the fifteenth, was sufficient.

A statutory rule for computing time does not apply where the first or last day on which an act may be done is expressed in the instrument. *Northwestern Guaranty Loan Co. v. Chan-nell* (Minn. 1893), 55 N. W. Rep. 121.

Promissory Notes.—Where a note is made payable in a given number of days, the day of the date is excluded in computing the time. *Leavitt v. Simes*, 3 N. H. 14; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; *Homes v. Smith*, 16 Me. 181; *Blanchard v. Hilliard*, 11 Mass. 85; *Woodbridge v. Brigham*, 12 Mass. 403; 7 Am. Dec. 85; *Presbrey v. Williams*, 15 Mass. 192; *Blich v. Brewer*, 83 Ga. 333; *Henry v. Jones*, 8 Mass. 453; *Hicks v. Blanchard*, 60 Vt. 673.

"Clear Day."—Where a statute pre-scribes a certain number of clear days, both the day on which the notice is served and the day of the proceeding must be excluded. *Stewart v. Meyer*, 54 Md. 454. See also *Walsh v. Boyle*, 30 Md. 262; *Hoffman v. Duel*, 5 Johns. (N. Y.) 232; *Rex v. Cumberland*, 4 N. & M. 378; *Barber v. Chandler*, 17 Pa. St. 48; 55 Am. Dec. 533; *Reg v. Shropshire*, 8 Ad. & El. 173; 35 E. C. L. 367; *Reg. v. Middlesex*, 3 D. & L. 109; *Mitchell v. Foster*, 12 Ad. & El. 472; 40 E. C. L. 98; *Watson v. Eales*, 23 Beav. 294.

In *Gillispie v. White*, 16 Johns. (N. Y.) 117, *Spencer, J.*, said: "It is the practice of this court and the King's Bench, where any act is to be done within a specified number of days, to consider the day on which notice is given, and the day on which the act is to be done, the one inclusive, and the other exclusive, without any particular designation that the one or the other shall be exclusive." See also *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745;

Irving v. Humphreys, Hopk. (N. Y.) 364; *Jones v. Planters' Bank*, 5 Humph. (Tenn.) 619; 42 Am. Dec. 471; *Manning v. Dove*, 10 Rich. (S. Car.) 395; *Meredith v. Chancey*, 59 Ind. 466; *Stebbins v. Anthony*, 5 Colo. 348; *In re Senate Resolution*, 9 Colo. 632; *Knoxville City Mills Co. v. Lovinger*, 83 Ga. 563.

In computing the time of delivering a list of a jury, the day of delivery and the day of trial must both be excluded. *State v. McLendon*, 1 Stew. (Ala.) 195. See also *Cook v. Gray*, 6 Ind. 335; *Jackson v. Vaulkenburgh*, 8 Cow. (N. Y.) 260; *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464; *Robinson v. Foster*, 12 Iowa 186; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Coquard v. Bochmer*, 81 Mich. 445; *Delaware, etc., R. Co. v. Mehrhof Bros. Co.*, 53 N. J. L. 205; *Willey v. Laraway*, 64 Vt. 566.

The rule that, in computing certain legal days, neither the day of the notice nor that on which the act is to be done are included, does not apply to art. 361, C. C., which provides that agreements between tutors and their wards arrived at the age of their majority, are null, unless preceded by a full account and vouchers rendered ten days previous to the agreement. *Hodgson v. Roth*, 33 La. Ann. 941. See also *State v. Ellis*, 40 La. Ann. 793.

The *New York Code Civ. Proc.*, § 788, regulating the computation of time, applies to courts not of record. *Dorsey v. Pike*, 46 Hun (N. Y.) 112.

1. *Oatman v. Walker*, 33 Me. 67.

By some of the adjudged cases, a distinction has been made between the date, and the day of the date of a written instrument. This distinction can be of no practical use, and is well calculated to mislead. *Weeks v. Hull*, 19 Conn. 376.

In *Pugh v. Leeds, Cowp.* 714, the question was whether the execution of a lease for twenty-one years to commence from the day of the date, was a compliance with a power reserved in a marriage settlement to lease for twenty-one years in possession but not in reversion, and it depended on the question whether the phrase "to commence from the day of the date" was to be

absence of particular circumstances, they are to be taken to exclude the day of the date.¹

construed exclusively or inclusively of the day on which the lease bore date. After a minute examination of all the cases which had been decided on the construction of the words "from the day of the date" used in instruments, the court, through Mansfield, J., established the principle that the meaning of the phrases was the same, and that neither of them was to have an absolute and invariable sense attached to it, but that they were to receive an exclusive or inclusive construction according to the intention with which they were used, to be derived from the context and subject-matter, and so as to effectuate and not destroy the deeds of parties. See also *Sands v. Lyon*, 18 Conn. 18.

1. In *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371, Shaw, C. J., said: "We consider it now well settled as a general rule, that when an act is to be done within a given number of days from the date, or day of the date, or act done, the day of the date is excluded; otherwise, an act to be done in one day must be done on the same day; and as there is no fraction of a day, such stipulation must create an obligation to do it *instantly*." See also *Fuller v. Russell*, 6 Gray (Mass.) 128; *Millett v. Lemon*, 113 Mass. 355; *Wiggin v. Peters*, 1 Met. (Mass.) 127; *Page v. Weymouth*, 47 Me. 238; *Lorent v. South Carolina Ins. Co.*, 1 Nott & M. (S. Car.) 505; *Smith v. Dickey*, 74 Tex. 61; *Williams v. Burgess*, 12 Ad. & El. 635; 40 E. C. L. 142; *Ammerman v. Digges*, 12 Ir. C. L. R. App. 1.

In *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470, it was held that under the provisions of the statute requiring a copy of the writ and of the return of the attachment of bulky personal property, to be deposited in the town clerk's office at any time within three days thereafter, the day of the attachment is to be excluded in computing the three days within which copies may be deposited in the clerk's office.

In *Bigelow v. Willson*, 1 Pick. (Mass.) 485, Wilde, J., said: "We are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation. And that this rule of construction is

never to be rejected, unless it appears that a different computation was intended. So, also, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day, until that day has expired." See also *Calvert v. Williams*, 34 Md. 672; *Cummins v. Homes*, 11 Ill. App. 158.

Where, by the rules of practice of the court, any subsequent proceeding in the cause is required to be had in a limited time, or within a certain number of days from or after any previous proceedings, the whole of the day on which the order was entered is to be excluded in the computation of time. But where previous notice of a motion or of any other proceeding in a suit is required to be given, the whole of the day on which the notice was served is to be included in the computation of time, and the day upon which the motion is to be made is excluded. *Vandenburgh v. Van Rensselaer*, 6 Paige (N. Y.) 147. See also *Bissell v. Bissell*, 11 Barb. (N. Y.) 96.

In *Rand v. Rand*, 4 N. H. 267, the court said: "In the computation of time from a date, or from the day of a date, we consider the settled rule in this state to be, that the day of the date is to be excluded." See also *Sheets v. Sheldon*, 2 Wall. (U. S.) 177; *Blake v. Crowninshield*, 9 N. H. 304; *Priest v. Tarlton*, 3 N. H. 94; *Chiles v. Smith*, 13 B. Mon. (Ky.) 461; *Batman v. Megowan*, 1 Metc. (Ky.) 548; *White v. Crutcher*, 1 Bush (Ky.) 473; *Handley v. Cunningham*, 12 Bush (Ky.) 401; *Pyle v. Maulding*, 7 J. J. Marsh. (Ky.) 202; *Wood v. Com.*, 11 Bush (Ky.) 220; *Pugh v. Reat*, 107 Ill. 440; *Carson v. Love*, 8 Yerg. (Tenn.) 215; *Goode v. Webb*, 52 Ala. 452; *Atkins v. Sleeper*, 7 Allen (Mass.) 487; *Perry v. Provident L. Ins. Co.*, 99 Mass. 162; *Wayne v. Duffy*, 1 Phila. (Pa.) 367; *Hampton v. Ehrenzeller*, 2 Brown (Pa.) 18; *Blackman v. Nearing*, 43 Conn. 56; 21 Am. Rep. 634; *McGavock v. Pollack*, 13 Neb. 535.

In *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, the court said: "Where reference is had to the day of date for computing time, I know of no decision in this state settling the point."

In the computation of time upon

III. RULE AS TO FRACTIONS OF A DAY.—(See DAY, vol. 5, p. 89.)

IV. USE OF THE WORDS "UNTIL" AND "TILL."—The use of the word "until" generally implies an intention to exclude the day to which it refers, unless a contrary intention appears from the context of the statute or instrument in which the word is used.¹ The word "till" has been held to include the day to which it is

service of notice of trial, the day of service is to be excluded, and the first day of term is included. *Easton v. Chamberlin*, 3 How. Pr. (N. Y. Supreme Ct.) 412; *Daton v. McIntyre*, 5 How. Pr. (N. Y. Supreme Ct.) 117.

In *Seward v. Hayden*, 150 Mass. 158; 15 Am. Rep. 183, Knowlton, J., said: "In reckoning from a day or a date, the rule generally adopted excludes the day from which the reckoning runs. Many early cases stated a distinction between computations from a day or a date, and computations from an act done or from an event. But this distinction does not rest upon a sound principle, and in most jurisdictions it is no longer recognized. The tendency of recent decisions is very strongly towards the adoption of a general rule which excludes the day as the *terminus a quo* in such cases. But this rule is not inflexible; and in the interpretation of a statute or contract, it yields to a manifest purpose or intention in conflict with it."

In *Lysle v. Williams*, 15 S. & R. (Pa.) 135, the day a bond was dated was included in computing the time for issuing a *scire facias*.

In *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422, the rule is laid down that in determining the time within which process or notice must be served, the language of the statute must be observed; and where an act is to be done in a certain number of days before a day stated, then that day is excluded in the computation. See also *Chaddock v. Barry*, 93 Mich. 543; *Arnold v. Nye*, 23 Mich. 286; *Charles v. Stansbury*, 3 Johns. (N. Y.) 261.

Where the terms of a policy of insurance required assessments to be paid within thirty days from the date of the notice thereof, it was held that the day on which the notice was received should be excluded. *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88.

Where land was sold for taxes on the fourth day of May, 1865, and the collector delivered his deed for the land to the purchaser on the fourth day

of May, 1866, it was held that the one year which the owner had to redeem land from the sale and to pay the taxes, had not expired, and that, consequently, the deed was executed prematurely. *Annan v. Baker*, 49 N. H. 161.

Where an act of the legislature, November 29, 1871, required all field notes that had been withdrawn from the land office to be returned in twelve months from its passage, it was held that the return of the notes on November 29, 1872, was in time. *Hill v. Kerr*, 78 Tex. 213.

1. *Ryan v. State Bank*, 10 Neb. 524; *Kendall v. Kingsley*, 120 Mass. 94; *Nichols v. Ramsel*, 2 Mod. 280; *Wicker v. Norris*, Cas. Temp. Hardw. 116; *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470; *Atkins v. Boyleston F. & M. Ins. Co.*, 5 Met. (Mass.) 439; 37 Am. Dec. 692.

Where a trader petitioned the court of bankruptcy for arraignment under 12 & 13 Vict., ch. 106, § 211, praying that his person might be protected from all process until further order, the commissioner made an order which, after reciting the petition, proceeded thus: "I hereby grant such protection in order that the personal property of the trader be protected from process until the 29th of July next," and the court appointed a meeting for twelve o'clock on that day for the creditors to assent to or dissent from the arraignment proposed by the trader. The court held that the word "until" in the order must be understood inclusive of the 29th of July, the day until which the protection was given. *Backhouse v. Mellor*, 4 H. & N. 116; 28 L. J. Ex. 141; 5 Jur. N. S. 175.

A party insured his goods against fire, with an insurance company, by policy for six months, whereby it was provided that from the 14th of February, 1868, "until" the 14th of August, 1868, or so long after as the assured should pay the sum of \$225.00, and the company at the time above mentioned accept the same, the fund should be liable to make good losses by fire to the goods. The assured intended to

prefixed.¹ But "till next term of court" has been said not to include the time during the next term nor any part of it.²

V. SOLAR AND STANDARD TIME.—The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in a certain line of business will not be recognized.³ The presumption is that common time (*i. e.* solar) is that relied on, when there is nothing to show that a different mode of measuring time has been in general use.⁴

VI. SUNDAY IN THE COMPUTATION OF TIME.—As a general rule, where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days, when it exceeds seven. If it is less than seven, Sunday must be excluded.⁵ But this is a mere

keep up his policy and the company knew his intention; but the renewal of premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the goods. The course of business between the assured and the company was that the company should come to the assured and demand the renewal premium. It was held that under the terms of the policy the whole of the 14th of August was protected, and that the company was, therefore, liable for loss caused by fire happening on that day. *Isaacs v. Royal Ins. Co.*, L. R., 5 Exch. 296; 39 L. J. Ex. 109; 22 L. T. 681; 18 W. R. 982.

Where the charter of the bank was continued in force "until the first day of January, 1850," it was held that the word "until" was used in an exclusive sense, and that the charter of the bank expired December 31, 1849. *People v. Walker*, 17 N. Y. 502.

In *Webster v. French*, 12 Ill. 302, under a statute providing that bids from all persons should be received "until the first of July, 1849, at which time all the bids received shall be opened and compared," it was held that the time for receiving bids terminated when that day began.

"On" and "To."—Where a lease was given for ten years "to end on the first day of May," it expired 12 o'clock on that day. But a lease given "to the first day of May" would expire on April 30th at 12 o'clock midnight. *People v. Robertson*, 39 Barb. (N. Y.) 9.

1. *Bunce v. Reed*, 16 Barb. (N. Y.) 352; *Dawkins v. Wagner*, 3 Dowl. Pr. Cas. 535.

2. *DeHaven v. DeHaven*, 46 Ind. 206.

3. In *Henderson v. Reynolds*, 84 Ga. 159, the court said: "It seems idle to

waste words in saying that the standard of time fixed by persons in a certain line of business, cannot be substituted at will by persons in a certain locality for the standard recognized by the statutes of the state as well as the general law and usage of the country. . . . To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law."

The time appointed for the sitting of the court must be understood as the mean time at the place where the court sits, and not Greenwich time, unless it is so expressed. *Curtis v. March*, 3 H. & N. 866; 28 L. J. Ex. 36; 4 Jur. N. S. 1112.

4. In *Searles v. Averhoff*, 28 Neb. 668, a summons was duly issued and served on the defendant on a certain day at 10 a. m. At the time stated in the return of the summons, the plaintiff appeared, but the defendant did not. The justice then waited one hour, standard time, and rendered judgment against the defendant by default. Before 11 a. m., common time, the defendant appeared and asked leave to make his defense, which was refused. It was held that the justice should have waited until 11 a. m., common time, and that the judgment was rendered prematurely.

5. *Haley v. Young*, 134 Mass. 366; *Snell v. Scott*, 2 Mich. N. P. 105; *Anonymous*, 2 Hill (N. Y.) 375, note b; *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Hannum v. Tourtellott*, 10 Allen (Mass.) 494.

In *Cunningham v. Mahan*, 112 Mass. 58, the court, by Morton, J., said: "When a statute fixes a limitation of time within which a particular act may or may not be done, if the time limited

rule of expediency and does not usually govern when there are other considerations. Thus, Sunday is frequently excluded, even where the time is more than seven days, because it is evident that, in fixing a specified time, working days were meant.¹

exceeds a week, Sunday is included in the computation; but if less than a week, Sunday is excluded.

In *Cooley v. Cook*, 125 Mass. 406, it is said by Gray, C. J.: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded or the intention of the legislature to exclude them is manifest. See also *Alderman v. Phelps*, 15 Mass. 225; *Ex p. Dodge*, 7 Cow. (N. Y.) 147; *Rowberry v. Morgan*, 9 Exch. 730.

The *Minnesota* constitution provides that the governor may sign certain bills within three days after the adjournment of the legislature. A bill was presented to him on the 8th and on the same day the legislature adjourned *sine die*. He signed it on the 12th, an intervening day being Sunday. The court held that the intervening Sunday must be excluded in computing the three days. *Stinson v. Smith*, 8 Minn. 366; *Farwell Co. v. Matheis*, 48 Fed. Rep. 363. A similar case is that of *People v. Hatch*, 33 Ill. 149 (though the rule of the text is not applied). It is there held that the ten days during which the executor is allowed to retain a bill before signing it or returning it with his objections do not include Sunday. So that where a bill was sent to the governor and on the eleventh day thereafter at noon the legislature adjourned, he had until the first day of the next session in which to return it.

Under a *Michigan* statute requiring short summons issued from a justice's court to be made returnable in two days, Sunday is not to be included in the two days. *Simonson v. Durfee*, 50 Mich. So.

The twenty-four hours allowed to a party to claim an appeal, must be hours exclusive of Sunday. *McIniffe v. Wheelock*, 1 Gray (Mass.) 603.

Sunday is excluded from the three days allowed for filing a bill of exceptions. *Crowley v. McLaughlin*, 141 Mass. 181.

Under a statute requiring six days

publication of a notice (such notice being in the nature of process), publication on Sunday is not to be counted. *Scammon v. Chicago*, 40 Ill. 146.

So where a notice is required to be published each day for a week, publication for the six days is sufficient. *Matter of Excelsior F. Ins. Co.*, 16 Abb. Pr. (N. Y.) 8.

Where the thirty days, during which property attached on *mesne* process is held subject to execution, expires on Sunday, the lien of the attachment does not continue to the next day. *Alderman v. Phelps*, 15 Mass. 225. See for other cases on this general subject, *Com. v. Certain Intoxicating Liquors*, 97 Mass. 601; *Penniman v. Cole*, 8 Met. (Mass.) 501; *Casey v. Viall*, 17 R. I. 348. But this general rule may vary according to the circumstances of the case. Thus, it is said that in computing the time during which a defect in a highway must have existed, in order to render the town liable for an injury occasioned thereby, Sunday is to be included; and this, though the time is less than seven days. *Flagg v. Milbury*, 4 Cush. (Mass.) 243.

The English Rule.—The English authorities stated the rule thus: "The general rule of the law is, that days means consecutive days, except Sunday be the first or last day. But in mercantile cases, it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage." *Alderson, B.*, in *Brown v. Johnson*, 1 C. & M. 444; 41 E. C. L. 245. *Mr. Benjamin*, citing this case, said: "Where a certain number of days is to be allowed for the delivery of goods under a contract of sale, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed, and any usage to that effect be shown." *Benj. on Sales* (4th Am. ed.), § 684; *Cockran v. Retberg*, 3 Esp. 121. See also *Peacock v. Reg.*, 4 C. B. N. S. 264; 93 E. C. L. 262, where it is held that Sunday, even though it be the last day, is to be computed in the three days allowed for an application to the justices to state a question for the opinion of one of the superior courts.

1. When Only Working or Judicial

If the period fixed by decree, order, or statute for an act to be done closes on Sunday, the act may, as a rule, be done on the following day, though there is strong authority for a different view.¹ So, if a contract matures on Sunday, the next day is the

Days are Meant.—The *Alabama* constitution limits the sessions of a legislature to fifty days. It was held that this meant fifty working days and that Sundays were to be excluded in the computation of the length of the session. *Alabama* Const., art. 4, § 5; *Ex p. Cowert*, 92 Ala. 96; *Moog v. Randolph*, 77 Ala. 597. See also *People v. Hatch*, 33 Ill. 149. Compare *Franklin v. Holden*, 7 R. I. 215 (Sunday counted in the forty-eight hours immediately after verdict in which motion for new trial may be made). And the twenty-four hours allowed after judgment before execution can issue, do not include Sunday. *Penniman v. Cole*, 8 Met. (Mass.) 496.

So, also, where four days are allowed in which an appeal may be taken, only working days are to be counted. *Neal v. Crew*, 12 Ga. 100.

Under a statute requiring that notice must issue to the owner of intoxicating liquors seized under a search warrant, in twenty-four hours after the seizure, Sunday must be excluded in the computation of the time specified. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 601.

An act provided that it should be unlawful for any railroad company to allow any freight received for shipment to remain unshipped for over five days, unless otherwise agreed upon by the shipper. It was held that five full running days were meant, that Sundays were to be counted; so that if Sunday was the fifth day, the penalty was incurred on Monday. *Branch v. Wilmington, etc., R. Co.*, 77 N. Car. 347; *Keeter v. Wilmington, etc., R. Co.*, 86 N. Car. 346; 9 Am. & Eng. R. Cas. 165.

A *Missouri* statute provided that all motions for a new trial or an arrest of judgment should be made within four days after the trial. It was held that this meant four judicial days and that Sunday was, therefore, not to be counted. *National Bank v. Williams*, 46 Mo. 17. See also *Bacon v. State*, 22 Fla. 46. An opposite view was taken in *King v. Dowdall*, 2 Sandf. (N. Y.) 131.

Where a statute provided that objections to special assessments were to

be made one day before the meeting of the common council, and a party objecting had no notice of his assessment until Saturday, it was held that a confirmation of the assessment could not be made by the council on Monday, because the party objecting was entitled to at least one *dies juridicus* in which to make his objection. *Burton v. Chicago*, 53 Ill. 87.

1. When the last day of the fixed period falls on Sunday, see *Barnes v. Eddy*, 12 R. I. 25; *Cock v. Bunn*, 6 Johns. (N. Y.) 326; *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Bacon v. State*, 22 Fla. 46; *Goswiler's Estate*, 3 Pen. & W. (Pa.) 200; *Spencer v. Haug*, 45 Minn. 231; *Sims v. Hampton*, 1 S. & R. (Pa.) 411; *Johnson v. Merritt*, 50 Minn. 303; *Caupfield v. Cook*, 92 Mich. 626; *Lee v. Carlton*, 3 T. R. 642; *Bullock v. Lincoln*, 1 Str. 914; *Hammond v. American Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Whart. Contr.*, § 897; *DAY*, vol. 5, p. 82. Compare *Kilgour v. Miles*, 6 Gill & J. (Md.) 268.

It is said, however, that the ten days allowed by U. S. Rev. Sts., § 2931, in which to serve a protest against duties imposed, is not extended, by the fact that the last day falls on Sunday, to the following Monday. *Shefer v. Magone*, 47 Fed. Rep. 872, citing *Dorsey v. Pike*, 46 Hun (N. Y.) 112; *Pearpoint v. Graham*, 4 Wash. (U. S.) 241; *Davies v. Miller*, 130 U. S. 284. Compare, also, *Massachusetts* doctrine, *Haley v. Young*, 134 Mass. 356, where a rule contrary to that of the text is laid down.

Redemption of Land Sold Under a Mortgage or for Taxes.—It has been held in one case, however, in apparent contradiction to the rule of the text, that where the last day of the three years limited for the redemption of land from a mortgage falls on Sunday, a tender of the amount due on the mortgage on the following day is too late. *Haley v. Young*, 134 Mass. 364; *Allen v. Elliott*, 67 Ala. 432; *Cunningham v. Mahan*, 112 Mass. 58.

The *New York* courts establish a different doctrine. The Code of Civil Procedure, section 1454, as to the redemption in sheriff's sales, provides that certain creditors may redeem from

one on which the performance is to be exacted;¹ except that when the last day of grace falls on Sunday payment must be

other redeeming creditors, provided it be done "within twenty-four hours after the last previous redemption." Where the last previous redemption was made on Saturday, it was held that the creditor wishing to redeem might have all the following Monday in which to do so, the intervening Sunday, being *a dies non*, was to be excluded. *Porter v. Pierce*, 120 N. Y. 217, *aff'd* 43 Hun (N. Y.) 11; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530.

In *Gage v. Davis* (Ill. 1887), 14 N. E. Rep. 36, a notice of the expiration of the time of redemption of land sold for taxes which specifies that such time will expire on November 3d, that day being Sunday, is wholly ineffectual for its intended purpose, and is, therefore, void, since *Illinois* Rev. Stat., ch. 100, § 6, requires that if the last day to be computed in a given period of time be Sunday, it shall be excluded from the computation. See *Gage v. Bailey*, 100 Ill. 530.

A *Kansas* statute provided that where real estate had been sold for taxes, the owner or his agent might at any time in three years from the date of sale redeem the same. The day of sale was always to be excluded in computing the three years in pursuance of the rule stated in the text. It was held that where the three years expired on Sunday, the owner might have all of the next day in which to redeem. *English v. Williamson*, 34 Kan. 212; *Cable v. Coates*, 36 Kan. 191; *Hicks v. Nelson*, 45 Kan. 51; 23 Am. St. Rep. 709. See also *Douglas v. Rinehart*, 5 Kan. 392; *Hook v. Bixby*, 13 Kan. 164. The same view is taken in *Indiana*. *Backer v. Pyne*, 103 Ind. 288.

Recordation of Mortgage.—In *Paine v. Mason*, 7 Ohio St. 206, a statute of *Ohio* required a chattel mortgage to be rerecorded within the thirty days next preceding the expiration of the year from the original filing. The original filing was on May 21, 1853. May 21, 1854, being Sunday, he refiled his mortgage on the following day, Monday. It was held that it was filed too late and that the mortgage was postponed in favor of subsequent mortgages acquired in good faith. The court, by Brinkerhoff, J., said: "On this point the adjudicated cases are clear and decisive." The rule is very clearly laid down in *Burr v.*

Lewis, 6 Tex. 76, where it was held that the courts in the construction of their own rules of practice generally exclude Sunday in the computation of time. But where a statute directs that an act shall be done within a certain number of days, Sunday cannot be excluded, although it should be the last day. To the same effect is *Ex p. Dodge*, 7 Cow. (N. Y.) 147. See also *Hannum v. Tourtellott*, 10 Allen (Mass.) 494 (Sunday not included in the three days allowed in which to record an attachment); *CHattel Mortgages*, vol. 3, p. 195.

1. *Bass v. White*, 65 N. Y. 566; *Barrett v. Allen*, 10 Ohio 426 (tender due on Sunday good when made on Monday); *Whart. Contr.*, § 897; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530; *Brown v. Johnson*, 10 M. & W. 331; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137; *Sands v. Lyon*, 18 Conn. 18; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; 3 *Randolph Com. Paper*, § 1032; *Spokane Falls v. Browne*, 3 Wash. 84 (time for notice of appeal). See also *Sheldon v. Benham*, 4 Hill (N. Y.) 129; 40 Am. Rep. 271; *City Bank v. Cutter*, 3 Pick. (Mass.) 414.

So, if a policy of insurance falls due on Sunday, it may be paid on the next Monday, and this, although the policy provided that it should terminate in case the premium charged shall not be paid on or before the day at noon on which the same shall become due and payable. *Hammon v. American Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 299.

"Where the day is in terms fixed by the parties, how can a court change their words and make it earlier than they have done?" *Bishop on Contracts* (enlarged ed.), § 1438.

Negotiable Instruments—Days of Grace.—If a negotiable note falls due on Sunday, demand must be made on the Saturday preceding. *Homes v. Smith*, 20 Me. 264; *Story on Notes* (7th ed.), § 220; *Story on Bills* (4th ed.), § 338; *Salter v. Burt*, 20 Wend. (N. Y.) 205; 32 Am. Dec. 530.

In *Nebraska*, the rule is otherwise by statute, and presentment and demand may be made on Monday when the third day of grace falls on

made on the day preceding.¹ But where, as in some cases, an act is to be done by a certain day, which happens to be Sunday, or within a certain time, which ends on Sunday, performance must be on Saturday at the latest, unless the act is one which may properly be done on Sunday.² Where compensation is to be paid by the day, Sunday is to be excluded, in the absence of a special provision otherwise.³ And Sunday is never to be counted as one of the days of a term of court.⁴

TIMEPIECE.—See note 5.

TIME-TABLES.—(See CARRIERS OF PASSENGERS, vol. 2, p. 738; RAILROADS, vol. 19, p. 775; TICKETS AND FARES, vol. 25, p. 1074.)

I. Definition, 14.

II. Obligation of Carriers to Conform to, 15.

I. DEFINITION.—A time-table is a statement setting forth the time at, or in, which something is to take place. The most gen-

Sunday. *Nebraska Comp. Sts.*, ch. 41, § 8; *First Nat. Bank v. McAllister*, 33 Neb. 646.

And if the last day of grace be Sunday, the grace expires on Saturday, and the note is payable then. *Whart. Contr.*, § 897; *Bishop Contr.*, § 1438; *Story on Notes* (7th ed.), 220; *Farnum v. Towle*, 12 Mass. 89; 7 Am. Dec. 35; *Barlow v. Planters' Bank*, 7 How. (Miss.) 129. See also *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137.

In *Texas*, the usual rule prevails, that is, that if a note without grace falls due on Sunday, payment may be made on the following Monday. But by statute, if Monday is a holiday, payment must be made on Saturday. *Rev. Stat. of Texas*, arts. 2835-2837; *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452.

Much of this subject is a matter of statute, in many jurisdictions, and the holding of the authorities in each case must be considered in the light of the statute existing where it is made. See 3 *Randolph Com. Paper*, §§ 1032, 1033.

1. *Fleming v. Fulton*, 6 How. (Miss.) 473 (demand must also be made on Saturday); *Colms v. Bank of Tennessee*, 4 Baxt. (Tenn.) 422; 3 *Randolph Com. Paper*, §§ 1032, 1033.

This rule is altered by statute in *Nebraska*, and presentment (and presumably payment) is sufficient when made on Monday. *First Nat. Bank v. McAllister*, 33 Neb. 646.

2. **Act to be Done by or Within a Certain Time—Sunday Included.**—*Keating v. Serrell*, 5 Daly (N. Y.) 282; *Startup*

v. McDonald, 6 M. & G. 593; 46 E. C. L. 591; *DAY*, vol. 5, pp. 85, 86; *Bishop on Contr.*, § 1438; *Allen v. Elliott*, 67 Ala. 432; *Haley v. Young*, 134 Mass. 364.

In *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. (N. Y.) 449, a party had contracted to deliver a certain quantity of oil during the month of May. The 31st of May fell on Sunday. It was held that delivery on the first day of June would not satisfy the contract.

An act required to be done within twenty-four hours after notice, must, it seems, be done on Sunday, if the circumstances are such as require it, and the act is not in violation of the Sunday law. *Casey v. Viall*, 17 R. I. 348, *citing Rowberry v. Morgan*, 9 Exch. 730; *Peacock v. Reg.*, 4 C. B. N. S. 264; 93 E. C. L. 262.

A statute of *Colorado* requires that the statement of an election contest shall be filed within ten days after the day when the votes are canvassed. Under this, the time is not extended to Monday because the last day of the ten falls on Sunday. *Brown v. Vailes* (Colo. 1891), 14 L. R. A. 120.

3. In *Patterson v. Patterson*, 2 Pears. (Pa.) 170, a contract to pay demurrage was, in view of the statutory prohibition against labor on Sunday, construed to exclude Sunday; no express provision on the subject being contained in the contract. *Rigney v. White*, 4 Daly (N. Y.) 400.

4. *Read v. Com.*, 22 Gratt. (Va.) 924; *Michie v. Michie*, 17 Gratt. (Va.) 109.

5. A chronometer was held to be a timepiece, within the meaning of a

eral use of the term is in connection with railroads and other carriers, when it consists usually of a printed recital of the hours of arrival and departure of trains or other conveyances for the carriage of passengers.¹

II. OBLIGATION OF CARRIERS TO CONFORM TO.—It is the duty of a railroad company to run its trains in conformity with the time-tables issued for the benefit of the public, and it may be liable for damages sustained as a direct result of its failure to do so.² But the obligation is not an absolute and unconditional one, for the

statute providing that no carrier should be liable for the loss of articles of a certain kind, unless the value had been declared and an insurance price paid, among which were enumerated a time-piece. *LoCoutier v. London, etc., R. Co.*, 6 Best & S. 961; 118 E. C. L. 959.

1. A tabular statement of the time at which, or within which, something is to take place, as the recitations in a school, the departure or arrival of trains and other public conveyances, the rise and fall of the tides and the like. *Webster's Dict.*

2. *Denton v. Great Northern R. Co.*, 5 El. & B. 860; *Buckmaster v. Great Eastern R. Co.*, 23 L. T. 471; *Dunlop v. Edinburgh, etc., R. Co.*, 16 Jur. 407; *Hamlin v. Great Northern R. Co.*, 1 Hurlst & N. 408; *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Lafayette R. Co. v. Sims*, 27 Ind. 59.

In *Denton v. Great Northern R. Co.*, 5 El. & B. 860, a leading case on this subject, it was shown that a time-table advertised that a certain train would leave London at 5 p. m., reaching Petersburg at 7 p. m., and thence to proceed, amongst other places, to Hull. The plaintiff went to the station at the advertised time, intending to take passage, but found that there was no such train, nor had there been one during any part of the month during which their schedule was advertised. In delivering the opinion of the court, Campbell, C. J., said: "It seems to me that railways would not be that benefit and accommodation to the public which we find them to be if the representations made in their time-tables are to be treated as so much waste paper and not considered as the foundation of a contract. I think the plaintiff is entitled to recover both on the ground that there was a contract, and, also, for false representations. I think there was a binding contract, and that the case is the same as if the com-

pany should publish in express terms that if customers would come to a particular station at a particular hour, a train would be passing at that hour, and that any person who tendered his fare should have a ticket and be carried from that station to some other given station."

In *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510, it was held that when the plaintiff relied upon the representation being fraudulently made, he should aver that he acted thereon.

Willful Detention—By the Conductor.

—Where any detention is caused by the willful and unreasonable delay of the officer in charge, the company itself is liable. *Weed v. Panama R. Co.*, 17 N. Y. 364. In this case, the railroad company was held liable for an injury resulting from the willful detention of a train by the conductor, delaying it several hours. See also *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48; 75 Am. Dec. 372.

Failure to Stop at Stations as Advertised.—If common carriers fail to stop their trains at stations advertised as stopping places, whereby those who have been induced to take passage on the faith of such advertisements, are prevented from boarding or alighting from the train, they are liable for damages. *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391; *Purcell v. Richmond, etc., R. Co.*, 108 N. Car. 414; 47 Am. & Eng. R. Cas. 457; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 66; 76 Am. Dec. 785; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456; 6 Am. & Eng. R. Cas. 341. But the passenger should consult, of course, the published time-tables, though he may rely upon the statements of the agents from whom he bought his ticket. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703.

company is not liable for want of punctuality, or failure to comply with the schedule, which is not due to their negligence,¹

Failure to Make Connections as Advertised.—In *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 115 E. C. L. 310, the plaintiff sued to recover damages resulting from a delay of one hour, which caused his failure to meet a train on the Midland Railway, thereby delaying his arrival at his destination until the next day. The ticket bore the imprint "Cardiff to New Castle, via Midland Railway." Such a ticket does not, of itself, prove a contract to the effect that the company issuing it will run their trains in connection with those upon the Midland road, nor will the statement of a trainman have this effect. In order to prove such a contract, the time-tables of the company should have been produced. In delivering his opinion, Erle, C. J., said: "If there were any such contract here, it would appear from the time-tables published by the company, and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz., that the company do not warrant that their trains shall arrive with punctuality at the times indicated at the different stations."

Obligation to Employés—Injury to.—It is the duty of railroad corporations to prescribe, either by means of time-tables or by other suitable means, regulations for running their trains with a view to their safety, but it is obvious that obedience to these regulations must be entrusted to the employés having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent can personally oversee, and as to which employés must be relied upon. Where failure to observe the rules which have been prepared by the company for the running of its trains resulted in an injury to a fellow-servant, and no negligence could be imputed to the defendant, no recovery could be had. *Rose v. Boston, etc., R. Co.*, 58 N. Y. 217. And see *Sheehan v. N. Y. C., etc., R. Co.*, 91 N. Y. 332.

As regards the change in the time of running the train, it is held that all that is required of the company is that it should use due care and diligence in giving notice thereof, and it is not required that the master should

see to it personally that notice of such change comes to the knowledge of all those to be governed thereby. In *Slater v. Jewett*, 85 N. Y. 61, it is said: "Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has, beforehand, provided rules, minute, explicit and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to everyone entitled to it? We think that in the circumstances of this case, the latter clause of the query propounds the true rule, and should be answered affirmatively."

Contributory Negligence of.—In *Georgia Railroad & Banking Co. v. McDade*, 59 Ga. 73, where the printed rules which accompanied the schedules given to employés warned both conductors and engineers that they would be held responsible for the satisfactory running of the schedules, it was held that an engineer could not excuse himself for failing to conform thereto, by the fact that he acted under orders from the conductor. But in *Pennsylvania R. Co. v. Roney*, 89 Ind. 453; 12 Am. & Eng. R. Cas. 223, it was held that where the orders given to an engineer by the governing or superior officers of the company, require him to run in a different manner from that prescribed by the rules, and other trains of the class of that placed in his charge are so run, with the knowledge and by the direction of the governor's officers, then negligence cannot be imputed to the engineer, although he does not follow the general rules.

1. *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; 13 Am. Rep. 97. In this case plaintiff had purchased tickets of the defendants, entitling him to passage between two stations on their road. The time-table published by the company advertised a train as leaving Salem, one of these stations, at 8:45 a.m. The plaintiff was at Salem with the intention, and in time, to take this train, but it did not stop. The defendants offered to prove that their road was suitably equipped to accommodate any excess of travel to be usually expected on extraordinary occasions, but,

although it has been held that any deviation from the published time-tables renders the company liable.¹ The time-tables are subject to the implied condition that such changes may be made therein as may be considered necessary, after reasonable notice, actually brought to the intended passenger or published as extensively as the original advertisement;² and express conditions and stipulations in the time-tables limiting the liability of the carriers, which are just and reasonable, are parts of the engagement.³

that on the morning in question, the train was already overloaded before reaching Salem, and to have taken on the unusual number waiting there would have been dangerous; further, that the train consisted of nineteen cars, and if it had stopped at Salem, being on an up grade, it would have been impossible to start it again, and that after the arrival of the train at its destination, and as soon as safety would permit, it was sent back to Salem to bring on those desiring transportation. It was held that the company was not liable, if it had done all that due skill and care could do to carry the plaintiff punctually; and that the proposed evidence was admissible, as tending to show that the company's failure to carry the plaintiff was not due to negligence on its part.

In *Woodgate v. Great Western R. Co.*, 51 L. T. N. S. 826, where the plaintiff on Christmas Eve had taken a first-class ticket, on which was a reference to the regulations on the company's time-table from Paddington to Bridgenor, the junction being at Hartleybury, the regulations stated that the company would not be responsible for any delay unless upon proof that it arose from the willful misconduct of the company's servants, but that it was to be understood that trains would not start from the various stations before the appointed time. The traffic was great, there was a fog, a stoppage, and the line was blocked. Under these circumstances the train reached Hartleybury too late to make connection, and the plaintiff was sent on by a second-class carriage attached to a goods train, arriving at his destination about four hours late. He then sued the company for damages, and the judgment by the lower court for damages amounting to £1 was set aside by the provisional court.

Question for the Jury.—Whether in a given case due diligence requires that a train should leave on schedule time,

or whether persons upon it, not as passengers, should alight from it before the time of departure fixed by the schedule, is a question of fact for the jury to determine. *Harris v. Central R. Co.*, 78 Ga. 525; 30 Am. & Eng. R. Cas. 581.

1. See Angell on Car. (4th ed.) 527a; *Hawcroft v. Great Western R. Co.*, 8 Eng. L. & Eq. 362. See comment of the court upon this case in *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; 13 Am. Rep. 97.

2. *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433; 92 Am. Dec. 780. In this case, the posting of handbills in the cars and at the stations was held to be insufficient notice to one who had previously purchased a ticket in accordance with the time-table existing at the time of the purchase.

3. See CARRIERS OF PASSENGERS, vol. 2, p. 738; CARRIERS OF GOODS, vol. 2, p. 771.

In *M'Cartau v. North Eastern R. Co.*, 54 L. J. Q. B. 441, the county court judge held that there was an implied contract that the railway company would use reasonable diligence to secure punctuality, and were liable for damages when, through a delay of thirty-seven minutes, the plaintiff failed to connect with a train on another road. The defendants appealed and the divisional court reversed the decision on the ground that on the outside of the company's time-table there was a notice that they would not be liable for unpunctuality. The court said, by Haddleston, B.: "We must look here at what is the contract; and the contract is to be collected from the tickets, the time-tables and the conditions, and we must construe them with the best powers which we possess." This notice constituting part of the contract relieved the company from liability.

In *Denton v. Great Northern R. Co.*, 5 El. & B. 860, a condition in the schedule that "the companies make every exertion that trains shall be

Time-tables issued merely for the use and government of employes do not amount to engagements with the general public.¹ Nor will the mere statement of a company's agent that the time for transportation is a certain time, constitute an agreement to carry in that time.²

TIPLING HOUSE.—A place of public resort where spirituous, fermented or other intoxicating liquors are sold or given away, to be drunk in small quantities on the premises.³

punctual, but their arrival and departure at the time stated will not be guaranteed," did not exempt the company from damages where the train was altogether taken off.

In *Le Blanche v. London, etc., R. Co.*, 1 C. P. D. 286, it was held that the words "every attention will be paid to punctuality as far as practicable," used in certain conditions attached to the time-table, imported a contract that the company would use due attention to insure punctuality, but that they were not to be held responsible for delays arising from circumstances unconnected with the management of the train.

It is customary now for railroad companies to insert notices in their time-tables to the effect that they do not warrant the trains to arrive and depart at the precise time indicated. *Lord v. Midland R. Co., L. R.*, 2 C. P. 339; *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 115 E. C. L. 310; *Prevost v. Great Eastern R. Co.*, 13 L. T. N. S. 20.

In *Thompson v. Midland R. Co.*, 34 L. T. 34, the plaintiff took a ticket from a railway company on the faith of its published schedule. On the back of the ticket was printed "this ticket is subject to the regulations and conditions stated in the company's time-tables and bills," and the time-table stated this condition, "that the company did not hold itself responsible for any delay, detention, etc., arising off its lines or from the acts or defaults of the other parties, nor for the correctness of the times over other lines or companies." Where the purchaser of the ticket was detained by the lateness of another company's train, he could not recover damages for such detention, but was bound by the monthly time-table.

"Other Cause."—In *Buckmaster v. Great Eastern R. Co.*, 23 L. T. 471, a stipulation in the ticket that the company shall not be liable for any delay

in the starting or arrival of trains arising from accident or "other cause," was held to include "other causes" in the nature of accidents, and not any cause whatever.

1. In *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. Cas. 307, it was held that a time-table which on its face announces that it is for the government and information of employes only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not complying therewith. See also *Denver, etc., R. Co. v. Pickard*, 8 Colo. 163; 18 Am. & Eng. R. Cas. 284.

2. *Strohn v. Detroit, etc., R. Co.*, 23 Wis. 126; 99 Am. Dec. 114. A mere casual conversation with a person whose duty it is to open and shut the carriage doors or the like, cannot amount to evidence of a special contract with the company. *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; 34 L. J. C. P. 264.

3. *Emporia v. Volmer*, 12 Kan. 622; *Morrison v. Com.*, 7 Dana (Ky.) 218; *Patten v. Centralia*, 47 Ill. 370; *Harris v. People*, 1 Colo. App. 289; *Minor v. State*, 63 Ga. 318. See also *INTOXICATING LIQUORS*, vol. 11, p. 693.

In *Koop v. People*, 47 Ill. 329, it was defined to be a public drinking house.

In *Harney v. State*, 8 Lea (Tenn.) 113, it was held, under a statute making it a misdemeanor, subject to fine and imprisonment, to sell or "tipple" any intoxicating beverage within four miles of any institution of learning, that the buyer of the liquor is not guilty of the offense; but *Turney, J.* (in which *McFarland, J.* concurred), held that both the seller and buyer are necessary to the offense, and that "tipple," in its legal sense, means a sale and consumption; that the seller cannot tipple by himself, but must have a purchaser, who of course is a party to the tipping.

TITLE INSURANCE—(See also INSURANCE, vol. 11, p. 278).—A contract of title insurance is one whereby the title of real estate is insured. The business is usually carried on by companies, as in the case of other kinds of insurance. And the practice of such companies is substantially as follows: To have the title to specified property examined on application of the purchaser and the abstract of title prepared, the correctness of which is guaranteed, whereupon a policy is issued to such purchaser stipulating that he shall be indemnified for any loss that may arise to him by reason of a defect in the title.¹

Under the *Tennessee* statutes, the courts have defined a "tippling house" to be a place where spirituous liquors are sold, without license, in less quantities than a quart, or in any quantity to be drank on the place. *Harney v. State*, 8 Lea (Tenn.) 114; *Dunnaway v. State*, 9 Yerg. (Tenn.) 350; *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

In *Minor v. State*, 63 Ga. 318, it was held that if liquors were given away by the drink, or other small quantity, it constituted the house a tippling house. This was the case of a social club, each member of which contributed a certain sum on or before the Saturday preceding each Sunday, for the purpose of purchasing liquors necessary for the use of the club the following Sunday, and it was held to be a tippling house. And see *Marmont v. State*, 48 Ind. 21.

In *Hussey v. State*, 69 Ga. 54, it was held to make no difference in law whether a place be called a barroom, glee club, parlor, or restaurant; if it be a place where liquor is retailed and tipped, if it have a door for entrance so that anybody can push it open, enter and drink, the proprietor is guilty of keeping a tippling house. Nor does it matter whether the drinking be done standing or sitting, whether at the bar or around a table; in either event it is tippling, and the place where it is done is a tippling house.

1. The organization of title insurance companies is of such recent date that decisions bearing upon their rights, liabilities, etc., are as yet rare.

The *Pennsylvania* Act of May 9, 1886, which provides for the incorporation of companies to insure titles, does not empower them to engage in the business of conveyancing, and to an action upon a title insurance policy, it is no defense that the conveyancing was done by the conveyancer of the

plaintiff. *Gauler v. Solicitors, L. & T. Co.*, 9 Pa. Co. Ct. Rep. 634.

False Answers.—To a question as to what was the last price paid for certain property, upon an application for a policy of insurance of title to land, the answer was \$11,000, and if it was provided in the policy that an untrue answer would avoid the same, such answer amounted to a warranty, and its immateriality was of no moment. Again, the question called for the actual and not the nominal price. Of the \$11,000 stated in the deed as the consideration, only \$3,000 was paid in money, the rest being the transfer of certain mining stock, to the amount, par value, of \$15,000, but which the jury found to be worth very little, and the instruction of the court that if the jury found that the \$3,000, together with a fair market value of the stock, aggregated \$11,000, or if they believed that the plaintiff honestly thought he was paying \$11,000 in full cash value, and the other party accepted the same as \$11,000 in money, then they should find the answer true, was sufficiently favorable to the plaintiff. *Stensgaard v. St. Paul Real Estate Title Ins. Co.* (Minn. 1892), 52 N. W. Rep. 910.

The Records Kept by Title Guaranty Companies Private Property.—In *Ex p. Calhoun*, 87 Ga. 359, it was held that an officer of a title guaranty company could not be forced by a subpoena *duces tecum*, in a suit to establish lost public records, to produce the abstract books of the company which contained copies of the public records of land conveyances. In delivering the opinion of the court in this case, Bleckley, C. J., said: "These abstract books called for by the subpoena came into existence as the result of private enterprise and labor, and were afterwards purchased by this private corporation at great expense. They are its private

TITLE (REAL PROPERTY).—(See also EJECTMENT, vol. 6, p. 195; REAL COVENANTS, vol. 19, p. 973; REAL PROPERTY, vol. 19, p. 1028; SPECIFIC PERFORMANCE, vol. 22, p. 908. As to title by escheat, see ESCHEAT, vol. 6, p. 854; title by occupancy, see ABANDONMENT, vol. 1, p. 1; by adverse possession, ADVERSE POSSESSION, vol. 1, p. 225; by estoppel, ESTOPPEL, vol. 7, p. 19; by prescription, PRESCRIPTION, vol. 19, p. 6; by forfeiture, FORFEITURE, vol. 8, p. 443; by accretion, ACCRETION, vol. 1, p. 136; by public grant, GRANTS, vol. 9, p. 43; PUBLIC LANDS, vol. 19, p. 305; by office grant or matter of record, GRANTS, vol. 9, p. 43; by private grants, REAL PROPERTY, vol. 19, p. 1028; GRANTOR AND GRANTEE, vol. 9, p. 19; DEEDS, vol. 5, p. 423; LEASE, vol. 12, p. 974; REAL COVENANTS, vol. 19, p. 973; as to title by devise, see LEGACIES AND DEVISES, vol. 13, p. 7; WILLS.)

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I. NATURE OF TITLE—1. Definition.—Title in real property, according to classic authorities, is the means whereby a man holdeth land.¹ It may be said to be the collection of all the

property and are used by it in the conduct of its corporate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished if not destroyed."

1. This is the familiar definition of Coke, Blackstone, and all of the older authorities. Co. Lit. 345 B; 2 Bl. Com. 195; 3 Washb. Real Prop. 399. This definition, without regard to its absolute accuracy, certainly requires further elucidation. If the statement of a modern writer of standing be taken as a basis in the discussion of ownership, "every right is a consequence attached by the law to one or more facts which the law defines. . . . When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights. . . . The word 'possession' denotes such a group of facts." See Holmes on The

facts on which ownership is founded, or by which ownership is proved.¹

2. Elements or "Stages" of Title—*a. IN GENERAL.*—In the older books there are said to be three stages or degrees in a complete title—the mere possession; the right of possession, which may be apparent or real; and the mere right of property.²

Common Law 214. In the light of this statement, it would seem that title, in its strict application to real property, denotes a collection of all the facts of ownership; and this view appears confirmed in the traditional mode of division, where the several parts or stages of a complete title are separated into the several progressive rights of ownership, each of them based upon a progressive and partial collection of these facts, on the total sum of which the right of absolute ownership is founded. See, in this connection, Burton on Real Prop., § 418; Kaines, Law Tracts 98; Maine's "Ancient Law," p. 256; Taylor on Civil Law 476—cited in 3 Washb. Real. Prop. 399.

1. See the last note; also the succeeding section in the text and the notes under it. "When the existence of any right of property . . . is in question, every fact which constitutes the title of the person claiming the right . . . is deemed relevant." Steph. on Ev., art. 5.

2. Mere Possession.—Mere possession is said to exist when one man, without any pretense of right, invades the premises of another, by force or surprise, and turns him out of the occupation of his land. This is called disseisin. Other instances where mere possession may be gained, to which the law applies special terms, are abatement and intrusion. The first occurs where, after the death of the ancestor, and before the entry of the heir, a stranger gains possession of the land to the exclusion of him who had the right to enter. The second exists where a stranger gains possession after the death of a particular tenant, and before the entry of the remainderman or reversioner.

Right of Possession.—This is said to exist in disseisin as above described, where the disseisor has actual possession and the disseisee the right of possession. Such right of possession was protected by remedies no longer known by the law; such as the right to enter and turn out the disseisor, or the right to make continual claim, that is, to

make claim as near the premises as possible, repeated once in every year and a day. The right of possession was said to be of two kinds, apparent and actual.

Apparent Right of Possession.—This was founded on the maxim, now abolished, that descent tolls seisin (*descensus tollit seisinam*) whereby, when the disseisor's unlawfully acquired possession descended to his heir, the latter's right was superior to his ancestor's, in that he could be dispossessed only by an action at law, and not by a mere entry. This principle was modified by Stat. 32, Hen. VIII, ch. 33, and has been abolished in most, if not all, of the states.

Actual Right of Possession.—This is the only one of these stages or degrees of title which is of importance in modern law. It exhibits the only mode recognized by the law by which a title may be acquired on the foundation of mere possession. At common law, it was said to exist where the person disseised failed to bring his possessory action within the requisite time, thereby losing such remedy and leaving in his adversary an actual right of possession.

Mere Right of Property.—This was at common law the last degree or stage in a complete title, and was what remained in the owner after he had lost the possession and the right of possession, both apparent and actual. This right was founded on the fact that when the owner had neglected to bring his possessory action within the requisite time, he still had a further period within which to bring an action by which he claimed a mere right of ownership. Other instances when this right existed were when the estate tail was discontinued by a feoffment by the tenant in tail, such right of property remaining in the heirs in tail, and in the remainderman; and, finally, when the owner had lost the right of possession by a judgment in a possessory action.

This right of property was founded on and protected by the writs of right

In so far as these stages or degrees of title are in themselves the foundation of independent rights of ownership, as was the case in early law, their treatment is no longer of practical use. With the disappearance of the various kinds of real remedies and real actions, especially of the so-called writs of right, these various grades of title have merged into one,¹ which may be acquired in a variety of ways.²

The mention of possession as an element of title seems to proceed in the minds of many writers from a theory regarding the origin of ownership in land, in early stages of society, and in this aspect has no place here.³

The chief importance of possession seems to be as a fact in issue or as part of the evidence to prove ownership. "Possession, *per se*, evidences no more than the mere fact of present occupation by right. . . . Undoubtedly, if a person be found in possession of land, claiming it as his own in fee, it is *prima facie* evidence of his ownership, and seisin of the inheritance."⁴

in early law, for which there existed a period of limitation longer than that which barred possessory actions. As these writs of right have been practically abolished, the foundation for the distinction between the right of property and the actual right of possession no longer exists, and, in fact, this actual right of possession may be said to be in every respect coincident with absolute ownership. (The union of all these stages in the complete title was said to constitute,—the last two the *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*—all three the *juris et seisinæ conjunctio*—distinctions which have to-day hardly even a theoretic value.) For a discussion of the three stages or degrees of a complete title at common law, see 2 Minor's Insts. 447-451; 2 Bl. Com. 195-199; Co. Litt. 153, n.; 4 Kent's Com. 373; 3 Washb. Real Prop. *400.

1. This will be found discussed in the text below in this section and in the corresponding note.

2. See *infra*, this title, *Modes of Acquisition of Title*.

3. See 3 Washb. Real Prop. *482, citing 2 Sharswood's Bl. Com. 196, and note; Wood's Civil Law 78, 126; 2 Washb. Real Prop. 399, and the authorities cited, notably Maine's "Ancient Law," where the common theory that property had its origin in possession is denied. See 2 Bl. Com. 3, 4; 2 Kent's Com. 318. But see 2 Minor's Inst. 3, where the theory is maintained that while between nations property originated in occupancy, individuals

first obtained particular portions of territory by the actual or implied sanction of the community.

In *Campbell v. Holt*, 115 U. S. 620, Miller, J., said: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use to the exclusion of others. And legislatures and publicists have always acknowledged its efficacy in confirming or creating title." See *LIMITATION OF ACTIONS*, vol. 13, p. 694.

4. Story, J., in *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

It can hardly be doubted that all so-called rights less than a complete title, such as the right inherent in possession, are nothing but facts in evidence by which ownership is proved. From some of these facts, such as possession, presumptions more or less strong are said to arise of ownership, according as they are accompanied by other incidental facts, such as claim or color of title, and thus it follows that the whole question of title is merely one of evidence or presumption, and that nothing but confusion can result from considering such evidential facts as rights (however incomplete) of ownership. In harmony with this view, the title to land may be proved in many ways; it cannot be said to be a definite whole composed always of certain fixed parts. What in one case is essential to the complete proof of ownership may in another case be dispensed with. This

is strikingly shown by the fact that possession of land even for less than the statutory period, may give a complete title. See *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

Hodgdon v. Shannon, 44 N. H. 572, is an interesting case as showing the various acts, tests, and declarations of ownership which may be submitted to a jury to determine the title to land. Thus, in a writ of entry to recover a tract of land upon execution as the property of a judgment debtor, where the defendant claimed as tenant of certain devisees of the mortgagee of said land, it was held that the question whether the mortgagees ever foreclosed for condition broken, and the mortgagee subsequently exercised acts of ownership over premises, or otherwise, were proper questions for the jury. See *Jackson v. Wood*, 12 Johns. (N. Y.) 242; 7 Am. Dec. 315; *Giles v. Baremore*, 5 Johns. Ch. (N. Y.) 545; Ang. on Lim. 493. Likewise, the payment of taxes (*Little v. Downing*, 37 N. H. 355; *Farrar v. Fessenden*, 39 N. H. 277; *Carr v. Dodge*, 40 N. H. 403), the description of the property in an application for a policy of insurance, the claim of ownership, and the giving of the note binding the party to pay losses, were all held direct acts of ownership, and explanatory of the possession of the party. See *McCall v. Neely*, 3 Watts (Pa.) 69; *Nepan v. Doe*, 2 Sm. Ld. Cas. 493; Ang. on Lim. 425. Declarations of the mortgagee were likewise held to have been correctly admitted, upon the ground that she was first found by the jury to be in actual possession of the premises under her deed. The declarations were received as explanatory of the character of the possession, and as giving color and limits to the same. See 1 Greenl. on Ev., §§ 109, 110; *Currier v. Gale*, 14 Gray (Mass.) 504. See also 1 Greenl. on Ev., § 153, citing *Jones v. Williams*, 2 M. & H. 331; *Doe v. Kemp*, 7 Bing. N. Cas. 332; *Simpson v. Dendy*, 36 Eng. L. & Eq. 366.

In *Currier v. Gale*, 14 Gray (Mass.) 504, the extent of the rule which admits the declarations of a party in possession, adverse to his own interest, was considered. The declarations of a deceased occupant were here offered by the defendant for the purpose of showing that the declarant occupied as tenant of another, and adversely to the plaintiff. The court held the evidence admissible, saying: "Such dec-

larations have in various forms and under different circumstances been deemed admissible. The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary, it has been allowed. So, also, as evidence against the party making the declaration, and all persons in privity with him, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his declaration in disparagement of his apparent title, as indicated by his possession, may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord. Thus, in *Peaceable v. Watson*, 4 Taunt. 16, it was held that the declarations of a deceased occupant of land, stating under whom he occupied as tenant, were admissible, *Mansfield, C. J.*, saying: "Possession is *prima facie* evidence of seisin in fee simple; the declaration of the possessor that he is tenant to another makes most strongly, therefore, against his own interest, and consequently is admissible." *Davies v. Pierce*, 2 T. R. 53, is an authority to the same point. The case of *Marcy v. Stone*, 8 Cush. (Mass.) 4; 54 Am. Dec. 736, is directly to the same effect. If these declarations were offered as the declarations of deceased persons, while occupying the premises, they would have been, therefore, admissible." The court concluded that the evidence proved that defendant had acquired by possession and occupation a legal, although not indefeasible, title to the land; that he was lawfully seised and possessed of it against all the world, except the true owner; that his title passed to the grantees and to their assignees with the covenant of warranty, and that, in an action for the breach of this covenant, defendant could not set up in defense a constructive seisin or possession in a stranger. So it was said in *Jackson v. Porter*, 1 Paine (U. S.) 457, that it is not possession alone but possession accompanied with the claim of the fee, which, by construction of law, is deemed *prima facie* evidence of such an estate. See *Buswell on Lim. & Adverse Possession*, § 237. For the same reason a squatter cannot acquire title, unless he has denied the title of the lawful owner. See *Sacket v. McDonnell*, 8 Biss. (U. S.)

The discussion of these several stages or degrees of title may, however, rest on the view that while they are insufficient in themselves to constitute separate rights of ownership, they are each indispensable to a complete title. In this sense possession, at least constructively, together with the actual right of possession, may be considered indispensable elements of a complete title;¹ but a mere right of property, distinct from the actual right of possession, has, it seems in modern law, disappeared as a requisite, as well as an independent foundation, on which to establish a right of ownership. While the early effect of the Statute of Limita-

394; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17; *Ruffin v. Overby*, 88 N. Car. 369; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213; 21 Am. Dec. 306. As to the effect of payment of taxes, see *Webb v. Richardson*, 42 Vt. 465; *Sorber v. Willing*, 10 Watts (Pa.) 141; *Naglee v. Albright*, 4 Whart. (Pa.) 291. See also, as to actual possession, *Humphreys v. Rawson*, 8 Watts (Pa.) 79; *Robinson v. Lake*, 14 Iowa 421; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Price v. Brown*, 101 N. Y. 669; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72. As to the effect of the particular circumstances of each case, see *Turner v. Hall*, 60 Mo. 271; *West v. Lanier*, 9 Humph. (Tenn.) 762; *Corning v. Troy Iron, etc., Factory*, 44 N. Y. 577; *Clancey v. Hondlette*, 39 Me. 451; *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 137; *Booth v. Small*, 25 Iowa 177; *Cook v. Babcock*, 11 Cush. (Mass.) 210; *Little v. Downing*, 37 N. H. 367. As to actual occupation, cultivation, etc., see *Langworthy v. Myers*, 4 Iowa 18; *Morrison v. Kelley*, 22 Ill. 624; 74 Am. Dec. 169; *Kane v. Footh*, 70 Ill. 587; *Blood v. Wood*, 1 Met. (Mass.) 335; *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Royall v. Lisle*, 15 Ga. 545; *Denham v. Holean*, 26 Ga. 191; 71 Am. Rep. 98; *Doolittle v. Tice*, 41 Barb. (N. Y.) 181; *Brown v. Cockerell*, 33 Ala. 47; *School Dist. No. 8 v. Lynch*, 33 Conn. 330; *Alexander v. Polk*, 39 Miss. 755; *Samuels v. Borrow-scale*, 104 Mass. 207.

The possession must be held *animo clamandi*. *Grant v. Fowler*, 39 N. H. 101; *Jackson v. Wheat*, 18 Johns. (N. Y.) 44; *Magee v. Magee*, 37 Miss. 152; *Davenport v. Lebring*, 52 Iowa 364; *Grube v. Wells*, 34 Iowa 150; *Perkins v. Nugent*, 45 Mich. 156; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Smith v. Stevens*, 82 Ill. 554. See also *Society, etc. v. Pawlet*, 4 Pet. (U. S.) 480; *Ewing v. Barnet*, 11 Pet. (U. S.) 41; *La Frombois v. Jackson*, 8 Cow. (N.

Y.) 609; 18 Am. Dec. 463; *Ford v. Wilson*, 35 Miss. 504; 72 Am. Dec. 137; *Hall v. Stevens*, 9 Met. (Mass.) 418; *Day v. Cochran*, 24 Miss. 261; *Clarke v. McClure*, 10 Gratt. (Va.) 305; *Floyd v. Mintsey*, 7 Rich. (S. Car.) 181; *Criswell v. Altemus*, 7 Watts (Pa.) 581; *Long v. Mast*, 11 Pa. St. 189.

Under REAL COVENANTS, vol. 20, p. 993, will be found a distinction between possession and seisin, together with an account of the doctrine of "actual seisin," which obtains in *Massachusetts*, *Maine*, and, in a qualified form, in *Ohio*.

1. **Constructive Possession.**—In the common phrase the legal title is said to draw to it the possession. 3 Washb. Real Prop. *485.

See *Green v. Watkins*, 7 Wheat. (U. S.) 28, where (on a writ of right), the court, by Story, J., said: "It has been already decided by this court, and is indeed among the best established doctrines of the common law, that seisin in deed, either by possession of the land and perception of profits, or by construction of law, is indispensable to enable the demandant to maintain his suit."

In *Morrison v. Kelly*, 22 Ill. 609, Walker, J., said: "The doctrine is well recognized and established that a man may have the actual possession of real estate without a residence upon it. And it may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which in contemplation of law draws to and connects with it the possession." See *Hunnitt v. Peyton*, 102 U. S. 333. As to "actual possession," see ACTUAL, vol. 1, p. 184g *et seq.*; ADVERSE POSSESSION, vol. 1, p. 255, and cases there cited.

Three important instances of con-

constructive possession, as considered in questions of title to land, are said to exist. First, as above stated, where the legal title is said to draw to it the possession of the whole land, in the absence of ouster or adverse possession of the whole or of any part. See the cases above cited. Second, where, though there may be adverse possession of a part under color of title to the whole, if the legal owner be in actual possession of a part also, he has the constructive possession of all the land not in the actual possession of the adverse holder. Third, where one enters on unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title.

In *Hunnicut v. Peyton*, 102 U. S. 333, it is said: "The true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still his possession beyond the limits of his actual occupancy is only a constructive one. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, the constructive possession is in him of all the land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the defective title. 'The reason is plain. Both parties cannot be seised at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title.' *Clarke v. Courtney*, 5 Pet. (U. S.) 319. . . . One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if, while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretense. . . . In *Altemus v. Long*, 4 Pa. St. 254; 45 Am. Dec. 688, it was ruled that, though actual possession under a junior title of part of a tract of land, which interfered with an older grant, gave possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner

upon any part of his land was an ouster of the intruder from what he had in constructive possession merely. We know of no authoritative decision that is in conflict with this." But see *infra*, this title, *Color of Title—Generally*.

In 3 Washb. Real Prop. *485, it is said: "There is also a constructive possession without being a possession in fact, if accompanied by an entry under 'color of title,' as it is called, as where one, under a title-deed describing a parcel by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part; nor can he be disseised except by an actual entry and occupancy by another, and only to the extent of such occupancy. So the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual entry and adverse possession by another." See *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; and the note to *Ewing v. Burnet*, 11 Pet. (U. S.) 41. But see *infra*, this title, *Color of Title—Generally*; *Den v. Hunt*, 20 N. J. L. 487; *Foulke v. Bond*, 41 N. J. L. 527.

Possession and Seisin.—In *Slater v. Rawson*, 6 Met. (Mass.) 439, the question was, whether one who had had actual possession of land, and had sold timber therefrom for a number of years, was seised for the purpose of liability to an action on his covenant of warranty. The court regarded it as indisputable that defendant, having actual possession, "had a valid title against all the world, except the true owner. . . . If any other person had entered on the land, he might have maintained trespass against him, or if he had been ousted, he might have maintained a writ of entry." It was considered whether, defendant's possession not amounting to a disseisin, he was ever actually seised, so that title could pass to his grantees and a covenant of warranty could run with the land and pass to their assignees. As to the remark of *Parsons, C. J.*, in *Langdon v. Potter*, 3 Mass. 219: "Although there may be a concurrent possession, there cannot be a concurrent seisin of lands," the court said: "However this may be, according to the doctrine of the ancient feudal law, it is not supported by modern decisions, and is not applicable to our tenures, except in a qualified and

tions was simply to bar the remedy of the owner, it seems that in the *United States* at least, adverse possession for the period of the statute, not only bars the remedy of the owner, but operates to transfer a complete title to the adverse holder.¹

limited sense. It is true that two adverse parties cannot both be seised of the same land at the same time. But if A enters on the land of B, without ousting him, or doing some act equivalent to an ouster, he will not thereby acquire a seisin as against B, unless B elects to consider himself disseised; but A's possession would constitute a legal seisin against any one who might enter upon him and oust him without right; and he might maintain a writ of entry against the wrongdoer, declaring on his own seisin, and a disseisin by the tenant." The court held that there is no legal difference between seisin and possession; although there is a difference between disseisin and disposssession; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisee, or some act equivalent to it, whereas by the latter no such act is implied. Co. Litt. 153 b, 181 a; 1 Bur. 108, 111; Matheson v. Trot, 1 Leon 209; Smith v. Burtis, 6 Johns. (N. Y.) 217; 5 Am. Dec. 218. Lord Coke says, seisin signifies, in the common law, possession. Co. Litt. 153 a. Seisin, according to Com. Dig. Seisin, a, 1, imports the having possession of an estate of freehold or inheritance in lands or tenements. See Smith v. Burtis, 6 Johns. (N. Y.) 206; 5 Am. Dec. 218, and cases there cited. The court then found that defendant had a good right to convey title, whatever it was, if he was in possession, without regard to distinction between seisin and possession, citing, as sustaining this principle, the case of Bearce v. Jackson, 4 Mass. 408, where the court said: "It is very clear that the defendant's intestate, being in possession, claiming a fee simple in the land, was able to convey." In this latter case it was also decided that such a possession and claim constitutes a legal seisin. This decision is, in Slater v. Rawson, 6 Met. (Mass.) 439, considered to be in conformity with the construction which holds that the covenants of seisin and of right to convey are synonymous, because the same fact, viz., the seisin of the grantor, will support both covenants.

1. See LIMITATION OF ACTIONS, vol. 13, pp. 693-694, where is quoted the distinction drawn in Jones v. Jones, 18 Ala. 248, between the operation of the Statute of Limitations on title as vesting it; and in contract where the remedy alone is affected in the debt itself. This distinction was approved in Campbell v. Holt, 115 U. S. 620, where it is said by the court, through Miller, J., "The weight of authority is in favor of the proposition that, where one has had peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. The doctrine has been repeatedly asserted in this court. Lefingwell v. Warren, 2 Black (U. S.) 599; Croxall v. Shererd, 5 Wall. (U. S.) 289; Dickerson v. Colgrove, 100 U. S. 583; Bicknell v. Comstock, 113 U. S. 152. It is the doctrine of the English courts, and has been often asserted in the highest courts of the states of the Union." This was said in regard to the distinction between the effect of the Statute of Limitations on contract as merely taking away the remedy, and its effect on real property, where it vests the title.

See the extensive list of cases cited in LIMITATION OF ACTIONS, vol. 13, p. 694. See also Boswell Lim. of Adverse Possession, par. 229, and the notes. See Rhode Island Pub. Stat., ch. 175, § 2, considered in Union Sav. Bank v. Taber, 13 R. I. 683; Smith v. Lorillard, 10 Johns. (N. Y.) 357; 3 Washb. Real Prop. *449.

The writ of right lay only for the recovery of an estate in fee simple, and was the last resort of the party who had been ousted of real property. In Derby v. Jacques, 1 Cliff. (U. S.) 425, in an action on a writ of right, it was held that this remedy still exists at common law, though abolished in the courts of Massachusetts in 1840 by Massachusetts Rev. Sts., ch. 101, § 51; but that in accordance with the decision in Homer v. Brown, 16 How.

b. POSSESSION—(1) How Far Does Possession Give a Right.—Possession in itself (as distinct from the “right of possession”), may be said to give a right protected by the law only in a modified and inaccurate sense, chiefly in such instances as in the action of forcible entry and detainer,¹ and where mere possession with color or claim of title is said to support ejectment and trespass.² But in the former instance, it appears clearly from the cases that

(U. S.) 363, this statute did not abolish a writ of right as process in the *United States* circuit court in the *Massachusetts* district. But, in accordance with the same decision, it was held that it was as process alone that the action continued in the circuit court for that district, and that the action was subject to the limitation prescribed by the state law as to the time within which such remedy might be prosecuted. This was in accordance with the 34th section of the Judiciary Act that the laws of the several states shall be regarded as rules of decision in the courts of the *United States* where they apply. “While, therefore,” the court said, “a writ of right may still be maintained in the circuit court of this district, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit, is no longer here in force. . . . To regard the writ of right in the circuit court of the district as still overriding a final judgment recovered on a writ of entry in the state court, would present the anomaly of one rule of property in the state courts, and another and a different rule in the circuit court in respect to the same subject-matter.” See also *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332, note; *Schall v. Williams Valley R. Co.*, 35 Pa. St. 205 and cases there cited, and *Fisher v. Philadelphia*, 75 Pa. St. 392.

1. See *FORCIBLE ENTRY AND DETAINER*, vol. 8, p. 119, where it is said that the question involved in the action is the fact of possession only, and not the right to possession. “The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possessions of plaintiff being proven, he would be entitled to resti-

tution, though the fee simple, title, and present right of possession, are shown to be in the defendant. The authorities on this point are numerous and uniform.” *McCauley v. Weller*, 12 Cal. 500. See also *Jenkins v. Tynon*, 1 Colo. App. 133; *Potts v. Magnes*, 17 Colo. 364; *Stillman v. Palis*, 134 Ill. 532; *Hill v. Olin*, 82 Mich. 643; *Craig v. Donnelly*, 28 Mo. App. 342; *Pettit v. Black*, 13 Neb. 142; *Lipp v. Hunt*, 25 Neb. 91; *Logan v. Lee*, 53 Ark. 94; *Gooch v. Hollan*, 30 Mo. App. 450; *Pederson v. Cline*, 27 Ill. App. 249; *Mosseller v. Deaver*, 106 N. Car. 494; *Cain v. Flood* (C. Pl.), 14 N. Y. Supp. 776.

2. Mere possession, with color or claim of title, is sufficient to maintain ejectment (as well as trespass) against one who subsequently entered. See *Woods v. Banks*, 14 N. H. 101. This proposition, it is clear, rests entirely upon the doctrine of presumptions. In the case just cited where it is announced, the court says: “The plaintiff’s possession is *prima facie* evidence of title. There is nothing . . . to rebut it. The defendants show no pretense of title under which to justify their subsequent entry. . . . A possession of the plaintiff then and the evidence of title which it furnishes stands wholly unimpeached and entitles him to an action of trespass to recover damages for an injury done to the possession.” This ground is taken even in the older books, as when Blackstone, describing mere possession, says: “Actual possession is *prima facie* evidence of a complete legal title in the possessor.” 2 Blackstone’s Com. 196. See 2 Min. Inst. 447.

It has been maintained in many states, notably in *Massachusetts*, that actual possession is evidence of title against a stranger having no title, a proposition of the law of evidence, which is equally true of personal as of real property. See *Buswell on Lim. & Adverse Possession*, §§ 2, 29. Thus in *Taber v. Lawrence*, 134 Mass. 94, it was held that in trover, possession of

the exclusive and direct object of the law is, not to protect possession, but to prevent disturbance of the public peace;¹ in the latter class of cases, the word "title" is used merely in a relative sense. The whole question is not that of absolute right in any one party, but of the relative strength of presumptions by a rule of evidence which is equally true for a similar purpose in the law of personal property.²

A third case where possession is said to give a right, may seem to exist where it is said that trover and replevin will not lie for goods against one in the actual possession of land from which they were taken; but this is easily seen to be a mere question of procedure.³

the goods under a claim of title is sufficient evidence of property as against one who shows no better right. See Greenl. on Ev., par. 67. So in Putnam v. Lewis, 133 Mass. 269, in an action for conversion, a previous decision of the court was sustained that a possession under a claim of right is sufficient title against one who has no right. See Burke v. Savage, 13 Allen (Mass.) 408.

Among the cases treating possession as evidence of ownership, cases which are almost innumerable, may be cited, viz.: Parker v. Birkbeck, 3 Burr. 1556; Jackson v. Harder, 4 Johns. (N. Y.) 202; 4 Am. Dec. 262; Jackson v. Hazen, 2 Johns. (N. Y.) 22; Lund v. Parker, 3 N. H. 50; Hubbard v. Little, 9 Cush. (Mass.) 475; Slater v. Rawson, 6 Met. (Mass.) 439; Pettingell v. Boynton, 139 Mass. 344. See also Cutts v. Spring, 15 Mass. 134; Cook v. Rider, 16 Pick. (Mass.) 186; Spurr v. Bartholomew, 2 Met. (Mass.) 479; Hubbard v. Little, 9 Cush. (Mass.) 475; Ricard v. Williams, 7 Wheat. (U. S.) 59; Hodgdon v. Shannon, 44 N. H. 572, with the cases there cited. See also the American note under the leading cases of Nepean v. Doe, and Taylor v. Horde, 1 Sm. L. Cas. *774. See PRESUMPTIONS, vol. 19, p. 53, where a list of cases will be found; ADVERSE POSSESSION, vol. 1, p. 363, with cases fully cited and stated. See also Jackson v. Town, 4 Cow. (N. Y.) 599; 15 Am. Dec. 405; Tuttle v. Jackson, 6 Wend. (N. Y.) 213; 21 Am. Dec. 306, and finally, Stephen on Pl. (3d. Am. ed.) 286, 287. From all these cases it appears that the use of the word "title" is a relative one; that the question is not that of absolute ownership in one party, but of the relative strength of the evidence between the two parties.

1. See the first note of this section.

2. See the second note of this section.

3. The principal cases which lay down the rule are Mather v. Trinity Church, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663; Brown v. Caldwell, 10 S. & R. (Pa.) 114; 13 Am. Dec. 660; Elliott v. Powell, 10 Watts (Pa.) 454; 36 Am. Dec. 200; Harlan v. Harlan, 15 Pa. St. 509; 53 Am. Dec. 612, citing among others, Heath v. Ross, 12 Johns. (N. Y.) 140; Higginson v. York, 5 Mass. 345; Clair v. Roberts, Wm. Jones, 243. See also Farrand v. Thompson, 5 B. & Ald. 272; Mooers v. Wait, 3 Wend. (N. Y.) 104; 20 Am. Dec. 667.

It is clearly shown by Harlan v. Harlan, 15 Pa. St. 507; 53 Am. Dec. 612, that the possession must be not only actual, but adverse, claiming title, the court saying: "The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form. Beyond, the cases do not go, nor does public policy require they should."

In Martin v. Thompson, 62 Cal. 618; 45 Am. Rep. 663, the court reviewed and distinguished the principal cases, sustaining the distinction drawn in Harlan v. Harlan, 15 Pa. St. 507; 53 Am. Dec. 612, quoting as follows from Halleck v. Mixer, 16 Cal. 574: "If the complaint alleged the title, it would . . . be demurrable; if it merely alleged ownership of the property, the party would be excluded on trial from the proof of his title. . . . The true rule is this: The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely

(2) *Possession as Evidence of Title*—(a) *Generally*.—A conclusive reason against the treatment of possession as giving incomplete right of ownership is that it can have no fixed character as such. As a foundation for ownership, possession can be accompanied by a variety of circumstances, presenting a whole, which, as evidence of title, must frequently be determined by a jury. These circumstances may be grouped in a general way; as, First: The facts immediately surrounding the possession, such as permission of the owner, or facts showing claim or color of title, viewed in themselves. Second: The relative strength of such facts when opposed to each other. Third: The nature of the action and the relative position of the parties, whether of attack or defense.

The result of the decisions can be most clearly seen in the progressive enumeration, necessarily imperfect, of classes of cases in which the effect of possession as evidence of ownership varies according to the nature of the accompanying facts, the enumeration proceeding from the simplest case to that which will constitute a complete title against all the world.

It may be stated as a cardinal rule, that as between two parties, possession will never prevail unless it be exclusive.¹

(b) *Bare Possession*.—Bare possession is sufficient evidence as

in good faith under claim and color of title. In other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is . . . upon such proof that the right of recovery rests. . . . A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action." See *Atherton v. Fowler*, 96 U. S. 513.

1. The indispensable requisite for acquiring title by possession as against the true or previous owner, is that the occupant claim ownership as against such real or previous owner, whether by denying, impugning, or openly defying such ownership. Permissive occupancy can never mature to a complete title. Typical cases of such permissive occupancy are so-called squatter claims. Such a case was *Sackett v. McDonnell*, 8 Biss. (U. S.) 394, which arose under *Illinois Rev. Stat.*, ch. 83, § 1, where the court said: "The Statute of Limitations invoked in this case does not give a person title who merely enters upon another man's land and remains there twenty years, unless he claims the right of entry by virtue of his own title, so as to give the owner an oppor-

tunity of trying titles with him. Thus, if a mere squatter . . . (that is, a person who enters without color of right) enters upon your land, claiming no title as against you, but simply moves on to the land on the assumption that you have no immediate use for it, and without impugning your title, and you acquiesce in his remaining there—do not drive him off, or sue him in ejectment or trespass—he gets no title as against you by such permissive occupation." See also *Kerr v. Hitt*, 75 Ill. 51; *Grim v. Murphy*, 110 Ill. 274; *McClellan v. Kellogg*, 17 Ill. 498; *Jackson v. Berner*, 48 Ill. 203. But it must be noticed that while such occupant cannot acquire title as against the true owner, such occupancy will be sufficient evidence as against one having a lesser right (such as a wrongdoer) to bring ejectment or trespass. See the notes immediately following, under the first of the typical cases stated in the notes.

This is, of course, distinct from acquiescence of the owner in the possession of another, as raising the presumption of grant. See *PRESUMPTIONS*, vol. 19, p. 81; *LIMITATION OF ACTIONS*, vol. 13, p. 694, n. 2; Washb. on Real Prop. *35; *Hall v. Stevens*, 9 Met. (Mass.) 418; *Clarke v. McClure*, 10 Gratt. (Va.) 305.

against every one who can show no better evidence.¹ Thus, a tenant at will may maintain trespass or writ of entry against a stranger;² and so may a tortfeasor, even though his tortious possession does not amount to a disseisin of the true owner.³ In both cases a constructive possession remains in the true owner; for a person may have a possession which is legal and valid against

1. See Greenl. on Ev., § 44. In *Lund v. Parker*, 3 N. H. 50, Richardson, C. J., said: "There is no doubt that possession of land without title or color of title is sufficient evidence of the seisin in the possessor to entitle him to hold the land against every person who can show no better evidence of title." In *Newhall v. Wheeler*, 7 Mass. 189, it was held that actual possession is *prima facie* evidence of a legal seisin. See 2 Bl. Com. 196.

2. In *Slater v. Rawson*, 6 Met. (Mass.) 445, Wilde, J., said: "A tenant at will may maintain trespass against a stranger, although his possession is the constructive possession of his lessor. In an action of trespass *quare clausum fregit*, the defendant can never plead soil and freehold in a third person, without alleging a license from him; because a party, having actual possession, but not the right of possession, has a good title against a party having none." See the next note.

3. In the case last mentioned, *Slater v. Rawson*, 6 Met. (Mass.) 438, a case which seems to be a controlling one in *Massachusetts*, on certain aspects of possession, the question was, whether one who had had actual possession of the premises and had sold timber therefrom for a number of years, was seised of the land, for the purpose of liability to an action on a covenant of warranty by his grantees. The objection was raised that as the defendant's possession did not amount to a disseisin, he never had legal possession, and that the constructive possession continued in the true owner. This was admitted to be true as between defendant and the true owner. "But" it was said, "the tortfeasor may, nevertheless, well maintain an action of trespass or a writ of entry against a stranger without title, for a trespass or a disturbance of his actual possession; and the defendant in such an action cannot defend on the ground that the plaintiff's possession was the possession of the true owner. A party may have a possession which is legal and valid against one party, and not

against another. . . . In an action of trespass *quare clausum fregit*, the defendant can never plead soil and freehold in a third person without alleging a license from him, because a party having actual possession, but not the right of possession, has a good title against the party having none." The court cited on this point *Harker v. Birkbeck*, 3 Burr. 1556; *Jackson v. Harder*, 4 Johns. (N. Y.) 202; 4 Am. Dec. 262, where it was held that a person having had possession of land for eight or ten years was entitled to recover possession against a mere intruder. *Jackson v. Hazen*, 2 Johns. (N. Y.) 22, a stronger case; and *Lund v. Parker*, 3 N. H. 50. As directly supporting this principle were further cited *Cutts v. Spring*, 15 Mass. 134; *Cook v. Rider*, 16 Pick. (Mass.) 186; *Spurr v. Bartholomew*, 2 Met. (Mass.) 479; *Jackson v. Worcester R. Co.*, in 1838 or 1839, not reported.

In *Hubbard v. Little*, 9 Cush. (Mass.) 475, it was held that the demandant in a writ of entry, who shows a possession prior in time, is entitled to recover against a tenant who shows no title to the premises, but merely possession at the time of suit brought; although such demandant may be a wrongdoer as to the real owner. The court said: "The force and effect of a mere possessory title, as against the person who ousts the party originally in possession, is fully explained and elucidated in *Slater v. Rawson*, 6 Met. (Mass.) 439. It is there laid down that, if A enter on land of B and oust him, A's possession, thus acquired, would constitute legal seisin against any one who might enter upon and oust him without right; and A might well maintain a writ of entry against the wrongdoer, declaring on his own seisin and a disseisin by the tenant. Actual possession of land gives a good title against a stranger having no title. Nor does this violate the well-established rule, that a party is to recover upon the strength of his own title only. A possession, prior in point of time to that of the tenant who has himself no

one and not against another.¹ This is sometimes stated in the brief form: every possession is good against a wrongdoer.²

(c) *Prior Possession.*—Mere prior possession will support ejectment.³ In some states this is provided by statute.

title, but only a subsequent possession acquired by an ouster of the demandant, is a better title, upon the strength of which a party is entitled to recover. It is a case where the maxim, *prior in tempore potior in iure*, is applicable."

It will be noticed that the court, in citing the supposititious case mentioned in *Slater v. Rawson*, 6 Met. (Mass.) 439, by an evident oversight, misapprehends the original statement in an important particular, losing much of its force for the principle under discussion. The actual words of the court, by Wilde, J., were: " . . . if A enters on the land of B, *without ousting him* . . ."

In *Litchfield v. Scituate*, 136 Mass. 39, it is held that the demandant in a writ of entry against a tenant who has no title, may rely upon the possession, and need not show title by grant or disseisin of the true owner.

In *Pettingell v. Boynton*, 139 Mass. 244, at the trial of a writ of entry to recover possession of an island, it appeared that the demandant and his ancestor had sold sand and driftwood for more than twenty years from the island; that they had made leases of cottage rights and had conveyed one parcel in fee. The court said: "Whether the acts done by the demandant were such as would oust the true owner, or whether, if of such a character, they had been continued for more than twenty years consecutively or not, they were certainly sufficient to create a possessory title which was good against a mere intruder, without pretense of title. . . . There may be a possessory title, the holder of which may be treated by the true owner as a tort-feasor, which will avail such holder in maintaining an action of trespass or a writ of entry, against a stranger for a disturbance of his own possession." See also *Provident Sav. Inst. v. Burnham*, 128 Mass. 458. The same principle was sustained in the later cases of *Gibbs v. Childs*, 143 Mass. 103; *Litchfield v. Scituate*, 136 Mass. 39; *Litchfield v. Ferguson*, 141 Mass. 97, where it was held that one being in possession, even if it is not such as would amount to a disseisin of the true owner, may maintain trespass against a mere intruder without right upon that possession, and

if he is ousted by such intruder, may maintain a writ of entry against him.

But where one had exercised no other rights of ownership over an open beach, except by going on and taking the driftwood for a number of years without forbidding others to exercise the same right, such temporary and occasional occupation was held insufficient to support an action of tort for breaking and entering the plaintiff's close. The case was held to come within the principle that where two parties have a concurrent or mixed possession of land, neither having title or exclusive priority of possession, one of them cannot maintain an action of trespass against the other. See *Brimmer v. Proprietors of Long Wharf*, 5 Pick. (Mass.) 131; *Barnstable v. Thacher*, 3 Met. (Mass.) 237.

1. See the two preceding notes, and *supra*, this title, *Elements* or "*Stages*" of *Title—In General*, where the subject of constructive possession is discussed.

2. See *EJECTMENT*, vol. 6, p. 227, and cases cited.

3. In *Smith v. Lorillard*, 10 Johns. (N. Y.) 355, Kent, C. J., clearly states the reason on which the doctrine is based. "That the first possession," he says, "should, in such cases, be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has, in the first instance, and after a continued possession for twenty years, under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry." See also *Christy v. Scott*, 14 How. (U. S.) 283.

In *Crockett v. Morrison*, 11 Mo. 1, the court said: "As the action for ejectment is a possessory action, where no title appears on either side, a prior possession, though short of twenty years, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned." So in *Dale v.*

(d) **Prior Possession as Against "Color of Title."**—Prior possession under claim of right will prevail against possession under color of title derived by deed from a grantor who entered subsequently.¹

(e) **"Outstanding Title" in Ejectment.**—In ejectment, the defendant may not invoke the outstanding title of the true owner, where such title neither strengthens his own title, nor impeaches that of the plaintiff as proved by him.²

Faivre, 43 Mo. 556, it was declared that it was well settled, that prior possession accompanied by a claim of the fee, raises a presumption of title, and is sufficient to support the right to eject him who has only the naked possession, and that the grantee of the person so holding prior possession, succeeds to his rights. See also Hubbard v. Little, 9 Cush. (Mass.) 475; and, generally, the cases mentioned in the last note.

By *Georgia Code* (1882), section 3014, bare possession will support ejectment; by section 3366, prior possession against one subsequently acquiring possession. Parker v. Waycross, etc., R. Co., 81 Ga. 387; citing Eaton v. Freeman, 63 Ga. 538; Clark v. Hulsey, 54 Ga. 610; Jones v. Easley, 53 Ga. 454; Jones v. Scoggins, 11 Ga. 119; Doe v. Lancaster, 5 Ga. 39.

See EJECTMENT; vol. 6, p. 203, where the statutory requirements are generally stated.

Under *New York Code*, section 449, actual possession of land for three years will support an action by the holder to compel the defendant to show his title. But in Ford v. Belmont, 69 N. Y. 567, it was held that where for a period of several years before the entry by the plaintiff under an unfounded claim, the premises had been in the actual possession of the defendants (by their agent), such prior possession was a sufficient answer to the claim of an intruder.

1. In Perry v. Weeks, 137 Mass. 584, the demandant, in the writ of entry, rested his case upon a warranty deed executed and recorded without any other evidence that the grantors had any title to the premises. It was held that the demandant's claim could not prevail against a possession under a claim of right. See Bearce v. Jackson, 4 Mass. 408; Slater v. Rawson, 6 Met. (Mass.) 439. The court adding that a grantor not shown to have any title to land, may not, by making a warranty deed, enable his grantee to render unavailable a possession sufficient to give title against the rest of the world, how-

ever insufficient against the true owner. See Ward v. Fuller, 15 Pick. (Mass.) 185; Williston v. Morse, 10 Met. (Mass.) 17. See the note and cases under the next rule.

2. **Doctrine that Defendant May Always Defeat Plaintiff by Proving a Better Outstanding Title.**—It is frequently stated in decisions, notably those of federal courts, as a rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title; the weakness of his adversary's title cannot avail him. As corollary to this, it is commonly said to be a principle that the defendant is always at liberty to prove the title out of the plaintiff, although he do not prove it to exist in himself. The first rule is undoubtedly true, if taken in the strict sense that as between the two claims the plaintiff must show his own to be the stronger; that he cannot recover by merely proving that the defendant has possession without title. As to the second principle, it is, also, undoubtedly true that the defendant may invoke an outstanding title where such title negatives that of the plaintiff as alleged by him; and likewise where such outstanding title is connected with the defendant's title, making the latter superior to that of the plaintiff. But in its broad and unlimited meaning, the doctrine must be denied in so far as it allows a defendant to set up an outstanding title which in no way impeaches that of the plaintiff, nor strengthens his own. A close examination of the cases by which this principle is supposed to be established, will show that there is hardly a single decision resting upon it exclusively, which allows the defendant to retain possession. In many cases, the doctrine is put forth as a *dictum* or as an alternative ground of the decision. In others, it is said to be "qualified by the case in which it arises." In the latest decisions, it is clearly rejected, and the question in ejectment is narrowed to that of the highest evidence of the title between the two parties.

In *Turner v. Aldridge*, 1 McAll. (U. S.) 229, this principle is construed. Numerous *California* cases are cited where the strict construction is not sustained. These are: *Ladd v. Stevenson*, 1 Cal. 18; *Brown v. O'Connor*, 1 Cal. 421; *Hutchinson v. Perley*, 4 Cal. 53; 60 Am. Dec. 578; *Hicks v. Davis*, 4 Cal. 67; *Winans v. Christy*, 4 Cal. 70; 6 Am. Dec. 597; *Bequette v. Caulfield*, 4 Cal. 278; 60 Am. Dec. 615. In these cases it was held that prior peaceable possession of the plaintiff is sufficient, however defective his title; that possession coupled with color of title must prevail, except where a better title is shown in the defendant. The court concludes that the general rule as stated, enables a mere trespasser to maintain his possession, if he can discover defects in any of the links of the chain of testimony which establishes the title of the plaintiff whom he has disseised, and holds that such a case constitutes an exception, relying chiefly upon *Christy v. Scott*, 14 How. (U. S.) 282, in which this exception was first announced.

In *Bragg v. Lorio*, 1 Woods (U. S.) 209, the second principle was maintained without any citation, but it is not necessary to the decision, being an alternative ground. In *Doswell v. De La Lanza*, 20 How. (U. S.) 29, the second doctrine was put forth without any supporting cases, but the court expressly refused to decide on that ground. In *McNitt v. Turner*, 16 Wall. (U. S.) 352, the first principle is applied to test the plaintiff's title as set forth by him. The second principle is neither mentioned nor applied. In *Love v. Simms*, 9 Wheat. (U. S.) 515, it was said: "The rule of law, that a plaintiff must recover by the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises. Since the rule is universal that the plaintiff in ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right of recovery, whether it be out of the tenant or not, if it be not in himself, it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. Possible difficulties may be suggested as to the application of this principle to mere tort-feasors or forcible disseisors; but besides that, such cases, being generally provided

for under statutes of forcible entry, must be of rare occurrence, it is time enough, when they occur, to consider what exceptions they present to the general principle." In the case under review, it is clear that the defendant could justly invoke the outstanding title against the plaintiff, since its effect was to destroy one of the links of the chain of title under which the plaintiff held. The court seems to overlook the distinction between an outstanding title unconnected with that of the defendant which may have such an effect, and one which does not disturb the title of the plaintiff as set forth by him.

In *McFarland v. Goodman*, 6 Biss. (U. S.) 111, the first principle as stated does not include the second. In *Sykes v. Hayes*, 5 Biss. (U. S.) 529, it was held that the admission by the defendant of plaintiff's ownership, was sufficient evidence of title in the plaintiff to sustain an action, so long as the defendant set up no title and showed no ownership in himself. And in *Aurora Hill Con. Min. Co. v. 85 Mining Co.*, 34 Fed. Rep. 515, in an action of ejectment for recovery of possession of a mining claim, it was said in the opinion to be a general rule that, "Any person vested with the right of immediate possession to realty, may maintain ejectment." Section 910 of the U. S. Rev. Sts., which provides that, "No possessory action between persons in any court of the *United States* for the recovery of any mining title or for damages . . . shall be affected by the fact that the paramount title to the land in which such mines lie, is in the *United States*; but each case shall be adjudged by the law of possession," was held to apply.

The most recent of the cases on this question is clearly in favor of the limitation of the principle here submitted. *Wilson v. Fine*, 38 Fed. Rep. 789, was an action brought in a *United States* district court to recover possession of land claimed by certificate under the homestead law, an action provided by *Oregon Comp. Laws* 1887, § 316, and held in this case to be "substantially the common-law action of ejectment." The complaint set forth unlawful ejectment of the plaintiff, being the "owner in fee simple," by conveyance from one to whom the premises were "duly certified by final certificate . . . by the proper officers of the land department of the

United States, under the Homestead Laws of the same." To this complaint, the defendant demurred for the reason that it "does not state facts sufficient to constitute a cause of action." As the opinion of the court was a thorough review of the cases on the subject in the *United States* courts, some of which have been mentioned above, it is here quoted to a large extent: "On the argument the only point made in support of the demurrer was that it appears from the complaint the plaintiff has not the legal title to the premises, the same being presumably in the *United States*, and therefore cannot maintain this action to recover possession of the same; citing *Langdon v. Sherwood*, 124 U. S. 74, and cases there referred to. In reply, counsel for the plaintiff contends that an action to recover the possession of real property may be maintained on a prior possession against a mere intruder or trespasser, such as the defendant appears to be; citing *Christy v. Scott*, 14 How. (U. S.) 282, and cases there referred to. In the case cited by counsel for the demurrer, the plaintiff sought to maintain ejectment for certain lands in *Nebraska* as the mere assignee of a certificate of purchase of the same, issued by the local land-officers at Omaha. It does not appear that he had ever been in the possession of the premises, or been disseised thereof. By the law of *Nebraska*, such certificate is made equivalent to a patent as proof of title against any one but the holder of the patent. But, notwithstanding this, the court held that ejectment cannot be maintained in the courts of the *United States* for the possession of lands in that state or elsewhere on such evidence. In support of this conclusion the court cited *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Fenn v. Holme*, 21 How. (U. S.) 481; *Hooper v. Scheimer*, 23 How. (U. S.) 235; and *Foster v. Mora*, 98 U. S. 425. In *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, the court held that the holder of a patent from the *United States* could maintain ejectment in the courts of the *United States* against an occupant claiming under such location. The effect of this decision is simply that, in ejectment, the party having the highest evidence of the legal title must prevail; that the patent of the *United States*, as evidence of title, was superior to that of location; and upon this point there can be but one opinion. . . .

Fenn v. Holme, 21 How. (U. S.) 481, was an action brought on a New Madrid location, which had neither been surveyed nor approved. *Hooper v. Scheimer*, 23 How. (U. S.) 235, was an action brought on an entry with the register and receiver to recover possession of certain lots in Little Rock, Ark., which the state had declared was sufficient evidence of title to support ejectment. The defendant claimed under a patent from the *United States*, which, appearing valid on its face, the court held could not be contradicted or overcome by evidence *aliunde*, and must therefore prevail against the certificate of purchase. In delivering the opinion of the court in the latter case, Mr. Justice Catron said that ejectment cannot be maintained in the national courts against 'a defendant in possession' on an entry made with a register and receiver; and Mr. Justice Daniel said in *Fenn v. Holme*, 21 How. (U. S.) 481, without qualification, that the plaintiff in ejectment cannot recover in ejectment without the legal title—the complete title. He seems to have labored under the impression that to allow the action to be maintained without such title would in some way destroy the distinction between actions at law and suits in equity, contrary to the constitution and laws of the *United States*. But in this he was certainly mistaken. *Foster v. Mora*, 98 U. S. 425, was an action brought by a person claiming title to the Mission San Juan Capistrano under a patent from the *United States*, to recover possession of the same from parties who claimed under a confirmed Mexican grant, on which a patent had not been issued. The court simply held that the legal title, as evidenced by the patent, must prevail, and, if there were any equities in the case, they could only be considered on the equity side of the court. Now, there is neither decision nor *dictum*, unless it be that of Mr. Justice Daniel, in any of these cases against the right to maintain ejectment in any common-law court, state or national, on a prior possession, against a mere intruder or trespasser, whether such possession is claimed or held in pursuance of a purchase from the *United States*, on which a patent has not yet issued, or otherwise. Nor can I see (and I say it with due deference), if a state provides that ejectment—an action at law to recover the possession of real property wrong-

(1) "Outstanding Title" of the Government.—In ejectment supported by possession with claim of fee for the statutory period, the defendant may not invoke the outstanding title of the government.¹

fully withheld from the plaintiff therein—may be maintained on any evidence of title to or interest in the premises from mere prior possession, to a patent under the seal of the *United States*, which shows a present right in the plaintiff to the possession, as against the defendant, how the character of the action is thereby changed, or confounded or blended with a suit in equity. An action at law is the acknowledged remedy for the recovery of the possession of real property wrongfully withheld from the plaintiff, or to recover damages for a trespass thereon; while a suit in equity is the proper remedy to compel a conveyance thereof, when wrongfully refused, or to establish or enforce a trust therein. If the legislature provides that the former may be maintained on any interest in the premises or right thereto short of the strict legal title, from which it appears that the plaintiff is legally entitled to the possession, as against the defendant, it is none the less an action at law, and in no sense a suit in equity. . . . The question in this case is simply this: Can ejectment be maintained in this court on a prior possession against an intruder or trespasser?" The court then cites the *Oregon* statute aforesaid, as the rule of procedure by virtue of U. S. Rev. Stat., § 914, and quotes from *Whitney v. Wright*, 15 Wend. (N. Y.) 179. "A prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrongdoer, or a person subsequently entering without a lawful right" . . . also from *Jackson v. Boston*, etc., R. Corp., 1 Cush. (Mass.) 575: "If A enters on the land of B and takes possession, and afterwards C enters on A and dispossesses him, A may well maintain an action against C to recover possession, although his entry on B was without right, and tortious; for mere possession is a good title against a stranger having no title;" and finally from *Christy v. Scott*, 14 How. (U. S.) 282, as to the right of one having actual prior possession of land to recover it in ejectment from a mere trespasser setting up an outstanding title in another; and concluded: "The plaintiff

is the beneficial owner of the property, and was in possession of the same when the defendant entered without title or right. Such possession is sufficient, according to the rules of the common law and the statute of this state governing the procedure in this court, to enable the plaintiff to maintain this action. . . ." Citing also 2 Bl. Com. 195; *Fields v. Squires*, 1 Deady (U. S.) 388; 2 Washb. Real Prop. 493. See *Childers v. Calloway*, 76 Ala. 128, citing *Wilson v. Glenn*, 68 Ala. 383.

1. This proposition is controlled by the same reasons as the one stated above, of which it is in fact, a corollary; the same cases therefore apply to it as there cited.

In *Davis v. Thompson*, 56 Mo. 39, it was said: "When the plaintiff, as in this case, showed a possession in his grantors extending back more than thirty years, accompanied with a claim of right, it made out in him a title which warranted a recovery, unless defeated by a better title set up by the defendant. And from the lapse of time during which the land had been occupied and possessed, it might well be presumed, as against everybody except the government, that a patent had actually issued. But the government is not here defending or making any claim to the land, and the defendant will not be permitted to interpose a defense in its behalf." See also *Christy v. Scott*, 14 How. (U. S.) 283.

A like decision was given in a like case in *Barry v. Otto*, 56 Mo. 177. See also *Crockett v. Morrison*, 11 Mo. 1; *Dale v. Faivre*, 43 Mo. 556; *Farrar v. Heinrich*, 86 Mo. 521; and *Fulkerson v. Mitchell*, 82 Mo. 13.

Origin of the Doctrine that Defendant in Ejectment May Defeat Plaintiff by Exhibiting an Outstanding Title.—The origin of the doctrine may possibly be derived from a conception of the rule in the trial of title on a writ of right, that the tenant can set up title and seisin in a stranger, to disprove the seisin of the demandant. But it is clearly shown in *Green v. Watkins*, 7 Wheat. (U. S.) 28, by Story, J., to be the ground of this rule, that since the *mise* involves the title of both parties,

and institutes a comparison between them, it is the right of each party to give any fact in evidence which destroys the title of the other; "for the question in controversy is, which hath the better mere right to hold the demanded premises;" that since seisin, in deed or by construction of law, is indispensable to enable the demandant to maintain his suit, "the tenant may thus defeat the demandant, by proving that he never had any such seisin in deed, or if he once had it, that he has parted with his whole estate, . . . It follows, therefore . . . that the tenant may disprove the demandant's seisin in deed or by any evidence competent for this purpose; and if he succeeds in establishing the fact, the demandant must fail in his suit." In considering the broad question: "Can the defendant defend himself by an older and better existing title than the demandant's in a third person?" the court in distinguishing the decision in *Green v. Liler*, 8 Cranch (U. S.) 220, said: "It is material to consider, that this question does not purport to inquire whether the tenant may disprove the defendant's seisin in the writ of right; nor does it purport to inquire whether the tenant may not show that the demandant has no title, or a title defective in point of legal operation. It supposes that the demandant has a title *per se*, sufficient for a recovery, and then asks if a better title may be shown in a third person to defeat such recovery. The answer of the court is in the following words: 'We are of opinion that a better subsisting adverse title in a third person is no defense in a writ of right; that writ brings into controversy only the mere rights of the parties to the suit.' It is most manifest, that in this answer the court proceed upon the supposition that the demandant has *prima facie*, a good title, upon which he may maintain his suit; and that he has established a seisin sufficient, in point of law, to entitle him to a recovery. And the point then is, whether a superior adverse title and seisin in a stranger can be given in evidence to dispute such recovery. . . . It cannot be admitted, because a writ of right does not bring into controversy the right of the demandant as against all the world, but the mere right of the parties to the suit. But it does bring into controversy the mere right between these parties; and if so, it, by consequence,

authorizes either party to establish, by evidence, that the other has no right whatsoever in the demanded premises, or that his mere right is inferior to that set up against him." It is obvious that if in the old *droit* action, the whole question is a comparison of the titles of the two parties and a determination of which is the better of them, this is *à fortiori* true in a possessory action like ejectment, where the abstract title is not in question.

Doctrine that Ejectment Must Be Supported by the Strict Legal Title.—A similar doctrine to the preceding one, resting, it seems, also on a misconception, has prevailed to some extent in the federal courts. It is that ejectment may be maintained in the *United States* courts only on a strict legal title. This is put forth in *Fenn v. Holme*, 21 How. (U. S.) 481; *Foster v. Mora*, 98 U. S. 425; *Shierburn v. De Cordova*, 24 How. (U. S.) 423; *Alexander v. Roulet*, 13 Wall. (U. S.) 386; *Hooper v. Scheimer*, 23 How. (U. S.) 235. See also *Young v. Porter*, 3 Woods (U. S.) 343, 344; *Butler v. Young*, 1 Flip. (U. S.) 276; *Ross v. Doe*, 1 Pet. (U. S.) 655; *Smith v. McCann*, 24 How. (U. S.) 398; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Mezes v. Greer*, 1 McAll. (U. S.) 401; *affirmed* in 24 How. (U. S.) 268. But see *Turner v. Aldridge*, 1 McAll. (U. S.) 229; *Hylton v. Brown*, 1 Wash. (U. S.) 204; *Cowell v. Springs Co.*, 100 U. S. 55; *Stoddard v. Chambers*, 2 How. (U. S.) 284; and *Hale v. Gaines*, 22 How. (U. S.) 144. The recent case of *Wilson v. Fine*, 38 Fed. Rep. 789, in an exceedingly clear view of the title requisite to maintain ejectment, points out the error at the foundation of this theory, and likewise explains the fallacy of the "settled rule" that a patent for land carries with it the best title known to the court of law, and suggests the only intelligent basis of actions for the recovery of land: that the higher title between the parties must prevail without regard to an outstanding title, which neither strengthens nor weakens the title of either party. See the extensive quotations from this case in the preceding note. It would seem that the mistake in this doctrine lay in enlarging the well-known rule, that in a common-law action like ejectment, the legal title will prevail as against the equitable title, to a rule which requires the plaintiff to prove that he has the abstract legal title.

(g) *As Ground for Damages for Discontinuance of Highway.*—Possession under a claim of fee is in *Massachusetts* sufficient to maintain a petition for damages sustained by the discontinuance of a highway with which the land is connected.¹

(h) *Possession Under the Statute of Limitations.*—Possession with claim of fee for the period of the Statute of Limitations, will constitute a good title against all but the government.²

(i) *"Color of Title."*—In some jurisdictions, "color of title" is a requirement for the operation of a special statute of limitation of which the period is shorter than the common period. In the absence of statute, "color of title" offers no advantage, other than as explaining and supplementing acts which may constitute actual possession.³

c. COLOR OF TITLE—(1) *Generally.*—There is probably no term in all the law of such uncertainty as to meaning and effect as "color of title." It is owing to the indefiniteness of the term itself that various theories have existed differing so diametrically from each other. For a long time the theory prevailed that the virtue of color of title was in the resemblance it bore to a true title, when it was said to be "that which is in appearance a good title, but is in reality no title."⁴ Under this view it was generally held, though not without exception, that color of title could exist only by a written instrument.⁵ And the peculiar property

1. Possession of land for nine years under a claim of title in fee was, in *Hawkins v. Berkshire County*, 2 Allen (Mass.) 254, held *prima facie* sufficient to support a petition for damages thereto sustained by reason of the discontinuance of a highway. Deeds had been offered in evidence; by one of which, part of the land in question had been conveyed to the petitioner; but the court refused to permit a verdict on any ground except that of possession. It appeared that the petitioner had had charge and control of the land, and that he had leased it to a tenant for a number of years, who had had nothing to do with any other person but the petitioner in regard to the management of the land. The decision was based upon the case of *State Lunatic Hospital v. Worcester*, 1 Met. (Mass.) 437, where persons in the undisputed possession and occupation of lands over which the highway was established by the commissioners, were held entitled thereby, being aggrieved at the doings of the commissioners, to have a jury to determine the matter of their complaint under the statute.

2. See *LIMITATION OF ACTIONS*, vol. 13, pp. 693, 711 *et seq.*; *ADVERSE POSSESSION*, vol. 1, pp. 298-302.

3. See this subject considered generally *infra*, this title, *Color of Title*. See, however, *Parker v. Maycross*, etc., R. Co., 81 Ga. 387, and *Hadley v. Bean*, 53 Ga. 688, where it was said that, "Possession under a deed without more, was sufficient to make out a *prima facie* case so as to render it necessary for the defendant to show that his possession was not that of a trespasser."

4. See *Wright v. Mattison*, 18 How. (U. S.) 50, where this is said to be "a meaning concurred in by the courts without exception."

This definition is rejected, as "without reason," and as "being abandoned," in *Bell v. Longworth*, 6 Ind. 273, *citing* *Summer v. Stevens*, 6 Met. (Mass.) 337; Ang. on Lim. (3d ed.) 503. See also *Holcroft v. Hunter*, 3 Blackf. (Ind.) 147.

So Chief Justice Gibson departs entirely from the definition in *McCall v. Neely*, 3 Watts (Pa.) 69. See also *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332. See *infra*, this title, *Definition*; also the review in 23 Cent. L. J. 408, of *Cooper v. Ord*, 60 Mo. 421, with sustaining cases, *cited infra*, this article.

5. See *Bouv. L. Dict.*, where the

was attributed to it of giving constructive possession to the whole tract claimed, of which but a small part was actually occupied; although the instrument was admittedly void;¹ and although it is

definition seems to be derived from the *Illinois* cases (and the federal decisions reviewing them) under the *Illinois* Statute of 1839 which expressly requires a paper title.

So in 3 Washb. Real Prop. *498, citing *Brooks v. Bruyn*, 35 Ill. 394, a similar definition is implied, when it is said: "As to what constitutes a color of title, any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. The color must arise out of some conveyance purporting to convey title to a particular tract of land." See *Shackleford v. Bailey*, 35 Ill. 391. But on the same page of this text-book (in what is apparently the original paragraph of the author's own edition), the law is stated more correctly: "If an entry be wrongful, though it be under a deed, a possession thereby gained will only extend so far as a tenant shall actually occupy the premises." There are cited among others, *Den v. Hunt*, 20 N. J. L. 487; *Little v. Megquier*, 2 Me. 176.

Even in an *Illinois* case, one which seems to be a leading case on the subject, *Woodward v. Blanchard*, 16 Ill. 424, it is said: "Color of title may be made through conveyance, or bonds, or contracts, or bare possession under parol agreement. . . . But our statute requires this color of title to be accompanied by a written evidence, a paper title. . . ." The decision was approved and largely quoted from, in *Wright v. Mattison*, 18 How. (U. S.) 50. But the court seems, nevertheless, to hold that a written instrument is the sole means by which the color of title may be acquired, when it says: "Decisions by this court . . . are deemed conclusive, that a claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyances to pass a title to the subject thereof, yet a claim asserted under the provision of such a deed is strictly a claim under color of title." See also *Gregg v. Sayre*, 8 Pet. (U. S.) 253; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Pillow v.*

Roberts, 13 How. (U. S.) 472; *Tate v. Southard*, 3 Hawks. (N. Car.) 119; 14 Am. Dec. 578; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Gittens v. Lowry*, 15 Ga. 336; *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473. See *infra*, this title, *How Acquired; Under Statutes*.

1. In *Hunnicut v. Peyton*, 102 U. S. 333, it was held that, "Where one enters on unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed; that the true owner will be deemed to be dispossessed to the extent of the boundaries described in that title.

His possession beyond the limits of his actual occupancy is . . . a constructive one." See also *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

The decision of Chief Justice Gibson in *Altemus v. Long*, 4 Pa. St. 254; 45 Am. Dec. 688, hardly sustains this doctrine. It is there said that, "A warrant and survey gives the owner constructive possession of all the land included by his lines, though no part of it be actually occupied by him." This would not seem to be consistent with the constructive possession over the same land, of an adverse holder actually occupying a part. "Giving, for the sake of the argument only, the same effect to the unofficial survey of the settler that could be claimed for a survey on a warrant . . ." are words clearly insufficient to attribute such a doctrine in this case. On the contrary, they show that the opposite was in the mind of the court, as does the account in the latter part of the opinion, where it is shown that only by the election of the tenant could there be such a constructive dispossession. See *Litt.*, § 417; *Taylor v. Horde*, 1 Burr. 60.

The doctrine of *Hunnicut v. Peyton*, 102 U. S. 333, would seem, however, to have been approved in a recent case in the *United States* Supreme Court, *Depurton v. Young*, 134 U. S. 241, where it was said, by Fuller, C. J.: "Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is dispossessed by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title." See also *Barr v. Gratz*,

only the legal title which can draw to itself a "constructive" possession.¹

4 Wheat. (U. S.) 213; *Riley v. Jameson*, 3 N. H. 23; 14 Am. Dec. 325; *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 418; *Hall v. Powell*, 4 S. & R. (Pa.) 456; 8 Am. Dec. 722; *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.) 18; 12 Am. Dec. 357, note.

In the decisions of the *New Jersey* supreme court, this doctrine has been totally rejected; notably in *Den v. Hunt*, 20 N. J. L. 487; and in *Foulke v. Bond*, 41 N. J. L. 527. In the former case, *Whitehead, J.*, said: "It appears to me, that we cannot carry out this doctrine of constructive possession, without becoming involved in serious difficulties. There is always connected with an adverse possession the idea of wrong in the first place; it being an invasion of another's right. Whenever a party relies upon an adverse possession for his right to land, he impliedly admits that the strictly legal right is in another; and that this legal right has been wrongfully invaded, more than twenty years before action brought. And this idea of wrong is associated with every adverse possession in the first place, whether under color of deed or not. For it is a settled principle of law, that two persons cannot be severally seised in fee at the same time, of the same tract of land. If the title of one is good, that of the other is bad. Now if the one claiming under a defective paper title, however honest he may be, takes possession of a part of the land claiming it as his own, he does a wrong to him who has the legal title. It is an invasion of his right of possession. Is it right that this wrongful possession should be extended by construction, to the metes and bounds of the defective paper title, to the prejudice of him who has the legal right? I think not. There should be other evidence than a mere residence on, or inclosure, or cultivation of a small part. There should be proof of acts of ownership, or such acts and conduct, over the unclosed part, as might fairly be considered evidence of an intention to assert an ownership and possession. There is another difficulty connected with this idea of constructive possession, involving the absurdity of two persons being, at the same time, by construction of law, in possession of the same

land. This must always be the case when this claim under a defective paper title, comes in conflict with the rights of the legal owner. To illustrate my meaning. When a person acquires a good and valid title to a tract of land, wild, uncultivated and unoccupied, he is, by construction of law, in possession of the whole tract. His right to it is complete; the title and possession are in him. Although not actually in possession of any part, he is constructively in possession of the whole. Suppose another person, claiming title to the same land, say a tract of 1000 acres, under a deed which is not valid in law, but which he believes conveys to him a good title, takes possession of a part of the tract, say ten acres, and resides on and improves it. He is here in the actual occupancy of a part, with a paper title for the whole tract; and upon the principle of some of the decisions, he must be, by construction of law, in possession of the whole. That is to say, he is in the actual occupancy of ten acres and constructively in possession of nine hundred and ninety acres. But this cannot be, because the legal owner, by virtue of this valid title, is constructively in possession of the whole tract, except the ten acres which are in the actual adverse possession of the other; unless we suppose the legal owner, and the person claiming under the defective title, to be both constructively in possession of the nine hundred and ninety acres, which in truth are not in the actual possession of either. But this, as I have said, cannot be. Two persons under conflicting titles cannot be, in construction of law, in the possession of the same land at the same time. The legal title draws to it the constructive possession."

1. And "two persons cannot be in adverse, constructive possession of the same land at the same time." 3 Washb. Real Prop. *485, citing *Hodges v. Eddy*, 38 Vt. 344. And yet in the same section the learned writer approves the doctrine of *Barr v. Gratz*, 4 Wheat. (U. S.) 213, and of *Hunnicut v. Peyton*, 102 U. S. 333, that possession under "color of title" gives constructive possession. See also cases cited in the note immediately preceding; and see *infra*, this title, *Effect*.

This doctrine of color of title, in fact, the whole legal use of the term, seems to have little or no foundation in English cases—to be entirely of American origin.¹

While there were never wanting decisions contrary to the prevailing one, it is but lately that this doctrine has begun to wane. According to the best authorities and certainly the clearer reason, "color of title" has been shorn of its peculiar effect in giving constructive possession, and seems to be limited in its scope as a mere fact in evidence of claim, especially as to the particular nature of the claim and the extent of the premises.²

(2) *Definition*.—Color of title is any ground of claim of ownership of real property, other than mere occupancy, acquired in good faith, which on its face is legal, though actually void for the purpose of supporting title in itself.³

1. See *Tate v. Southard*, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578. See, however, *Woodward v. Blanchard*, 16 Ill. 433, where the opinion reviews the subject at great length, citing the English cases, *Redford v. Barby*, 2 Cro. Jac. 122; *Austin v. Austin*, 2 Cro. Jac. 319; cases, however, which refer to personal property.

In *McCall v. Neely*, 3 Watts (Pa.) 69, Gibson, C. J., said that he was "not aware that the definition of a colorable title, or, as it has been expressed more frequently, color of title, had ever been attempted. The words do not necessarily import the accompaniment of the usual documentary evidence."

In *Waggoner v. Hastings*, 5 Pa. St. 300, the same learned judge holds that the doctrine of constructive possession in *England* and in the early *Pennsylvania* cases, applies only where "no other person has possession in fact or in law." But he holds the law to be otherwise in the *United States*, owing to changed conditions. So it is considered in *Fugate v. Pierce*, 49 Mo. 441. See note to *Taylor v. Buckner*, 12 Am. Dec. 358; and American note to *Taylor v. Horde*, 2 Sm. Lead. Cas. 563.

2. See *infra*, this title, *Definition; Effect; How Acquired*.

It is especially in the *New Jersey* cases of *Den v. Hunt*, 20 N. J. L. 487; and *Foulke v. Bond*, 41 N. J. L. 527, that the departure from the old doctrine is most sharply taken, and clearly set forth.

3. In *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586, it was said by way of definition: "When we say a person has color of title, whatever may be the meaning of the phrase, we ex-

press the idea, at least, that some act has been previously done, or some event transpired, by which some title, good or bad, to a parcel of land of definite extent has been conveyed to him." The court added: "Can the making of the claim of a stranger upon the plat of his land by the owner, confer a color of title on one who has no priority in estate, in contract, or in law with the title of the stranger?"

The opinion of the court in *Bell v. Longworth*, 6 Ind. 273, departs from the customary definition of color of title, and also from the common doctrine as to its effect. Its substantial definition is that, "Where a party is in possession under and pursuant to a state of facts, which, of themselves, show the character and extent of his entry and claim . . . and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more; . . . for such title alone does not give right. Hence, it has been decided that possession under a 'sale or gift of land by parol' is under color of title." See *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Angell on Lim.* (3d ed.) 503; *Holcroft v. Hunter*, 3 Blackf. (Ind.) 147.

The court in *Bell v. Longworth*, 6 Ind. 273, rejects in strong terms the definition of the *United States* Supreme Court in *Wright v. Mattison*, 18 How. (U. S.) 50.

Chief Justice Gibson, in *McCall v. Neely*, 3 Watts (Pa.) 69, discarding the requirement of a written conveyance, says: "An entry is by color of title when it is made under a *bona fide*, and not pretended, claim of title exist-

(3) *Effect*.—The effect of color of title is as a fact or state of facts in evidence to show the *animus* of the entry and the extent of the premises claimed. But there must be a substantial holding, co-extensive with the boundaries, with sufficient notoriety.¹

(4) "*Good Faith*."—One of the two functions of color of title has been said to be to show the *animus* of the entry; *i. e.*, the purpose of the disseisor to assert and rely on his claim. Where

ing in another." But see a different view of the same learned judge in *Waggoner v. Hastings*, 5 Pa. St. 300.

In certain *Missouri* cases, where the decisions were founded upon the sound principles of the *Indiana* and of the *Pennsylvania* courts on this question, in the cases just cited, a conception was arrived at very similar to that which is believed to be the true one of "color of title." Thus in *Rannels v. Rannels*, 52 Mo. 112, it was held that, "Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrongdoer for a trespass on the remainder of the land, would be a sufficient color of title, under the Statute of Limitations, as against the real owner." And it was held that this color may be created by an act *in pais* without writing. See *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Ashley v. Ashley*, 4 Gray (Mass.) 197. This view was approved in *Cooper v. Ord*, 60 Mo. 431. The only fallacy which seems to cling to these (*Missouri*) decisions, is that which attributes a constructive force to the "color of title" without actual occupation, as where it is said: "To maintain an action against outside trespassers, there must be actual possession of a part of the tract, with color of title to the whole."

The definition of the court is based most particularly upon the *New Jersey* decisions in *Den v. Hunt*, 20 N. J. L. 487, and *Foulke v. Bond*, 41 N. J. L. 527, where, while the principle is clearly set forth, no actual definition is formulated. The substance of these decisions will be found at length, *infra*, this title, *Color of Title—Effect*.

1. The importance of the law here stated lies in the limitations of this effect as compared with the view of the older cases. The principle of "constructive possession," under color of title by an adverse holder, as set forth *supra*, this title, under *Elements or "Stages" of Title—In General*, and under *Color of Title—Generally*, must be discarded, and "color of title" by

deed describing the whole of a tract of which a part only is under actual occupation, must be denied, as a broad legal rule, the effect of extending such occupation to the whole tract.

This doctrine is set forth in 3 Washb. Real Prop. *485, but the only case cited is to the effect that the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual possession by another. *Herdic v. Young*, 55 Pa. St. 177; 93 Am. Dec. 739. In fact, immediately following is the statement, that "two persons cannot be in adverse, constructive possession of the same land at the same time;" citing *Hodges v. Eddy*, 38 Vt. 344.

In a note to *Ewing v. Burnet*, 11 Pet. (U. S.) 41, it is remarked: "When an entry is made upon land under color of title, the same may be held by a constructive possession; but if made under a simple claim of title, the possession must be actual, a *pedis possessio*, definite, positive and notorious," citing *Bailey v. Irby*, 2 Nott & M. (S. Car.) 343; 10 Am. Dec. 609; *Gibson v. Martin*, 1 Har. & J. (Md.) 545; *Hog v. Perry*, 1 Litt. (Ky.) 171; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Smith v. Nowells*, 2 Litt. (Ky.) 160; *Hite v. Shrader*, 3 Litt. (Ky.) 444; *Braxdale v. Speed*, 1 A. K. Marsh. (Ky.) 106; *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270; *Skyle v. King*, 2 A. K. Marsh. (Ky.) 385; *Anderson v. Turner*, 3 A. K. Marsh. (Ky.) 133; *Doolittle v. Linsley*, 2 Aik. (Vt.) 155. But these cases, instead of sustaining the principle, seem rather to favor the opposite view. In *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, the doctrine is indeed set forth; but it was not necessary to the decision, and the case has less value, as it arose on a writ of right.

A more recent class of cases, while they omit the theory of "constructive" possession, yet give to color of title practically this effect, as a "fact showing the extent of the land claimed." In *Cooper v. Ord*, 60 Mo. 420, it was said that it does not always require a written instrument to constitute color

of title, but there must be some visible acts, signs, or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title. A note reviewing this case in 23 Cent. L. J. 408, considers that, by the cases cited, it appears that the sole office of color of title is to show the character and extent of the claim of one who enters upon land, and that any facts which of themselves show this character and extent constitute color of title; for "the entry under color of title upon a part of a tract of land operates as a disseisin of the true owner as to the whole tract embraced in the deed, and is equivalent to an actual and exclusive possession of the whole tract. . . . And the entry is referred to the color of title under which it was made, to define the boundaries of the claim and to characterize the possession. . . . And thereby the true owner has actual or constructive notice of the character of the disseisor's possession and the extent of his claim." See *Bell v. Longworth*, 6 Ind. 273; *Van Cleave v. Milliken*, 13 Ind. 105; *Rannels v. Rannels*, 52 Mo. 113; *Crispen v. Hannavan*, 50 Mo. 544; *Fugate v. Pierce*, 49 Mo. 447; *Waldron v. Tuttle*, 4 N. H. 371; *Prescott v. Nevers*, 4 Mason (U. S.) 326; *Putnam Free School v. Fisher*, 34 Me. 177; *Brckett v. Persons Unknown*, 53 Me. 231; 87 Am. Dec. 548; *Childress v. Calloway*, 76 Ala. 133, citing *Farley v. Smith*, 39 Ala. 38.

The true view of the effect of color of title is clearly marked out in the decisions of the *New Jersey* supreme court in *Den v. Hunt*, 20 N. J. L. 487; and *Foulke v. Bond*, 41 N. J. L. 527. In the former case, the court denies, at the outset, the doctrine of the *United States* Supreme Court relating to the constructive possession of an adverse holder under color of his defective deed, on the ground that adverse possession always begins by a wrong admitted by the adverse holder. It is said that this wrongful possession cannot be extended by construction to the metes and bounds of the defective paper title to the prejudice of him who has the legal right. It is clearly argued that since the legal owner of a tract of wild land is, without any occupation, in constructive possession thereof, if another person claiming title to the same land is in actual occupation of a small part with a paper title to the whole, the latter could not

be in constructive possession of the whole without arriving at the legal absurdity of two persons under conflicting titles being, in construction of law, in the possession of the same land at the same time. Denying, then, the effect frequently attributed to the "color" of a defective title, it is laid down, on the other hand, that actual occupancy is not necessarily required; that owing to the great variety in the nature of lands, in so far as they are susceptible of outward manifestations of ownership, it is impossible to lay down a general legal rule as to occupancy. The question whether possession has been held adverse, continuously, and with the requisite notoriety, is one of fact for the jury; nor is it held that a person claiming right to land by virtue of his adverse possession under color of title by a deed, is restricted to the land actually occupied or cultivated by him. The precise effect of color of title under the *New Jersey* doctrine then, seems to be simply as a fact in evidence along with other facts, such as acts of ownership, to show the *animus* of the entry and the extent of the claim by metes and bounds. "But," it was said in *Foulke v. Bond*, 41 N. J. L. 547, "whether there has been a substantial holding co-extensive with the boundaries in the deed, with sufficient notoriety to make title under it corresponding with the description, must be decided as a question of fact, from the nature and condition of the property, and the acts of ownership exercised over it, having regard to their frequency as well as to their character as open and notorious manifestations of the claim of title." The presumption that the possession is co-extensive with the boundaries of the title deed, is held to apply only to the owner of the legal title. "Color of title," it is said, "and actual occupation by residence, cultivation, or inclosure of part of the tract, or by other conspicuous acts of ownership by the disseisor, may serve to give character to his acts of possession over the residue, but will not relieve him from the obligation of satisfying a jury that his possession has been of such a character as, under the circumstances, may reasonably be expected to have informed the true owner of the nature of the possession and the extent of the title proposed to be acquired under it." This view, besides having the advantage of reason and justice, is also in

this claim is founded on mere occupation, nothing more than such a consistent hostile intention to assert is requisite.

Where the claim rests on color of title, there must be an honest belief of the disseisor in the genuineness and sufficiency of his "title" when acquired, however defective it may be in fact or form.¹ Otherwise it is clear that the *animus* being one of fraudulent design, cannot avail in itself to sustain an open, notorious, and adverse possession.² But it must be noticed that even here if

harmony with the oldest American cases, which stand in close relation with the course of English decisions. Thus, in *Doolittle v. Linsley*, 2 Aik. (Vt.) *155, it is said that one claiming title by possession, must have shown such acts of ownership exercised and performed by him . . . as would have subjected him to an action of ejectment by the original owner. Where the land is not susceptible of cultivation, acts which in themselves might constitute trespass, may be explained by a color of title. The latter performs its true purpose, then, in giving character to the acts of possession, or to the entry, and likewise, where the color of title is derived from matter of record, in giving public notice of the extent of the claim. See *Rannels v. Rannels*, 52 Mo. 112.

To this same effect are other old cases which have been supposed to ground the erroneous doctrine of "constructive" possession. See *Bailey v. Irby*, 2 Nott & M. (S. Car.) 343; 10 Am. Dec. 609; *Gibson v. Martin*, 1 Har. & J. (Md.) 545; *Hog v. Perry*, 1 Litt. (Ky.) 171; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Hite v. Shrader*, 3 Litt. (Ky.) 444.

The court, in *Foulke v. Bond*, 41 N. J. L. 527, relied to some extent upon the English cases of *Lord Advocate v. Lord Blantyre*, 4 App. Cas. 770; *Jones v. Williams*, 2 M. & W. 331; 2 Bing. N. Cas. 102; *Tyrwhitt v. Wynne*, 2 B. & Ald. 554; *Stanley v. White*, 14 East 332; also on the American cases of *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Cornelius v. Giberson*, 25 N. J. L. 1; *Cobb v. Davenport*, 32 N. J. L. 369. See the recent cases of *Cooper v. Morris*, 48 N. J. L. 607; *Doyle v. Wade*, 23 Fla. 90; *Word v. Box*, 66 Tex. 596. *Contra*, *Joy v. Stump*, 14 Oregon 361.

1. In *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463, it was

said: "If the entry is under color of title, the possession will be adverse, however groundless the supposed title may be. The fact of possession and its character, or the *quo animo* of the possessor are the test." As regards the case under review, it was said of the possession of the plaintiff, that his *quo animo* was apparent from his uniform claim of title, and continued exercise of acts of ownership; that the writing produced was in accordance with the possession he held, and the claim of title under it; that his entire confidence in his title, and his reliance upon its sufficiency to protect his possession were decisive of his own opinion and belief in the validity of his title. See *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511. See also *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587. In *McCall v. Neely*, 3 Watts (Pa.) 69, this element of *bona fides*, was considered the controlling one in color of title, where the latter is termed "a *bona fide* and not pretended claim of title. . . ." But in a later decision by the same court, the other element, the effect of the deed in showing the extent of the claim, is given in turn a disproportionate importance. See *Waggoner v. Hastings*, 5 Pa. St. 300. See also *infra*, this title, *Color of Title—How Acquired*.

2. **Animus as an Element in Adverse Possession.**—The intent of the disseisor is, as has been shown, of importance purely as evidence to be taken together with the acts performed as explaining their effect in constituting actual possession. In itself, the state of mind of the disseisor is of no moment whatever, no matter how hostile or evil intentioned. The distinction cannot be too carefully drawn between good faith as a requisite of color of title, and good faith in adverse possession generally. Good faith can have no bearing whatever, on adverse possession as such. But it is, nevertheless, an important element of color of title, paradox-

there has been actual possession, the fraud is no answer to the bar of the statute.¹

But this is the strict limit of the requirement of good faith "in color of title." Where adverse, hostile possession is concerned, there cannot be a question of *bona fides* between the true owner and the disseisor.

The only elements to be considered are time and notoriety. It is evident that an intent to conceal is inconsistent with this notoriety, and for this reason only it must destroy the effect of color of title.²

ical though it may seem, as a means of acquiring such adverse possession. There is no law that prevents the acquisition of a good title by adverse possession by a wrongdoer, who enters with all the bad faith of a Beelzebub, so long as he marks out the tract claimed by ordinary signs of actual occupation. But if he stands on the special ground of color of title claiming its advantages, the very substance of this claim is not a mere defiance of the owner, but the assertion with full and earnest intent of a distinct title (with defined boundaries), however defective such title may actually prove to be. The peculiar advantage lies in its quality as evidence of a claim decisively asserted and distinctly defined. It is clear that this peculiar advantage falls to the ground where the claimant is shown to have been conscious *ab initio* of the invalidity of his "title." Its force as evidence of the *animus* or spirit of the claim must vanish. See a discussion of this element in an article on "Color of Title," by H. C. Black, Esq., in 26 Am. L. Reg., p. 409.

1. See *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, where *Jackson v. Andrews*, 7 Wend. (N. Y.) 152, which seems to hold otherwise, is held corrected by the decision in *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463.

In the first mentioned case are cited the English decisions, bearing on fraud in general as answer to a statute of limitation. *Stowel v. Lord Zouch*, Plowd. Com. 371; *Cholmondely v. Clinton*, 2 Jac. & W. 155 (1 Turn. & Rus. 107); and also the cases of *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 174; *Prevost v. Gratz*, 6 Wheat. (U. S.) 497.

In scanning the authorities on this question, it must not be forgotten that some cases which may seem to hold otherwise in the text, merely say that a void deed will not in itself, without

actual possession, be of avail. See *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511. *Jackson v. Andrews*, 7 Wend. (N. Y.) 152, ruling to the contrary, was held overruled by *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463; *Parker v. Waycross, etc.*, R. Co., 81 Ga. 387.

In *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, the court said: "If the right be claimed under a void deed, it is not therefore less available than a claim without deed, which is yet admitted to be a bar. The question is on the *quo animo*, the intent. . . ." See the cases cited in the preceding note. Finally, the deed must not be so defective that its defect will appear plainly to a person of "average comprehension." *Tate v. Southard*, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351. It must have words of conveyance, a grantor, and a grantee. See *infra*, this title, *Color of Title—How Acquired*.

2. On this part of the question it is again the *New Jersey* case of *Foulke v. Bond*, 41 N. J. L. 547, which speaks with great clearness of reason. To quote from it at some length: "Fraud in obtaining or continuing possession or knowledge that the party's claim of ownership is unfounded and wrongful, will not deprive him of his title by adverse possession, or relieve the true owner of the consequences of the bar of the Statute of Limitations, if the possession of the intruder has, in fact, been adverse and has been asserted by such open and notorious acts of ownership as are essential in the acquisition of title by adverse possession. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587. . . . *Jackson v. Huntington*, 5 Pet. (U. S.) 402. 'Disseizin ever implyeth a wrong.' Co. Litt. 153 b. . . . 3 Bac. Abr. 151."

But, "Possession clandestinely taken and held for the purpose of fraudu-

(5) *How Acquired*.—It is clear that a written instrument is not necessary. Color of title may exist by parol agreement, and by descent, as well as by deed or conveyance.¹ Some act must have been done, or some event transpired, by which some title, good or

lently concealing from the real owner, knowledge of the acts of ownership over his property, in virtue of which title is endeavored to be obtained, will defeat the effort to acquire title by such means, not on any general doctrine of fraud, but for the reason that possession under such circumstances would be devoid of that notoriety of the possession, and of the adverse claim which is necessary to perfect title by adverse possession . . .

Thorpe v. Corwin, 20 N. J. L. 319. This is the doctrine of the law in all cases where the adverse possession commences with an actual disseisin . . . A disseisin may be effected by an entry under a deed . . . which is void. . . . In such a case . . .

a party cannot have the advantage of an entry under color of title, unless his deed, which gives the colorable title, was obtained *bona fide*. . . .

Den v. Hunt, 20 N. J. L. 487. But a grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part. . . . Gregg v. Sayre, 8 Pet. (U. S.) 244. . . . There must be proof of actual fraud . . . proof of an intent to defraud the real owner. . . . Clapp v. Bromaghan, 9 Cow. (N. Y.) 529. Otherwise . . . a disseisin of one tenant in common by conveyance of the entire estate by his co-tenant, would be quite impossible." See the more recent case of

Colgan v. Pellens, 48 N. J. L. 31, where it is held that the fraud which will preclude color of title must be actual; that an assertion, not of fact, but of a legal conclusion, though erroneous, is not actual fraud. See also Conyers v. Kenan, 4 Ga. 308; 48 Am. Dec. 226. As to fraud generally, in reply to the Statute of Limitations, were cited Paschal v. Davis, 3 Ga. 256; Troup v. Smith, 20 Johns. (N. Y.) 32; Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Mille, 17 Wend. (N. Y.) 202; Brown v. Howard, 2 Brod. & B. 73; on actions in general, Battley v. Faulkner, 3 B. & Ald. 288; Granger v. George, 5 B. & C. 149.

On sustaining concealment of fraud as a good replication, were adduced Sherwood v. Sutton, 5 Mason (U. S.)

143; Bree v. Holbeck, Doug. 655. See Gregg v. Sayre, 8 Pet. (U. S.) 244.

In Munson v. Hollowell, 26 Tex. 475; 84 Am. Dec. 582, there is also a review of English and American authorities on the question of concealed fraud in answer to the statute, including among others 2 Stark. on Ev. 890; 6 Bac. Abr., Limitations (Bouvier's Am. ed.), p. 383; Massachusetts Turnpike Corp. v. Field, 3 Mass. 201; Jones v. Conoway, 4 Yeates (Pa.) 109; McDowell v. Young, 12 S. & R. (Pa.) 115; Rush v. Barr, 1 Watts (Pa.) 110; Pennock v. Freeman, 1 Watts (Pa.) 401; McKown v. Whitmore, 31 Me. 448; Bishop v. Little, 3 Me. 405; Hall v. McCormick, 7 Tex. 269; McDonald v. McGuire, 8 Tex. 361. *Contra*, are cited Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Mille, 17 Wend. (N. Y.) 202; Miles v. Berry, 1 Hill (S. Car.) 206; Hamilton v. Smith, 3 Murph. (N. Car.) 115; Callis v. Waddy, 2 Munf. (Va.) 511. But see Rice v. White, 4 Leigh (Va.) 474. As to "Good Faith" in the Illinois Statute of 1839, see *infra*, this title, *Color of Title—Under Statutes*, as explained in Woodward v. Blanchard, 16 Ill. 424; *approved* in Wright v. Mattison, 18 How. (U. S.) 50, and in the recent case of Deputron v. Young, 134 U. S. 241, the construction is substantially the same as that of the text.

1. See Woodward v. Blanchard, 16 Ill. 424; Spradlin v. Spradlin (Ky. 1892), 18 S. W. Rep. 14. Under a deed void for the fraud of a vendor, where the vendee is innocent, Gregg v. Sayre, 8 Pet. (U. S.) 253. Under a void grant from the state, Moody v. Fleming, 4 Ga. 118; 48 Am. Dec. 210. Under a void tax deed, Edgerton v. Bird, 6 Wis. 527; 70 Am. Dec. 473; Lindsay v. Fay, 25 Wis. 460. See Waterson v. Devoe, 18 Kan. 223; Harrison v. Spencer, 90 Mich. 586. Under a void sheriff's deed, Beverly v. Burke, 9 Ga. 440; 54 Am. Dec. 351.

Payment of Taxes.—See Fletcher v. Fuller, 120 U. S. 534, *sustaining* Davis v. Easley, 13 Ill. 201; St. Louis Pub. Schools v. Risley, 40 Mo. 370. In the former case it was held, in an action of ejectment, that the payment of taxes indicated that the plaintiff claimed title to

bad, to a parcel of land of definite extent has been conveyed to the claimant.¹

(6) *Under Statutes*.—By the statute of one state, "claim and color of title made in good faith" are necessary for the acquisition of title by adverse possession. The statute further enacts that the person who has fulfilled all the requisites "shall be held and adjudged to be the legal owner . . . to the extent and according to the purposes of his or her paper title."² It will be

the whole tract, and likewise tended to explain the character and extent of his possession. The court, in *Fletcher v. Fuller*, 120 U. S. 534, also approved the decision in *Ewing v. Burnet*, 11 Pet. (U. S.) 54, where it was said that the payment of taxes on a lot for twenty-four consecutive years was "powerful evidence of claim of right to the whole lot."

As to tax deeds, and sales of land for taxes, see the article in 26 Am. L. Reg., p. 409, by H. C. Black, Esq., on "Color of Title," which discusses the ground of the decisions holding that a new sale of land by a tax collector will not give color of title. *Annan v. Baker*, 49 N. H. 161. See also *Childress v. Calloway*, 76 Ala. 128, and other cases cited in the above-mentioned article. Under a bond for title, where no purchase-money had been paid, *Elliott v. Mitchell*, 47 Tex. 450, citing *Scarborough v. Arrant*, 25 Tex. 131; *Miller v. Alexander*, 8 Tex. 36.

A claim under a written contract to convey, which equity would specifically enforce, was held sufficient claim under color of title in *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463. Under a forged deed, which must, however, be believed to be genuine, *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Parker v. Waycross*, etc., R. Co., 81 Ga. 387; *Millen v. Stines*, 81 Ga. 655, *distinguishing* *Simmons v. Lane*, 25 Ga. 178.

As to void and defective titles generally, see *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558; *Den v. Hunt*, 20 N. J. L. 487; *Woodward v. Blanchard*, 16 Ill. 424; *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327; *Ferguson v. Kennedy*, Peck (Tenn.) 321; 14 Am. Dec. 761; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; 18 Am. Dec. 463; *Conyers v. Kenan*, 4 Ga. 308; 48 Am. Dec. 226; *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Ewing v. Burnet*, 11 Pet. (U. S.) 54; *Tate v.*

Southard, 3 Hawks (N. Car.) 119; 14 Am. Dec. 578. See also *Brooks v. Bruyn*, 35 Ill. 394; cited, with other cases, *infra*, this title, *Color of Title—Under Statutes*; and *Pittsburg*, etc., R. Co. v. Reich, 101 Ill. 157. Where the decision seems contrary to prevailing view, see the full list of examples in the article on "Color of Title," by H. C. Black, Esq., in 26 Am. L. Reg. 407; also the note under *Swift v. Mulkey*, 18 Oregon 59.

Under a parol gift, *Sumner v. Stevens*, 6 Met. (Mass.) 337; and under a conditional promise, see *Moreland v. Moreland*, 121 Pa. St. 573; Com. v. Gibson, 85 Ky. 666; *Strutton v. Strutton*, 10 Ky. L. Rep. 607; *Wilson v. Campbell*, 119 Ind. 286; *Wheeler v. Laird*, 147 Mass. 421; *Braden v. Campbell* (Pa. 1885), 1 Atl. Rep. 580. Under an executory agreement, *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558; *Jackson v. Harder*, 4 Johns. (N. Y.) 208; 4 Am. Dec. 262. Under a verbal partition, *Mitchell v. Allen*, 69 Tex. 70.

Entry Under Color of Title.—It was held in *Brobst v. Brock*, 10 Wall. (U. S.) 519, that where one had a right to enter on land by virtue of the mortgage of which he was assignee, it was a legal presumption that his entry was in right of deed under color of his title, and that he intended to assert his claim to the entry subject to the grant. See *Ellicott v. Pearl*, 10 Pet. (U. S.) 412.

1. See *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586, where it is said, "he (the claimant) cannot claim under color of title in a person who has no privity." See generally the full list of cases cited in ADVERSE POSSESSION, vol. 1, p. 276 *et seq.*

2. *Illinois* Act March 2d, 1839, is incorporated in *Illinois* Rev. Stat., ch. 24, pp. 104, 105, §§ 8–10 inclusive, entitled *Conveyance*; [an act which supplements the act of Jan. 17th, 1835, incorporated in Rev. Stat. 1845, ch. 66, pp. 349, 350, §§ 8–11, which is confined to titles deducible from record]. The provisions of these statutes are additional

to the common statute of twenty years' limitation. See *Woodward v. Blanchard*, 16 Ill. 427, which is the controlling case in the interpretation of the statute of 1839. In defining "claim and color of title," it was said: "The act of taking possession, if otherwise unexplained, will be referable to the paper title, and understood as making claim under it. Color of title may be made through conveyances, or bonds and contracts, or bare possession, under parol agreements. Nor is it at all important whether the title be weak or strong, under general statute; for color of title is acquired to establish an adverse possession . . . which commenced by the disseisin of the rightful owners, with a claim of the land. But our statute requires this color of title to be accompanied by a written evidence, a paper title, and an act or motion of the mind."

In *Wright v. Mattison*, 18 How. (U. S.) 50, the *United States* Supreme Court gave a final decision in a case arising under the *Illinois* Statute of 1839, approving throughout and referring to the interpretation in *Woodward v. Blanchard*, 16 Ill. 424.

As regards good faith in the person making claim or acquiring color of title, the court in the former case, *Wright v. Mattison*, 18 How. (U. S.) 50, approved the rule that color of title is matter of law; that good faith in the person claiming under such color is purely a question of fact; that while the facts in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing the want of confidence and good faith in the mind of the vendee, if they were known to him. The following language of the court in *Woodward v. Blanchard*, 16 Ill. 424, was confirmed: "Good faith is doubtless used here in its popular sense, as the actual existing state of the mind; whether so from ignorance, skepticism, sophistry, delusion, fanaticism or imbecility, and without regard to what it should be from given legal standards of law or reason." In a recent case, the *United States* Supreme Court, by Fuller, C. J., approved all the definitions and decisions above mentioned, adding the remark, in *McCagg v. Heacock*, 84 Ill. 476: "The good faith required by the statute in the creation or acquisition of color of title, is a freedom from the design to defraud the person having the better title, and

the knowledge of an adverse claim to, or lien upon property, does not of itself indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien." See the following cases cited in *Woodward v. Blanchard*, 16 Ill. 424: *Radford v. Harbyn*, 2 Cro. Jac. 122; *Austin v. Austin*, 2 Cro. Jac. 319; *Moody v. Fleming*, 4 Ga. 118; 48 Am. Dec. 210; *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 200; *Clapp v. Bromingham*, 9 Cow. (N. Y.) 558; *Jackson v. Harder*, 4 Johns. (N. Y.) 208; 4 Am. Dec. 262; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 238; *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.) 19; 12 Am. Dec. 354; *Roberts v. Sanders*, 3 A. K. Marsh. (Ky.) 29; *Overfield v. Christie*, 7 S. & R. (Pa.) 174; *McCall v. Neely*, 3 Watts (Pa.) 70; *Lawrence v. Hunter*, 9 Watts (Pa.) 73; *Watson v. Gregg*, 10 Watts (Pa.) 295; 36 Am. Dec. 176; *Ash v. Ashton*, 3 W. & S. (Pa.) 513; *Patterson v. Reigle*, 4 Pa. St. 204; 45 Am. Dec. 684; *Waggoner v. Hastings*, 5 Pa. St. 300; *Dikeman v. Parrish*, 6 Pa. St. 219; 47 Am. Dec. 455; *Fitch v. Mann*, 8 Pa. St. 503.

In *Brooks v. Bruyn*, 35 Ill. 393, in an action of ejectment, where the defense was adverse possession under the Statute of Limitations with color of title, the court, by Beckwith, J., said: "Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, and because it does not, for some reason, have that effect, it passes only color, or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority, in law or in fact, to convey one, or whether such want of authority appears on the face of the instrument, or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and, therefore, it gives the semblance or color only of what its effect would be if they were not wanting. The law presumes that all men act in good faith, until there is some evidence to the contrary; and, in the absence of evidence, color of title is presumed to have been so acquired." The following

noticed that the phrase "claim and color" is very different in effect from the common phrase "claim or color." Similar statutes exist in other states.¹

Tennessee is the only state where, in the absence of special statute, "color of title" has been held to be necessary for the acquisition of title by adverse possession under the common Statute of Limitations.²

II. MODES OF ACQUISITION OF TITLE—1. General Classification.—Title to real property is acquired either by operation of law or by act of the party. The sole mode by which title may be acquired by operation of law is descent. Purchase, in its strict legal meaning, denominates every mode of acquisition of title other than descent. Thus the fundamental classification of modes of acquisition of title is by *descent* and by *purchase*.³

cases are relied on: *Shakelford v. Bailey*, 35 Ill. 387; *Dickenson v. Breedon*, 30 Ill. 279; *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327; *Cook v. Norton*, 43 Ill. 391; *Elston v. Kennicott*, 46 Ill. 187; *Morrison v. Norman*, 47 Ill. 477; *Hinkley v. Greene*, 52 Ill. 223; *Winstanley v. Meacham*, 58 Ill. 97; *Hardin v. Crate*, 60 Ill. 215; *Rawson v. Fox*, 65 Ill. 200; *Fagan v. Rosier*, 68 Ill. 84. See also *Bailey v. Doolittle*, 24 Ill. 579; *Bowman v. Wettig*, 39 Ill. 416; *Stumpf v. Osterhage*, 111 Ill. 82; *Winslow v. Cooper*, 104 Ill. 235; *Connor v. Goodman*, 104 Ill. 365. But see *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157, where it was held that the deed of commissioners of highways was not color of title, when such commissioners could not be party grantors in a deed of conveyance.

1. *Georgia*.—*Georgia Code*, § 2683, was said in *Royall v. Lisle*, 15 Ga. 545, to negative entirely the idea of title by occupancy alone, however *bona fide* it might be, and to that extent to be in derogation of the common law. *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628. See *Millen v. Stines*, 81 Ga. 655; *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387; *Davis v. Stripling*, 32 Ga. 656. See, however, *Georgia Code*, § 2682; *Stimson's Stat. Law*, § 1120.

See *Pennsylvania Purd. Dig.*, tit. *Limitations of Actions*, said in *Kirk v. Smith*, 9 Wheat. (U. S.) 317, to have been repealed by the subsequent act of 1785.

Wisconsin.—The early statute of 1849, providing a period of limitation, where there is color of title by tax deed, was thoroughly considered in *Edger-ton v. Bird*, 6 Wis. 527; 70 Am. Dec.

473. See also the valuable note by Vilas and Bryant, summing up the conclusions. Also *Sprecker v. Wakeley*, 11 Wis. 432; *Lindsay v. Fay*, 25 Wis. 460; *Waterson v. Devoe*, 18 Kan. 223. "The whole subject" was, however, "considered, revised and amended by the *Wisconsin* legislature, by the enactment of ch. 309, Laws of 1880." See the thorough discussion of the statute in *Urquhart v. Wescott*, 65 Wis. 135, *distinguishing* *Ruggles v. Fond du Lac County*, 63 Wis. 205. See *Tennessee Stats.*, § 3459; *Colorado Stat.*, §§ 2186-7, where the phrase is "claim and color of title;" *Louisiana Rev. Civ. Code* (1875), §§ 3474-5, 3478-3479, 3499; *New Mexico Stat.* 1880. See also § 2747, *New Jersey Revision* (1877); *Limitations*, § 24; *North Carolina Code*, § 139; *California Civ. Code*, § 325. See *Reynolds v. Lincoln*, 73 Cal. 191.

2. See *Ferguson v. Kennedy*, Peck (Tenn.) 321; 14 Am. Dec. 761, note, *citing* *Waterhouse v. Martin*, Peck (Tenn.) 392; *Barton v. Shall*, Peck (Tenn.) 215; *Powell v. Harman*, 2 Pet. (U. S.) 241; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 185; and under the Act of 1819, ch. 28, enacting a seven-years' period, *Wallace v. Hannum*, 1 Humph. (Tenn.) 443; 34 Am. Dec. 659. Color of title was expressly held unnecessary in *Watson v. Gregg*, 10 Watts (Pa.) 289; 36 Am. Dec. 176.

3. See 4 Kent's Com. *374, where titles by curtesy and in dower are in the note considered "to fall more properly under the head of title by descent," *citing* Co. Litt. 18 b; Harg. note 106; and the article on Alienation in *American Law Mag.*, Oct. 1843; *Pemberton v. Hicks*, 1 Binn. (Pa.) 1.

2. Title by Descent—(See SUCCESSION, vol. 24, p. 344).—Descent is that mode of acquisition of title by which one, by operation of law, succeeds on the death of his ancestor to his estate as heir.¹

3. Title by Purchase.—Purchase, in its strict legal meaning, signifies any mode of acquisition of title other than descent.²

TO.—A term of exclusion, unless by necessary implication used in a different sense.³

1. 2 Bl. Com. *201; Bouv. L. Dict.; 2 Minor's Inst. 451, citing 2 Co. Litt. 156 and note; 4 Kent's Com. *374. See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; HEIR, vol. 9, p. 357; HEREDITAMENTS, vol. 9, p. 359; LEGACIES AND DEVISES, vol. 13, p. 7; REAL PROPERTY, vol. 19, p. 1028; SUCCESSION, vol. 24, p. 344.

2. See Williams on Real Prop. (6th ed.) *100, "Possession to which a man cometh not by title or descent," citing Co. Litt., § 12. "A devisee under a will is accordingly a purchaser in law." Within the meaning of the Statute 3 and 4 Wm. IV. vol. 106, which has considerably changed the law of descent in *England*, a purchaser prescribed as the *stirps* or stock of descent, is "the last person who had a right to the land, and who cannot be proved to have acquired the land by descent, or by certain means" (escheat, partition, and inclosure), "which render the land part of, or descendible in the same manner as, other land acquired by descent." Williams on Real Prop. *100.

3. Bradley v. Rice, 13 Me. 201; 29 Am. Dec. 501.

A word of exclusion, when used in describing premises, unless by necessary implication manifestly used in a different sense. Montgomery v. Reed, 69 Me. 514; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491; People v. Jones, 112 N. Y. 605.

"To" an object excludes the terminus referred to. Bonney v. Morrill, 52 Me. 252; State v. Bushey, 84 Me. 459. And see generally Schumacker v. Toberman, 56 Cal. 508; Stearns v. Sweet, 78 Ill. 446.

Where land is described as extending "to," and then bounding upon, a road, the grant extends to the center of the way, unless there is some further circumstance to control the construction. Reed's Petition, 13 N. H. 381; Goodeno v. Hutchinson, 54 N. H. 159.

But general terms of description in

a deed, like "to," "upon," or "along" a highway or railroad, do not convey the land to the center of the road or highway, unless the grantor owns the fee therein. Church v. Stiles, 59 Vt. 642.

In Thomas v. Hatch, 3 Sumn. (U. S.) 178, it was held that a boundary "to" a stream, includes the flats, at least to low-water mark, and in many cases, to the middle thread of the river, though it was said that it might be different where the boundary was "to" the bank.

But the word "to" may be sometimes taken inclusively, according to the subject-matter, and where a turnpike company was empowered by its charter, to carry the road to a certain city, it was held that the object of the grant was to open a good road to the compact part of the city, and that the road did not terminate on arriving at the bounds or charter limits, several miles from the business center. Farmer's Turnpike Road v. Coventry, 10 Johns. (N. Y.) 389. And in Hazelhurst v. Freeman, 52 Ga. 244, a company chartered to build a railroad to a city was held authorized to build it into the city; McCay, J., saying that "'from' and 'to' do not have a precise fixed meaning, but may mean from within, and into." And see to the same effect McCartney v. Chicago, etc., R. Co., 112 Ill. 626; 29 Am. & Eng. R. Cas. 326; Moses v. Pittsburg, etc., R. Co., 21 Ill. 516; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; RAILROADS, vol. 19, p. 834.

In Moran v. Legotte, 54 Mich. 87, it was said that, "The word 'to,' as commonly made use of, conveys to the mind the idea of movement towards and actually reaching a specified point or object; and the meaning is not satisfied unless the point or object is actually attained. But this use is not universal; the word is sometimes employed in a sense that embraces a part of this idea only, or simply as a word of direction."

TOBACCO.—See note 1.

TOKEN.—A material, visible sign of the existence of a fact.²

TOLERATE.—(See also SUFFER, vol. 24, p. 489; PERMIT, vol.

To and From.—(See also FROM, vol. 8, p. 981).—"To and from the *Illinois* shore," in a contract by a railroad company with a ferry company to always employ the latter's ferry to transport across the river all freight and passengers arriving or departing by said company's railroad, does not mean "to and from" all parts of the shore. *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 6 Cent. L. Jour. 215.

There cannot be derived from the charter provisions of a company to run "to and from" a town, the obligation to run trains to a particular spot within its limits. *People v. Louisville, etc., R. Co. (Ill. 1886)*, 25 Am. & Eng. R. Cas. 235.

A reservation in a deed, of a right to lay tracks "to and from" certain kilns to the track of a railway, was construed to mean "to and from" the locality where the kilns were situated, in such a manner and to such an extent as to enable the owner to enjoy their use and possession for the purposes named in the reservation. *James v. Fonda*, 58 Vt. 453. As to sales to arrive, see SALES, vol. 21, p. 643.

"To"—Omission of in Indictment.—See FORGERY, vol. 8, p. 520.

1. Tobacco cannot be considered as either a drug or a medicine, or as an article of food, within the exceptions of the *Missouri* statute, allowing drugs and medicines, and food where it is a case of necessity, to be exposed for sale on Sunday. *State v. Ohmer*, 34 Mo. App. 124. And see Anonymous, 12 Abb. N. Cas. (N. Y.) 458.

Granulated tobacco, as used in the internal revenue laws, is not synonymous with snuff, but refers to certain kinds of chewing and smoking tobacco. *Venable v. Richards*, 1 Hughes (U. S.) 326.

2. Abb. L. Dict. A "sign" or "mark." *State v. Green*, 18 N. J. L. 181. As used in statutes against obtaining money or property by means of false tokens, see, in addition to cases set out below, numerous examples in FALSE TOKENS, vol. 7, p. 794. As used in a statute punishing the obtaining of a signature, money, etc., by any false "token" or pretense, it means "a sign, a mark, a symbol." *Jones v. State*, 50 Ind. 476.

A bank check may be a false token, and would be such, under the *California* statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it. *People v. Donaldson*, 70 Cal. 118.

The common law extended to cheats effected by means of any false "token," having a semblance of public authority, or in any manner touching the public interest. *People v. Johnson*, 12 Johns. (N. Y.) 292; *Respublica v. Powell*, 1 Dall. (Pa.) 47. And where fraud at common law is charged to have been effected by means of a false "token," the token must be such as indicates a general intent to defraud; a mere privy token, or counterfeit letters in other men's names, seem not to come within the term "false token," as used at common law. *People v. Stone*, 9 Wend. (N. Y.) 182. And see *Com. v. Warren*, 6 Mass. 72. But a fraud perpetrated upon an individual, without the use of "false tokens," or any deceitful practice affecting the community at large, and without the aid of a conspiracy, but the result of a false assertion, was not indictable at common law. *State v. Justice*, 2 Dev. (N. Car.) 199.

Promissory notes are not of themselves public tokens, but bank notes are. An indictment, therefore, for a cheat at common law, by passing certain promissory notes as and for bank notes, without an averment that they resemble bank notes, cannot be sustained. *State v. Patillo*, 4 Hawks (N. Car.) 348.

The false passing, as a true note, of a false and forged note purporting to be a note of a bank which never existed, and procuring goods by means thereof, is not such an offense as comes within an act to prevent the deceitfully obtaining goods by privy token or counterfeit letters; but it is a public cheat indictable at common law, if the defendant knew that it was a false note, and it is necessary in such case to aver the *scienter* in the indictment. *Com. v. Speer*, 2 Va. Cas. 65. See also *Rex v. Wheatley*, 2 Burrow 1125; *Lara's Case* 2 Leach 652.

18, p. 334).—To allow so as not to hinder; to permit as something not wholly approved of; to suffer; to endure; to admit.¹

TOLL—(See also BRIDGES, vol. 2, p. 540; CARRIERS, vol. 2, p. 784; FERRIES, vol. 7, p. 951; FREIGHT, vol. 8, p. 901; INJUNCTIONS, vol. 10, p. 978; LOGS AND LUMBER, vol. 13, p. 1038; TURNPIKES).—The word toll applies at common law to a very large class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally, if not universally, connected with some franchise which involves duties as well as privileges of a general or public nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public in turn are protected from extortion by an obligation to pay only regular dues.² The word is used also in reference to the sum which one railroad company received from another for the use of its tracks.³

Toll is used, too, to express the compensation allowed by law and custom to a miller for grinding grain.⁴

TON—(See LOAD, vol. 13, p. 974).—Used to denote weight,⁵

1. Gregory v. U. S., 17 Blatchf. (U. S.) 330.

2. McKee v. Grand Rapids, etc., R. Co., 41 Mich. 279.

In Pennsylvania Coal Co. v. Delaware, etc., Canal Co., 29 Barb. (N. Y.) 592, the court, by Clerke, J., said: "Toll is a Saxon word, originally signifying a payment in towns, markets and fairs, for goods and cattle bought and sold there. It is defined in the Institutes to be a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable, within the same. It is now, also, popularly applied to the charges which canal and railroad companies require for the transportation of goods, payable no doubt at once, in all cases, where there is no right or arrangement importing the contrary—precisely as goods sold are presumed to be sold for cash, unless by express terms, or from the circumstances of the case, the transaction shows a credit. The word means nothing more than a compensation for the privilege or service granted or rendered; and the period of payment depends entirely, as in every other case, upon the express or implied understanding of the parties."

Toll Distinguished from Freight.—See FREIGHT, vol. 8, p. 901. And see also Lake Superior, etc., R. Co. v. U. S., 93 U. S. 454, and dissenting opinion of Mr. Justice Miller on p. 457.

3. Com. v. New York, etc., R. Co., 145 Pa. St. 38; Boyle v. Philadelphia, etc., R. Co., 54 Pa. St. 310; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

4. Lake Superior, etc., R. Co. v. U. S., 93 U. S. 458.

5. In England, the ton is estimated at twenty hundred weight of 112 lbs. each, known as the long ton. 41 and 42 Vict., ch. 49, § 14.

In the United States, the ton is estimated at 2,000 lbs., known as the short ton. In the appraisal of imports, the word "ton" is declared by statute to mean twenty hundred weight, each hundred weight being 112 lbs. U. S. Rev. Stat., § 2951.

But the custom or common understanding as to the meaning of the word may be shown, and will control its meaning when used in a contract. In The Miantinomi, 3 Wall. Jr. (U. S.) 48, a contract was made to furnish coal by the ton, which up to the time of making the contract was understood to be 2,240 lbs. It was held that that number of pounds must be furnished, notwithstanding the fact that the state previously fixed the weight of coal at 2,000 lbs. per ton. And in Many v. Beekman Iron Co., 9 Paige (N. Y.) 188, where the parties to a contract intended to contract for a certain number of tons gross weight at a specified

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and measure.¹ A ton, in measurement, is forty cubic feet; in weight, 2,000 pounds (short ton), or 2,240 pounds (long ton).

TONNAGE AND TONNAGE DUTIES—(See TAXATION, vol. 25, p. 43).—Tonnage in the *United States* is a vessel's internal cubical capacity in tons of one hundred cubic feet each, to be determined in the manner prescribed by Congress.² And tonnage duties are duties upon vessels in proportion to this capacity.³

TONTINE INSURANCE.—(See also ANNUITY, vol. 1, p. 592; ESCHEAT, vol. 6, p. 854; INSURANCE, vol. 11, p. 278; JOINT TENANTS AND TENANTS IN COMMON, vol. 11, p. 1057; LIFE INSURANCE, vol. 13, p. 629; LOTTERIES, vol. 13, p. 1164; SURVIVORSHIP, vol. 24, p. 1027.)

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I. DEFINITION AND NATURE—1. The Tontine System Generally.—

Tontine insurance is that form of life insurance which adds and applies to the ordinary contract of indemnity, the principles involved in the scheme of financiering invented by Lorenzo Tonti, an Italian banker of the 17th century.⁴ Some explanation of the latter

price per ton, but in the written contract the term tons only was used, it was held that in an action at law upon the contract, it could not be shown that any other than the statute ton of 2,000 lbs. was intended, but that the party injured by the mistake might file a bill to reform the written contract so as to make it conform with the intention of the parties.

In *Barry v. Bennett*, 7 Met. (Mass.) 354, it was held that the words "one ton of wire," used in a contract, might be shown by parol evidence to mean a certain mass of wire stored in a certain place and denominated a ton, and not a precise ton by weight.

In *Pennsylvania*, 2000 lbs. avoirdupois constitute a ton. *Weaver v. Fegeley*, 29 Pa. St. 27; 70 Am. Dec. 151; *Evans v. Myers*, 25 Pa. St. 114. So in *New York*. 1 *New York Rev. Stat.* 609, § 35.

1. A ton measurement contains forty cubic feet of space. Where a charter

party stipulated "to carry out seven hundred tons measurement of assorted cargo, or more, if that does not make or draw over fourteen feet of water," it was held to be no violation by the charter party if, when laden with three hundred and sixty tons, she drew fourteen feet, and the owner refused to carry more. *Roberts v. Opdyke*, 40 N. Y. 260.

2. U. S. Rev. Stat., § 4153.

3. Bouv. L. Dict.

By the Constitution of the *United States*, p. 1, § 10, par. 2, the states are prohibited from levying any duty of tonnage. For numerous cases relating to the question whether wharfage duties are within the constitutional prohibition, see TAXATION, vol. 25, p. 43.

4. Tonti was a Neapolitan by birth, but emigrated to *France* about the middle of the 17th century, and there brought his project to the attention of Cardinal Mazarin, then prime minister. The "Tontine Royale," the first

Definition and Nature. TONTINE INSURANCE. The System Generally.

system, therefore, will aid materially in reaching a proper understanding, both of the general and the legal nature of the Tontine insurance contract.

The essence of Tontinism consisted in reserving for the last survivor among several investors, the profits realized from their common investment.¹ Originally the system was used as a method of floating public loans, the profits being guaranteed to the last surviving subscriber.² Measures of this kind were employed in *France* as early as 1689,³ and in *England* by 1692,⁴ and thereafter were frequently resorted to in both countries, the

proposal of its kind, was sanctioned by an edict of the king in 1653; but the parliament refusing to register this edict, the plan was never carried out. As proposed, it included a public loan of 1,025,000 francs, to be taken by subscriptions of 300 francs each. The entire loan was to be divided into ten equal portions and the subscribers into a corresponding number of classes. The interest of each of these portions was to be divided among those of the proper class living when such interest matured. The last surviving subscriber was, of course, to receive the whole current subscription and upon his death it was to escheat to the state. Concerning other plans of Tontì, a writer in the "Gentleman's Magazine" for 1791 (part 1, page 27), says: "Three years after he tried his project again for building a stone bridge over the Seine, when it had both the favor of the court and the sanction of parliament, under the title of Banque Royale, but it failed again; for somebody having given it the unlucky name of Tontine, nobody in Paris would trust his money in a lottery that had an Italian title. The last attempt poor Tontì made was to get his plan adopted by the clergy for the payment of their debts; but though they acknowledged the ingenuity of it, they rejected it as unfit for their purposes."

1. "As life insurance is, commercially, profit by dying, so the Tontine is profit by surviving." Fowler, "History of Insurance in Philadelphia," (1888,) p. 698.

2. See note *supra*.

3. The writer in the "Gentlemen's Magazine" above quoted, thus describes the early French Tontines: "When Louis XIV. was distressed by the league of Augsburg, and granted money beyond what the revenues of the kingdom would furnish, for supplying his enormous expenses, he had recourse to

the plans of Tontì, which, though long laid aside, were not forgotten; and by an edict in 1689 created a Tontine Royale of 1,400,000 livres annual rent, divided into fourteen classes. The actions were 300 livres apiece, and the proprietors were to receive 10 per cent., with benefit of survivorship in every class. This scheme was executed but very imperfectly; for none of the classes rose above 25,000 livres, instead of 100,000, according to the original institution; though the annuities were very regularly paid. A few years after, the people seeming in better humor for projects of this kind, another Tontine was erected upon nearly the same terms; but this was never above half full. They both subsisted in the year 1726, when the French king united the 13th class of the first Tontine with the 14th of the second; all the actions of which were possessed by Charlotte Bonnemay, widow of Louis Barbier, a surgeon of Paris, who died at the age of 96. This gentlewoman had ventured 300 livres in each Tontine, and in the last year of her life she had for her annuity 73,500 livres, or about £3,600 a year for about £30."

4. "The first government life annuities were created in *England* by a proposal to borrow £1,000,000, payable in Tontine annuities; first £100,000 to be paid per annum to the subscriber (10,000 in number of £100 subscription each) with nominees surviving, until 1700; then £70,000 to be paid annually. A table was compiled in connection with this proposition, showing a life decrement yearly of the initial 10,000 nominees in ninety-nine years (1694-1793). Deaths the first year, 1694, were 2.82 per cent. of the living; 1695, 2.84 per cent. of the living. The interest or payment to each £100 contributor, £8 17s. in 1701, advanced to £14 1s. in 1715, with 4,966 nominees

last instance in *England* being in 1789.¹ Later the Tontine principle was applied to private annuities, and finally to other forms of investment. Companies for erecting buildings and promoting other semi-public works have often been organized in *America*, as well as in the aforementioned countries, on a plan which was intended to secure the fruits of the enterprise to the surviving contributors.² Communistic ventures have also been undertaken on the Tontine principle (though not by that name), property being surrendered into a common stock for the joint lives of all members, the longest lived to acquire ultimately the whole.³

2. Its Application to Life Insurance—*a.* IN GENERAL.—The Tontine idea having thus been long before the public mind, the transition from general financiering to life insurance, which is always a fruitful field for novel schemes of investment, was easy. As soon as life insurance passed beyond its crudest form, and the insurer began to offer the insured a share in the profits of the investment, and to write policies maturing at a fixed time, and not at death only, the opportunity arose for applying the Tontine system to this field. As early as 1853, a life insurance company, which conducted business on the Tontine plan, was organized in Philadelphia,⁴ and this was but a transplantation to *America* of insurance methods already long in vogue in the old world. The issue of Tontine policies now forms an important part of the business transacted by several of the foremost American life-insurance companies,⁵ as well as by many of less prominence.

b. THE PLAN OF OPERATION.—As in the case of ordinary life insurance,⁶ every premium payment is regarded as composed of three parts, each of which is apportioned to a particular fund which the company maintains.⁷ One part is set aside with

alive at end of year—death rate of the year, 3.49 per cent. The annual payments to contributors having living nominees yearly increased until 1792, when for the last nominee alive were to be received, by the table, £70,000. Here the question of average life duration or age influence on human vitality was of no account to the annuity-granting government. The last survivor was the sole measure of its obligation." Fowler, "History of Insurance in Philadelphia" (1888), p. 608.

1. This was a loan of £1,000,000 in shares of £100 each. "Notes and Queries," 3d series, p. 213. And see a discussion as to the methods of administering this Tontine, "Notes and Queries," 4th series, vol. 10, pp. 12, 72, 151 and 215.

2. "American Cyclopaedia," vol. 15, p. 797; "Encyclopedia Britannica," (9th ed.), vol. 23, p. 444. A hotel in Glasgow was built on this plan, the last

shareholder dying in 1862. "Notes and Queries" 3d series, vol. 2, p. 339.

3. *E. g.*, the "Harmony" or "Economy" society of *Pennsylvania*, whose plan of organization is described and given judicial sanction in *Schriber v. Rapp*, 5 Watts (Pa.) 351; 30 Am. Dec. 327.

4. Fowler, "History of Insurance in Philadelphia" (1888), pp. 697-8. In another place (p. 756), the same author speaks of Tontinism as "a *New York* movement starting in 1867."

5. *E. g.*, the *New York Life*, the *Equitable Assur. Soc. of New York*, the *United States* and the *Northwestern Mutual of Milwaukee*. See a list of those investigated by a committee of the *Ohio* legislature. Tabor, "Three Systems of Life Insurance" (1886), p. 43.

6. *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499; 11 Ins. L. J. 219.

7. It is not necessary that the funds be kept separate; but only that distinct

others to accumulate into a sufficient source for the payment of policies as they mature, and is called the reserve fund. Another part is absorbed into the expense fund, which comprehends the cost of maintaining the company. The remaining portion of the premium goes to the surplus fund, which is also increased by earnings from the investment of the reserve. In most modern companies this surplus is regularly distributed among the policyholders. Under the ordinary system, this distribution is made

accounts of them be maintained. *Pierce v. Equitable Life Assur. Co.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328, 338.

Tontine Bookkeeping.—The method of maintaining these three funds, and keeping accounts under the Tontine system, is necessarily the most important feature in its practical workings, and is likely to be the subject of extensive inquiry in future litigation concerning it. A detailed statement of these methods is therefore desirable. The following description is taken from the testimony of an actuary of the Equitable Life Assurance Society, before the investigating committee of the *Ohio* legislature in 1885: "As to policies in the Tontine classes, a special account is kept of the income and outgo properly belonging to these classes, separate from the other business of the society, so that the amount of the Tontine fund—that is, the share of the whole amount of assets properly belonging to policies in the Tontine classes—can be ascertained at the end of each year. To do this, the Tontine fund is credited with all premiums received from Tontine policies, is charged with a due proportion of expenses upon these premiums, receives credit for interest upon its accumulations proportionate to that made on the total funds of the company, and has to pay the losses by death (occurring among the Tontine policies only) and the claims of such policies as reach the end of their Tontine periods. At the end of each year the total amount of the Tontine fund, and the total amount of reserve necessary to have on hand to secure the original and absolute obligations under the Tontine policies, is calculated, and the difference between these amounts is the Tontine surplus, part of which belongs to the policies completing their Tontine periods in each year just entered upon, while a far larger part belongs to the far more numerous policies which will mature in

the many succeeding years. As the Tontine policies, after completing their Tontine terms, leave the Tontine class, and cannot participate in future divisions of surplus, the opportunity to correct in each future division any error made in previous distributions is taken away, and it is necessary to determine with accuracy the share of the surplus belonging to the outgoing members of the Tontine class. It would have simplified the calculations, perhaps, to have made separate classes for each year of issue of policies with the same Tontine period, so that there would be no mingling of the claims of policies leaving the class with the claims of policies having yet many years to remain in the class. But there was the insuperable objection to this plan that in small numbers, and even in numbers of considerable magnitude, irregularities will arise, very troublesome in practice, and giving rise to grave suspicions of unfairness, and it is therefore desirable in all life-assurance calculations to take advantage of the largest averages attainable. It was therefore decided that all policies with the same length of Tontine period, no matter in what year issued, should be classified together for the purpose of determining the rate of dividends to be allowed, and the plan in detail was this: Rates of interest, of mortality, of lapses, and of management expenses, were assumed, approximating to the actual as nearly as possible. On the basis of these rates a calculation of what would be the surplus on policies taken out at every age, and at the end of every year of their existence during the Tontine period, was made, and tables of estimated surpluses for all possible contingencies formed. With these tables it is easy at the end of each year to calculate the expected surplus on each policy in force. The total of these expected surpluses, when compared with the total actual surplus, as shown by the valuation of the Tontine policies, gives a ratio of the expected to the actual

annually, or at some longer fixed period, to all policy-holders. But by the Tontine plan, a division of the surplus is effected only at the end of the time for which insurance is taken (called the Tontine period), and only upon those policies the holders of which then survive and who have met their premium payments during the whole period.¹ In operating on the Tontine plan, a company must use care to make the plan conform to, and not depart from, the statute under which it is organized. Thus, where the statute provides for a sum to be set aside and invested for the exclusive purpose of a "guaranty fund," the use of the same as a "Tontine reserve fund" is illegal and will justify a dissolution of the company.²

3. Analogies in Other Branches of the Law.—While the Tontine system first came before the courts at a comparatively recent date, notions analogous to it have long formed a familiar part of the law. As these will probably throw much needed light on questions arising in future litigation over the Tontine contract, they deserve a brief consideration. Perhaps the closest resemblance to the Tontine idea is found in the rules of survivorship in joint tenancies at common law.³ Land held under this system

surplus; and applying this ratio to the expected surplus by the tables of policies just maturing, we get the actual surplus to which they are entitled. The actual surplus for each policy whose Tontine term is not ended, could, of course, be calculated in the same way by applying the ratio to the estimated surplus on them as given by the tables; but as these policies cannot draw any surplus till their Tontine period is concluded, this detailed calculation would be useless; and it is sufficient to leave this surplus undisturbed to accumulate for another year, when the same work of calculation and of distribution to the policies then maturing has to be repeated." Quoted in Tabor, "Three Systems of Life Insurance," pp. 47, 48.

1. For judicial discussions of the Tontine plan, see *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150. And compare *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433; *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499; 11 Ins. L. J. 219. For a general description, see Tabor, "Three Systems of Life Insurance" (1886), pp. 40, 41.

2. In *Chicago Mut. L. Ins. Assoc. v. Hunt*, 127 Ill. 257, the court said: "We think it clear that such disposition of the reserve fund was in direct violation of the letter, as well as the spirit, of the statute. The moneys

from which it was to be accumulated, viz.: those collected for the payment of death benefits, were dedicated and set apart by the statute to that purpose alone, and any other application of them was expressly prohibited. It follows that a reserve fund accumulated from that source could be lawfully applied to no other purpose than that of paying death benefits. But, in addition to this, the section of the statute permitting the accumulation of such fund expressly provided that the fund should belong to the association—a provision which necessarily excludes the idea of its belonging to, or being distributable among, the persistent surviving members of a particular class. Doubtless it was the intention of the statute, in providing for the accumulation of a reserve fund, to place the association in such condition as to be able to pay its death benefits with greater promptness and certainty, and perhaps to provide against unexpected drafts upon its resources by extraordinary mortality, caused by the visitation of epidemic diseases, when the ordinary death assessments would be likely to prove insufficient."

3. This analogy seems to have been borne in mind by Ch. J. Paxson, in *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, where, speaking of the Tontine arrangement, he says: "It appears to resemble to some extent a conveyance

of tenure belonged to the owners jointly, the entire estate devolving finally upon the last surviving owner.¹ The ordinary canons of inheritance were of course suspended,² as well as the rights of dower and curtesy.³ Rules corresponding to the above were also applicable to the joint tenure of personal estate,⁴ but the system, so far as it concerns realty, is now rapidly becoming obsolete. Statutes abolishing, or at least greatly changing, the character of estates in joint tenancy, have been enacted in many states,⁵ and in others joint tenancies are not favored and are generally treated as tenancies in common.⁶ The principle seems likely to be revived, however, in construing certain forms of policies,⁷ and its importance in the law of Tontine insurance becomes apparent. Thus the full amount of an ordinary life policy⁸ or mutual-benefit certificate,⁹ originally made payable to the insured's "wife and children," accrues, on the death of one of these beneficiaries before payment, to the survivors. A rule somewhat similar has been applied to a fire policy taken in the name of two persons.¹⁰ In one instance, where a statute was in force declaring against joint tenancies in real estate, a certificate payable to a wife and daughter was held to make them joint tenants in the fund, with the right of survivorship.¹¹

between two or more persons as tenants in common, with a right of survivorship." The right of survivorship, however, was not an incident of tenancies in common, but of joint tenancies alone. See also *Farr v. Grand Lodge*, 83 Wis. 446, where a similar analogy is suggested.

1. *Survivorship.*—"From the same principle also arises the remaining grand incident of joint estates; viz.: the doctrine of survivorship, by which, when one or more persons are seised of a joint estate, of inheritance, for their own lives, or *per auter vie*, or are jointly possessed of any chattel interest, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. . . . This right of survivorship is called by our ancient authors, the *jus accrescendi*, because the right upon the death of one joint tenant accumulates and increases to the survivors," citing *Co. Litt.* 280, 281; 2 *Bl. Com.* *183 *184. See also 1 *Washb. Real Prop.* (4th ed.) 643; *Williams Real Prop.* 134; *Tiedeman Real Prop.*, § 238.

2. "The great distinctive character-

istic of joint tenancies among estates of which there is a joint ownership, is the right of survivorship, by which, though the estate is limited to them and their heirs, the survivor or survivors take the entire estate, to the exclusion of the heirs or representatives of the deceased co-tenant." 1 *Washb. Real Prop.* (4th ed.) 643.

3. 1 *Washb. Real Prop.* (4th ed.) 649; 2 *Co. Litt.* 37 b.

4. 2 *Bl. Com.*, p. *399.

5. See *Tiedeman Real Property*, § 237, and notes where these states are enumerated.

6. *Maxwell v. Higgins* (Neb. 1894), 57 N. W. Rep. 388; *Tiedeman Real Property*, § 237.

7. See *Bacon Benefit Soc. & Life Ins.*, § 264, and also cases cited in the following notes.

8. *Robinson v. Duvall*, 79 Ky. 83; 9 *Ins. L. J.* 897; 42 *Am. Rep.* 208.

9. *Covenant Mut. Ben. Assoc. v. Hoffman*, 110 Ill. 603; 14 *Ins. L. J.* 220.

10. *Northrup v. Phillips*, 99 Ill. 449. Here the insured were described as having a two-thirds, and a one-third interest respectively, but the court held that they were entitled to share equally, and that the one who had collected two-thirds was obliged to account to the other for the excess over one-half.

11. In *Farr v. Grand Lodge A. O.*

Another analogy to the Tontine system is seen in certain associations which hold property in common under an arrangement by which the last survivor is to receive the whole. Such associations are lawful and will be protected by the courts, and a member's privilege of withdrawal during life is not transmissible to his personal representative, so as to enable the latter to recover the intestate's portion.¹

4. Estimates of Tontinism.—The Tontine scheme, at least before its application to life insurance, was often viewed as a species of lottery.² But so far as it has yet come before the courts, they have declined to construe it as having more of the gambling feature than other forms of insurance contract.³ For, as has

U. W., 83 Wis. 446, the court said: "The analogy between legacies and the benefits secured by a certificate or policy of a benefit insurance company, when the insurance is payable to two or more persons jointly on the death of the assured, is still closer. The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death. He can change the direction of his bounty during life. So far as the doctrine of joint tenancy and survivorship are concerned, they are strictly within the same reason. . . . So that we conclude that this insurance in joint tenancy with the right of survivorship is within the exception of our own statute in analogy to devises, and that the doctrine of the common law governs it. This is a new question in this state, but we are satisfied that the application of this doctrine in this case is within reason and the authorities."

1. See *Schriber v. Rapp*, 5 Watts (Pa.) 351; 30 Am. Dec. 327, where Gibson, C. J., says of the "Harmony" or "Economy" Society founded by George Rapp: "It has not been pretended that this society is detrimental to the public or its neighbors. It is an ecclesiastical community, performing with alacrity its duties to the laws, rendering unto Cæsar the things that are Cæsar's, and fashioning its rules of municipal property and government after the models of those Christian societies that existed in the days of the apostles. Its most peculiar features are submission to the will of its founder, and equal participation of property brought into the common stock by individuals or produced by the labor of the whole. That it is not a partnership, results from the fact that the profits are not shared in

severalty. At the period of initiation the neophyte surrenders his worldly wealth to the society, reserving to himself but the contingent right of resumption in the event of his secession, to which none but those who were creditors at the time could object, for all else would deal with him on the basis of a transfer already made. In the present instance, it is not alleged that there were creditors; without which, as was determined in *Buchler v. Gloninger*, 2 Watts (Pa.) 226, the administrator could not interfere. It is supposed, however, that as the intestate had power, by the articles, to secede from the society and take out of it whatever he had brought into it, the successor to his personal rights may exercise it as his representative. Such, however, are not the terms of the articles; nor would a posthumous exercise of the power, consist with the disposition he thought fit to make by dying in fellowship. An exercise of it by the administrator of one dead without kindred, would wrest the property from the society only to give it to the state by escheat. The right of secession, therefore, is intransmissible."

2. See "Encyclopedia Britannica," vol. 23, p. 544.

3. "It is proper to remark, however, that the cases which have been cited in regard to gambling policies have little, if any, application here. The policy in question was not a gambling policy. It was taken out by Mr. Hooper on his own life, and the premium was paid by him. It was held, in *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192, that a man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, and that such a transaction is not a wagering policy. This

been said,¹ "All insurance is based more or less upon the doctrine of chances," and hence, the contract as a whole is to be classed as aleatory.² But it is nevertheless a valid contract unless it becomes a mere wager,³ and the Tontine form of it stands on the same legal footing as the ordinary policy.⁴ Aside from its consideration by the courts, the merits of the Tontine plan have been a fruitful subject of controversy among those engaged in the business of life insurance. Charges have been made by its critics and vigorously denied by its defenders, to the effect that it is a gambling scheme,⁵ and that the abnormal profits which it offers to surviving policy-holders accrue at the expense of the less fortunate ones.⁶ An impartial authority speaks of the plan as one which "tends to redress the inequalities of the original contract,

results from the right which a man has to dispose of his own property." *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, where collateral to the policy was an instrument termed a "Tontine assignment," by which the amount of the policy was made payable in trust to a "Fiduciary Agency," which was empowered to distribute the proceeds of the whole group of policies among the survivors at the end of the Tontine period.

In *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 156, the court observed on this same point: "It was claimed by the counsel for the appellant, on the argument, that this insurance contract was a gambling contract, and that the plaintiff was in effect betting on the chances of the continuance of her husband's life, beyond the Tontine period of ten years, and that the company had bet against her. We cannot assent to this view."

1. Dykman, J., in *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150.

2. May on Ins. (3d ed.), vol. 1, § 5.

3. *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150.

4. See *supra*, this title, *The Plan of Operation*.

5. In answer to this charge, advocates of the system quote the following from the report of a committee appointed by the Ohio legislature in 1885, to investigate it: "Gambling, as usually understood, is a scheme by which one gets something for nothing—where no valuable consideration is given by the winner to the loser—where the gain to one is precisely offset by the loss to the other—and where the gain or loss depends, not

upon the will or power of either party, but rather upon mere chance or skill. It is usually condemned as a vice, as subversive of public morals, as wicked and unlawful. Nothing in the evidence obtained by the committee shows, or even tends to show, that such grave charges can be justly brought against Tontine life insurance. On the contrary, the evidence clearly proves that Tontine companies derive solid advantages from Tontine contracts, and can safely promise, and in fact do give, great and solid benefit to Tontine policy-holders. Statistics abundantly prove, for instance, that when applicants for insurance deliberately elect to pay larger premiums than are absolutely necessary, as Tontine policy-holders do when they elect to forebear the usual yearly dividends, they thereby give evidence, unconsciously perhaps, or by instinct, that they expect to live to enjoy the benefits promised in case of long life—in other words, they give evidence of superior vitality, which is more reliable in determining the value of the risk than the most skillful medical examination. It is clearly proven that the rates of mortality, and also the rates of lapses, or discontinuances, are far less among Tontine than among non-Tontine policy-holders. These constitute the solid advantages of Tontine contracts, and the companies can give, and in fact do give, in return, ample and compensating advantages in the way of larger dividends or surplus and larger surrender values than can be safely promised or given under ordinary policies." Tabor, "Three Systems of Life Insurance," pp. 43, 44.

6. See *Massachusetts Life Ins. Rep.* 1885, p. 45, where the insurance com-

the profits being assigned to the longest livers to a larger extent than in the common life-insurance system . . . where it is the man who dies early who obtains advantage for his heirs at the expense of the long liver."¹

5. Characteristics of the Tontine Policy—*a. IN GENERAL.*—In most of its provisions, the policy denominated "Tontine" does not differ from the ordinary form of the life-insurance contract.² It has the same limitations upon the liability of the insurer; the same clauses excepting "suicide;" "the use of intoxicants and narcotics;" "duelling, violating law, or conviction of felony;" the same restrictions on occupation, travel and residence; the same strict requirements of absolute good faith on the part of the applicant in making statements as to age, health, etc. Tontine policies are likewise issued on the endowment plan, for a term of years,³ or for life,⁴ and they command "the usual rates of premium."⁵ The peculiarities of the Tontine policy consist chiefly in its provisions regarding (a) forfeiture for non-payment of pre-

missioner of that state says: "The inducement to the investment is not the worthy product of capital in useful employment, but the expected profits for forfeitures enforced against policy-holders who are unable to keep their policies in force. And these forfeitures are taken from the widow and orphan, and the unfortunate most in need of the help and protection of life insurance, for the benefit of the more fortunate, who need it less or not at all. How the Tontine operates to defeat the primary object of life insurance must be clear to the dullest apprehension. The forfeitures already divided or set apart as profits for the survivors under this system, if applied under the *Massachusetts* law, would have provided for dependent family support to the amount of tens of millions of dollars. The companies engaged in Tontine business claim a notable financial success. If the corporations, expensively carried on, get wealthy out of it, and certain of the investment policy-holders make great profits out of it, as the companies promise, it must be at grievous loss to somebody who can ill afford the loss."

To the views of which the above is an expression, the legislative report, above quoted, replies as follows: "The whole testimony obtained by the committee disproves this charge. The rates of discontinuances, except in the first two or three years, when the conditions of the two contracts are similar, are far less among Tontine than among non-Tontine policies, and this is easily ac-

counted for. The penalty in case of lapse, and the reward in case of persistence, are both greater. The definite promise to pay a large sum in cash at the end of the Tontine period, as surplus and guaranteed surrender value, furnishes a substantial collateral, available, if necessary, to borrow money to pay premiums, and would thus enable a Tontine policy-holder to keep up his insurance when an ordinary policy-holder would be compelled to lapse, or to accept (as a semi-Tontine policy-holder might also do) a small paid-up insurance. Human nature is so weak that it often neglects duties which are for our own interest or benefit, unless there is a penalty for the non-performance, or a reward for the performance of the same."

1. "Encyclopedia Britannica," vol. 23, p. 444.

2. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

3. "Policies of this character are kept in classes of 10, 15, and 20 years, according to their Tontine periods; and while the funds of each class are not kept separate, distinct accounts are kept with each class so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its Tontine period." Pierce v. Equitable Life Assur. Soc., 18 Ins. L. J. 111; 145 Mass. 56; 1 Am. St. Rep. 433.

4. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

5. Tabor, "The Three Systems of Life Insurance" (1886), p. 39.

miums, and (b) apportionment of dividends, or the participation of the insured in the profits of the company.¹ These two features, then, will be briefly noticed.

b. FORFEITURE.—By the provisions of early policies of insurance, the holder who failed at any time to pay his premiums was deprived of all future² benefits from the contract. Not only did he not receive any allowance of credit for past payments, but the policy itself ceased to be operative upon the occurrence of the default. The hardships of this provision seem not to have been felt, sufficiently, at least, to bring about a change, until 1861, when the legislature of *Massachusetts* enacted the famous non-forfeiture law, by which so much insurance as the sum of premium payments would purchase, was secured to the defaulting policy-holder.³ Statutes having a similar purpose have been

1. *Massachusetts Life Ins. Rep.* 1885, p. 45. Tabor, in the work above cited, sets out (p. 39), the exclusively Tontine provisions as follows: "The first stipulation is as follows: 'No dividend shall be allowed or paid upon this policy until the person whose life is insured thereby shall survive the completion of its Tontine dividend period, and unless this policy shall then be in force.' The period referred to is either ten, fifteen or twenty years, according to the choice made by the policy-holder in his original application. The effect of this stipulation is that each premium must be paid in full in cash, during the Tontine period, without being reduced by dividends. The second stipulation is: 'Previous to the completion of its Tontine dividend period, this policy shall have no surrender value in a paid-up policy or otherwise.' The effect of the stipulations above quoted is to produce savings to the company, first, in not paying out dividends, and secondly, in not issuing paid-up policies in case of lapse. The value of such savings, with their accumulations, is credited to the Tontine policies which complete their respective periods."

2. The "protection" or insurance which he had enjoyed was supposed to constitute a past benefit.

3. *Massachusetts Stats.* 1861, ch. 186. Since this act is at once the starting-point and model of American legislation on this subject, its provisions are here quoted in full:

"Section 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this commonwealth, shall be forfeited or become void by the non-payment of

premiums thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the 'combined experience' or 'actuaries' rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be canceled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"Sec. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease; and provided also, that the company shall have the right to deduct from the amount insured in the policy, the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

enacted in various other states.¹ The life-insurance companies, also, induced by this reformatory legislation, as well as by competition, have inserted corresponding provisions in most of their contracts, so that now the holder of the ordinary policy may protect himself from a total loss of payments thereunder.

The Tontine policy, however, is in this regard a return to the original type. The scheme upon which it is based requires for its fullest success the addition of all lapses, or accumulated payments on policies the holders of which are subsequently in default to the Tontine fund.² Hence, even in those states where non-forfeiture laws are in force, Tontine policies are excepted from their provisions, and the clause in such policies which provides for prompt payment of premiums under penalty of losing all rights in the contract, is rigidly applied.³ Such is the first characteristic of the Tontine contract.

c. NON-PARTICIPATION.—Another advantage which marks the modern policy of life insurance as different from the old, is the privilege which it usually confers upon each holder of sharing in the profits of the company which issues it. This is commonly termed the distribution of dividends,⁴ and is a feature necessarily absent from the Tontine contract. For, by the latter, these profits or dividends, instead of being distributed regularly among all policy-holders, are set aside and accumulated into a general fund, to be shared at the end of the Tontine period, only by those of that class of policy-holders who then survive.⁵ This plan is valid and will be protected by the courts.⁶ Until the expiration of the Tontine period, a beneficiary has no interest in the general fund, and no distribution thereof can be compelled;⁷ nor can the company be required to invest the Tontine fund separately from other funds.⁸

1. See Richards on Insurance, pp. 580, 581, where the text of some of these statutes is given.

2. Tabor, "The Three Systems of Life Insurance" (1886), p. 43; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 427; 4 Am. St. Rep. 482.

3. *Alexander on Life Insurance*, p. 12; *Pierce v. Equitable L. Ins. Co.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, where the court says: "The plaintiff has forfeited all her rights under the policy named as a contract of insurance, by the failure to pay the annual premiums, and so her rights are foreclosed for that reason on this branch of the case." And again (p. 157): "It must be borne in mind, after all, that the plaintiff never acquired any vested rights in the Tontine fund,

because she voluntarily ceased the payment of premiums, and her policy lapsed for that reason before the expiration of her Tontine period."

4. See *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 156.

5. Tabor, "The Three Systems of Life Insurance," p. 39; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 427; 4 Am. St. Rep. 482; *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110; 1 Am. St. Rep. 433.

6. See cases in following notes, and compare *Alexander on Life Insurance*, p. 12.

7. *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150, 154.

8. *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309.

II. THE STATUS OF POLICY-HOLDERS.—The Tontine relation has been compared to a partnership,¹ but the comparison is correct only in a general and popular sense. It has been expressly decided that holders of ordinary policies in companies organized on the stock plan are not partners, even though they share to a limited extent in the profits.² The same has been held of members of mutual life-insurance companies,³ and unincorporated benefit associations.⁴

There seems to be no decision which applies a different rule to Tontine policy-holders, and the prevailing doctrine, which denies to them the right to compel an accounting,⁵ practically settles their status as different from that of partners.

Nor are the holders members or stockholders of the company which insures them. Since they do not participate in the management of the company, or enjoy other rights of membership, they are not subject to its burdens.⁶

There seems to be somewhat more difficulty in determining whether the relation of trustee and *cestuis que trustent* exists

1. The Policy-holders are not Partners.

—“A Tontine policy-holder is somewhat like a special partner, putting capital into a mercantile business for a term of years. He would not be allowed to withdraw his capital at will—that might ruin the business—but at the end of the partnership period he would have the right to withdraw his entire capital and his full share of the profits.” Report of Committee of Ohio Legislature, appointed to investigate insurance, 1885. “The name of a partnership composed of creditors or recipients of perpetual or life rents or annuities, formed on the condition that the rents of those who may die shall accrue to the survivors, either in whole or in part.” Bouv. L. Dict.

2. “There is a provision in the charter of this company that the stockholders may receive a semi-annual dividend of not exceeding three and one-half per cent. and that, at intervals of three years, the net profits, after paying such dividends, shall be paid, twenty per cent. to the stockholders, and eighty per cent. to the policy-holders. It is claimed that this sharing in the profits makes the policy-holders partners. These profits were not to be paid to them as the income of any business which they were carrying on or in which they were interested. They were the profits of the company in its business. The policy-holders could make no profits. They could never receive back more money than they paid,

and never as much, interest upon their payments being taken into account; and hence any dividend to them under this charter could in no proper sense be called, as to them, profits. As to the company, they might be profits earned by good management and too large premiums—profits earned solely out of the stockholders. These so-called profits, when divided, would be simply an equitable adjustment of premiums paid. If such profits should exist, they would show that the company had been exacting more premiums than were just and fair; and the excess was to be refunded in this mode. This novel claim of partnership is not sustained by any authority.” *People v. Security L. Ins., etc., Co.*, 78 N. Y. 123-4; 34 Am. Rep. 522. See, to the same effect, *Bewley v. Equitable L. Assur. Soc.*, 61 How. Pr. (N. Y.) 345; 10 Ins. L. J. 636.

3. *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

4. *Brown v. Stoerkel*, 74 Mich. 269. But see *Pritchett v. Shafer*, 2 W. N. C. (Pa.) 317.

5. See *infra*, this title, *Accounting*.

6. **The Policy-holders are not Members or Stockholders.**—“The plaintiff is not a member of the corporation, but its creditor, who has contracted with it. At the end of a fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have appor-

between the insurer and its Tontine policy-holders. A life-insurance company is not, according to the great weight of authority, a trustee for the holders of its ordinary forms of policies.¹ And so far, at least, a similar view has been adopted concerning the relation of the company to its Tontine policy-holders.² Even in *Massachusetts*, where the right to an accounting is allowed to the insured, the absence of any trust relation has been at the same time admitted.³ In *Illinois*, however, a different theory is advanced. There the Tontine fund seems to be regarded in the light of trust money, of which the officers of the company are trustees and the policy-holders are beneficiaries.⁴

On the whole, it seems that the status of Tontine policy-holders is not materially different from that of mere general creditors of

tioned to him his share of a certain computed fund. The defendant has no right to withhold it, as a corporation may withhold a dividend from a stockholder." *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 114.

1. Are the Policy-holders *Cestuis Que Trustent*?—*Hencken v. U. S. L. Ins. Co.*, 9 Ins. L. J. 912; 16 N. Y. Weekly Dig. 44; *Bewley v. Equitable L. Assur. Soc.*, 61 How. Pr. (N. Y.) 345; *Matthew v. Northern Assur. Co.*, L. R., 9 Ch. Div. 80. Compare *Re Haycock's Policy*, L. R., 1 Ch. Div. 611; *Lothrop v. Stedman*, 42 Conn. 589.

In *Hencken v. U. S. L. Ins. Co.*, 9 Ins. L. J. 916-17, the court said: "The position taken in plaintiff's behalf is substantially that the defendants were administering a trust fund, of which they were 'cestuis que trustent,' and having made profit by advantage taken of unsuspecting policy-holders, they (plaintiffs) are enabled to set aside the transaction, irrespective of the fact whether or not they suffered damage. A trustee cannot deal with trust funds to his own aggrandizement; the profit will inure to the beneficiary. But there is no such relationship here. Where is the fund in which the plaintiffs as policy-holders have an interest? The counsel intimates it to be the accumulated assets of the corporation over and above the capital stock. If this be sound, there is a right of property belonging to some one at some time. When, and to whom, and how, and by whom, is its amount to be ascertained? When the sum insured is paid to whomsoever entitled, it has been supposed all connection between the parties to the policies ends. The premiums have been met, and the contract of the company ful-

filled. The idea of any rights in plaintiff beyond those secured by the policy at its maturity cannot be maintained. There being no trust, relation between them and the company, argument founded upon its existence cannot prevail, irrespective of the question whether or not the corporation realized profit."

2. "We are convinced, after a careful examination of the character of the relations existing between the parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity." *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 428-9; 4 Am. St. Rep. 482. See also *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; 9 Ins. L. J. 250; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100; *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110.

3. *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110.

4. In *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 257, the court said: "Such officers are trustees, having funds intrusted to their care, to be safely and honestly kept and administered, not for their own benefit, but solely for the promotion of the laudable objects for which the association is organized. It is a duty of primary importance, incumbent on all trustees, to keep proper accounts of trust funds; for unless that is done the beneficial owners are subjected to constant uncertainty as to their rights, and to a constant liability to be defrauded.

the company. Aside from the *Illinois* decision above referred to, the courts have expressly designated them as creditors,¹ and contracting parties with the company,² or, where they have not been so specific, have practically treated the relation as if it were merely one of debtor and creditor.³ Still, where this theory would favor one class of policy-holders to the prejudice of others, it is not followed. Thus, under a plan by which mutual benefit certificates were issued, maturing in twenty-eight years, with eight equal periods of distribution, it was held that, in proceedings to wind up the concern, members whose certificates had earned the amount of the first distribution, were not creditors, in the sense that such amount could be paid in full out of the assets of the company, but that these assets were to be shared equally among all members.⁴

III. RIGHTS OF INSURED AND BENEFICIARIES—1. Accounting.—

Probably the most important question with which the courts have yet been called upon to deal in connection with Tontine policies, is the right of a holder of such policy to demand an accounting from the company in respect to his interest in the Tontine fund. The peculiar nature of this fund and its partial dependence upon the skill and fidelity with which it is managed, have not unnaturally resulted at times in dissatisfaction on the part of the insured, which has led to a resort to the equitable remedy of accounting. So far there has been a marked difference of

Next to the duty of honestly administering a trust fund is that of keeping a true, honest and intelligent account of such administration."

1. *Are the Policy-holders Creditors?*—*Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 18 Ins. L. J. 110.

2. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 429; 4 Am. St. Rep. 482.

3. *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; 19 Ins. L. J. 250; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100.

4. In *Re Order of Fraternal Guardian's Estate* (Pa. 1894), 28 Atl. Rep. 482, the supreme court adopted the opinion of the auditor, who says: "The matured certificate-holders claim to be creditors of the order for the amount of the first payments on their certificates, and, in support of this position, relied upon two cases: *Vanatta v. New Jersey Mut. L. Ins. Co.*, 31 N. J. Eq. 15, and *Mayer v. Atty. Gen'l*, 32 N. J. Eq. 820. While the above appear to be two cases, they are really one, as the same case came twice before the court in settlement of the one insurance

company, and they may, therefore, be considered together. In the settlement of the affairs of the New Jersey Mutual Life Insurance Company, which had become insolvent, there appeared to be three classes of claimants: (1) Endowment policies, that had matured by lapse of time previous to insolvency; (2) policies upon which, before insolvency, all payments had been made that were ever to be made, but the time of maturing the policies did not expire until after insolvency; (3) unmatured policies. In marshaling the assets, the court treated the first-named endowment policy-holder as a creditor, and awarded him payment in full out of the assets, on the ground that he had terminated his membership, and become a creditor; the other two policy-holders came in afterwards, *pro rata*. . . . The certificate-holder here was a member for twenty-eight years. He was still a member after his first installment became due, and he was bound to pay further assessments, and continue to take part in the management of the order. The auditor cannot bring this case within the ruling of *Mayer v. Atty. Gen'l*, 32 N. J. Eq. 820."

opinion as to granting the remedy. The courts of *New York* have refused it to the Tontine policy-holder, on the ground that he is a mere general creditor of the company.¹ So in the federal courts,² and in the province of *Ontario*,³ the division of the Tontine fund is viewed as a matter which rests largely in the discretion of the company's managers, and with which the courts will not interfere by compelling an accounting.

On the other hand, it is held in *Massachusetts* that the holder of such a policy is entitled to an accounting, not on the ground that he is a *cestui que trust*, and the insurer a technical fiduciary,⁴

1. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; 4 Am. St. Rep. 482, *distinguishing and overruling the dictum* in *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328. In the case first cited, the court said: "We think the payment of a premium by the policy-holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded there is no such relation of trustee and *cestui que trust*. (See *Foley v. Hill*, 2 H. of L. Cas. 28, 32.) By the very terms of this policy, the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund; so that the dividend which may come to the plaintiff or any other policy-holder depends upon numerous contingencies, and in relation to all these matters the parties have agreed, in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, 'shall be apportioned equally among such policies of the same class as shall complete their ten-year dividend period.' Here is the extent of the obligation of the defendant—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the Tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendant. The situa-

tion of the parties is that of a debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment which, taking the language of the policy into consideration, necessarily means that the appointment (apportionment) is to be made by the corporation through its officers."

2. *Hunt v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100.

3. *Bain v. Aetna L. Ins. Co.*, 20 Ont. 6.

4. In *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 18 Ins. L. J. 110, the court, by Devens, J., observes: "It is said that the plaintiff has a sufficient remedy at common law; that he can bring his action at law; and that, upon proper interrogatories addressed to the defendant, all the information necessary for the proper adjustment of the account may be obtained. But even if an action at law could be maintained, where an account is complicated so that a full examination and settlement of previous accounts, transactions, or methods of business are necessary, and where the whole matter is entirely within the knowledge of the defendant, it cannot so conveniently or accurately be investigated at common law as in equity. . . . That the accounts are singularly complicated, and that the method by which the value of the shares of the plaintiff which he has obtained by full payment of his premiums and completion of his Tontine period is ascertained, is one of much complexity and difficulty in its application, appears from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account from the data in its possession which shall show that it has complied with its promise equitably to

but by virtue of the general jurisdiction over accounts conferred on courts of equity by the statute of that state.¹ It is noticeable however, that the *United States* court, in accordance with the rule above indicated, though sitting in *Massachusetts*, and construing the same statute, refuses to allow an accounting.² In *Illinois*, the supreme court, while not passing specifically upon the right to an accounting, holds that the officers of the company are trustees of the Tontine fund,³ and this doctrine would seem to include the right of the insured to compel them to account for its administration.

2. Reformation of Policy.—The reluctance of the court of *New York* to interfere with the management of the Tontine fund, is shown not only in suits for an accounting, but also in applications to reform Tontine policies. That the insured was induced to enter into his contract by representations that his share in the fund, at the end of the Tontine period, would be much larger than it proved, has been regarded as insufficient to entitle the beneficiary to a reformation of the policy.⁴

apportion to the plaintiff his share in the accumulations made through the operation of the Tontine provisions in his policy."

1. *Massachusetts* Pub. Stat., ch. 152, § 2, cl. 10, which confers such jurisdiction "where the nature of an account is such that it cannot be conveniently and properly adjusted in an action at law."

2. See cases cited in note 2, p. 66.

3. See *supra*, this title, *The Status of Policy-holders*.

4. *Avery v. Equitable L. Assur. Assoc.*, 117 N. Y. 451; 19 Ins. L. J. 250; *Simmons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309; 15 Ins. L. J. 150. In the former case the complaint alleged that it was agreed that the insured might withdraw, at the end of the Tontine period, the sum of \$7,170, and referred to an attached memorandum given to the insured, which named this sum as one of the "Estimated Results." It was also alleged that the company had refused to pay this sum and had allowed only \$5,076.80. Plaintiff prayed for such a reformation of the contract as would insert the sum of \$7,170 as a substitute for the Tontine clause, which provided that the insured might withdraw "the policy's entire share of the assets." The court, after discussing the general principles upon which contracts may be reformed, says: "Does the plaintiff make out an equitable case for the interference of the court? I am unable to say that she

does. We must consider the question as affected by the incorporation of the contract in the plaintiff's complaint. She does not pretend that any fraud or any imposition was practised upon her, by which she was induced to accept the policy, nor that there was any fraudulent suppression or omission of any part of their agreements. She does not show that there was some mistake in the contract of assurance, which was mutual or which resulted in mutual error. Her whole subject of complaint is that the defendant's representation as to the sum payable in a certain contingency was not contained as an agreement of the policy. But is that a well-founded basis of complaint on her part? What was solicited of her husband to take out, and what he agreed to and did accept, was a peculiar form of policy, differing from the plain and ordinary contract of life assurance, under which the defendant would become liable for a certain sum, and only upon the death of the assured. Under the policy negotiated for, if the assured survived the stated period of fifteen years, the sum he might elect to receive in cash was, in its nature, uncertain, and, in the nature of things, incapable of being exactly computed in advance. This appears from the language of the policy itself, which describes it as issued under the Tontine savings fund plan, and indicates its speculative possibilities, in declaring it entitled to an equitable apportionment,

3. **Assignment of Policy.**—The right of the assured to assign his policy so as to confer upon another the power to receive the full benefit of its provisions, is not so extensive as in the case of most other contracts, for the parties in interest in the modern life-insurance policy, as a rule, include not only insurer and insured, but the beneficiary as well. The latter is usually¹ regarded as having a vested right in the contract, such as no assignment can impair.² So the insured in a Tontine policy, where the beneficiaries pay the premiums, cannot assign it so as to affect the right of the latter, even though it provides that the surplus dividends, if any, shall be payable to the insured "or assigns."³ Of late, however, policies are often made payable to the insured's estate, and where such is the case, a Tontine assignment of the same to a fiducial agency is valid, and payment to the latter is a good defense to an action by the administrator.⁴

with other like policies, of the surplus or profits derived from such policies in the class as shall cease before the completion of their respective Tontine dividend periods. The plaintiff expressly alleges that such was agreed upon as the policy, and the memorandum which she rests upon as presenting what was to be the defendant's agreement of assurance, describes the proposed policy as of that nature." Then, as to the legal effect of the estimates, it is further observed: "I think we may assume that the defendant's officers made these estimates as liberal as it was possible, and that they represented the chances in as favorable a light as they could. That is quite possible and probable; but that assumption would not affect the question. The results of such a plan of assurance were matters of opinion, and they are not considered as important in equity. The avenues of inquiry were equally open to the parties, and probably the experience of the officers was of more use to them than to the general public. Their statements of what the assured might possibly gain under that plan do not amount to misrepresentation; and if the assured accepted the policy relying upon them, and the result is not as supposed or estimated, that presents no ground for relief. It was, and in the very nature of the plan could only be, problematical or speculative. The figuring out of the chances of the assured, in the chances of all of his class, could only be based on hypothetical facts and figures."

1. But not always. There is some

conflict in the authorities, but the weight is strongly in favor of the rule stated in the text. See Cooke on Life Insurance, pp. 123-126, and notes.

2. In *Washington Central Bank v. Hume*, 128 U. S. 195, the court, by Fuller, C. J., said: "It is indeed the general rule that a policy and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named," citing *Bliss on Life Ins.* (2d ed.), p. 517; *Glanz v. Gloeckler*, 10 Ill. App. 484; 104 Ill. 573; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289; *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419; 4 Am. Rep. 328; *Gould v. Emerson*, 99 Mass. 154; 96 Am. Dec. 720; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157.

3. *Ferdon v. Canfield*, 104 N. Y. 143; 17 Ins. L. J. 73, holding also that although the title of defendants, who were claiming as assignees of the beneficiaries, might be incomplete, the plaintiffs were not bettered thereby.

4. In *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, the arrangement involved a new application of the Tontine plan. It appears to have been in the usual form of certificates of membership in mutual benefit societies. The Tontine provisions were supplied by a separate instrument, assigning the certificate to the fiducial agency which was described as the trustee and assignee of the

TOOK.—See note 1.

TOOLS.—(See EXECUTIONS, vol. 7, p. 135; STATUTES, vol. 23, p. 399).—The word comprehends, in its general acceptation, instruments and implements of manual operation, particularly such as are used by mechanics and farmers.² But the word, as used in exemption laws, is not confined to such instruments as are actually used with the tradesman's own hands.³ Nor, when tools necessary for the prosecution of a trade or occupation are exempted, will the exemption be confined to those only which are absolutely necessary, but may include those of an expensive and improved character.⁴ Yet, on the other hand, the most liberal

holders of ten such certificates. These constituted the Tontine class, the survivors of which were to share the profits from the ten certificates. The court also held that the arrangement was lawful and was not a gambling contract.

1. In *Harrison v. Manship*, 120 Ind. 43, a complaint charging that the defendant "*took* and drove off my ducks and sold them" without a colloquium or innuendo, was held to state no cause of action. But in *Stringham v. Cook*, 75 Wis. 589, it was held that a complaint alleging that the defendant wrongfully "*took*" timber from the lands, was a substantial charge of "wrongful cutting."

2. *Lovewell v. Westchester F. Ins. Co.*, 124 Mass. 418; *Oliver v. White*, 18 S. Car. 235.

In *State v. Zaddock*, 6 Vt. 594, it was held that the crucible was not a tool or instrument, under a statute of the *United States* making it a criminal offense for one to have in his possession any dye, stamp, or instrument or tool . . . for the purpose of forging or counterfeiting.

In a Policy of Insurance—Patterns.—Patterns used in manufacturing are included within the meaning of the word "tools," used in an insurance policy insuring fixed and movable machinery, engines, lathes, and tools. *Lovewell v. Westchester Ins. Co.*, 124 Mass. 418. So a policy of insurance on "tools used in the manufacture of boots and shoes," covers patterns for making boots and shoes. *Adams v. New York, etc., Ins. Co.* (Iowa, 1892), 51 N. W. Rep. 1149.

3. In *Howard v. Williams*, 2 Pick. (Mass.) 83, Lincoln, J., in reference to the statute exempting tools, said: "The design and effect of the law are to secure to handicraftsmen the means by which they are accustomed to obtain

subsistence in their respective occupations. The exemption is not limited merely to the tools used by the tradesman with his own hands, but comprise such in character and amount as are necessary to enable him to prosecute his appropriate office in a convenient and usual manner, and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each particular case. It would be too narrow a construction of a humane and beneficial statute to deny to tradesmen, whose occupation can hardly be prosecuted at all, much less to any profitable end, without the aid of assistance, as journeymen and apprentices, as a necessary means of their employment."

So in *Daniels v. Hayward*, 5 Allen (Mass.) 43, it was held that machines of simple construction, moved by the hand or foot, used in the manufacture of boots, were exempt, although the owner employed a number of men under him, by whom the machines were used.

But where the owner of tools is not a tradesman, and does not use them himself, but employs others to work for him, the tools are not exempt. *Abercrombie v. Alderson*, 9 Ala. 981.

4. *Seeley v. Gwillim*, 40 Conn. 106; *Caswell v. Keeth*, 12 Gray (Mass.) 351.

In *Healey v. Bateman*, 2 R. I. 454, it was said that it certainly could not have been intended that the term "tools necessary for his usual occupation" should be understood to mean those of absolute necessity; namely, those without which the debtor could not prosecute his work at all, but such as are reasonably necessary for the prosecution of it advantageously and usefully. Any other construction would be very little protection, since any mechanic may in some way go on with his work with a

definition of the words "working tools" will not include complicated machinery.¹ So the simple instruments used in husbandry may properly come within the exemption,² but not a threshing machine.³

For numerous illustrations of what have been held to be within the meaning of working tools, implements, etc., as used in exemption laws, see note 4.

very much smaller amount of tools than are supposed to be necessary for doing his work to advantage.

1. *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. (Mass.) 143; *Ford v. Johnson*, 24 Barb. (N. Y.) 34; *Boston Belting Co. v. Ivens*, 28 La. Ann. 596; *Knox v. Chadbourne*, 28 Me. 160; 48 Am. Dec. 487.

In *Buckingham v. Billings*, 13 Mass. 82, the court said that the statute exempting tools should be understood to designate those simple instruments which are commonly used by the hand of man in some manual labor necessary for his subsistence, and not complicated machinery and expensive utensils which might be of great value. But see *Patton v. Shepard*, 4 Conn. 450.

In *Batchelder v. Shapleigh*, 1 Fairf. (Me.) 135, a mill saw was held not to be a tool. And in *Kilburn v. Demming*, 2 Vt. 404, an instrument called a "billy and jenny," used for spinning and manufacturing cloth, was held not a tool.

In *Sylvester v. Seymour*, 35 Vt. 427, a machine for shaving and splitting leather operated either by hand or steam, was held not to be exempt from attachment as a tool necessary for upholding life.

The printing or stamping block of a painter of oilcloths of an expensive kind, used in the business requiring extensive buildings and numerous workmen, are not necessary tools to the tradesman. *Riche v. McCauley*, 4 Pa. St. 471.

A gin and grist mill, are not exempt as tools, *Cullers v. James*, 66 Tex. 494; nor a weaver's loom, *McDowell v. Shotwell*, 2 Whart. (Pa.) 26.

In *Seeley v. Gwillim*, 40 Conn. 160, where a debtor carried on the business of bookbinding and manufacturing blank books with the assistance of several employes, and for the purpose had sundry machines, all of which were operated by hand, and all of which, as well as the tools, would have been needed if he had done the work alone, it was held that the machines were not exempt, although the tools were.

2. *Pierce v. Gray*, 7 Gray (Mass.) 67; *Wilkinson v. Alley*, 45 N. H. 551. A farmer's plow, cart-wheels and rigging, harrow, drags, etc., have been held to be tools. *Wilkinson v. Alley*, 45 N. H. 551. But see *Dailey v. May*, 5 Mass. 313.

In the *Vermont* statute exempting "such tools as may be necessary for upholding life," the word "tools" has been held to extend to such farming tools as are used by hand and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, and other tools of a like character; but does not include machinery or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers. The court said: "We think this a sound, reasonable construction of the statute, and we see no reason why one who carries on farming to any extent should not have such simple mechanical tools exempt from attachment as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as much as a mechanic. He is, or may be compelled to perform such mechanical work in order to get along with his ordinary farming operations, and if so, he must have the tools and should hold them exempt from execution." *Garrett v. Patchin*, 29 Vt. 248; 70 Am. Dec. 414.

3. *Myer v. Myer*, 23 Iowa 359; *Ford v. Johnson*, 24 Barb. (N. Y.) 364.

4. **Musical Instruments.**—It has been held that the piano of a music teacher, used in her profession or business, is an implement, and exempt. *Amend v. Murphy*, 69 Ill. 337. So, a violin and bow of a musician. *Goddard v. Chaffee*, 2 Allen (Mass.) 395. So, also, a cornet. *Baker v. Willis*, 123 Mass. 95; 25 Am. Rep. 61.

Watches.—Where a watch was hung up for use in a house, the family having no clock, whose daily avocations were such in nature that a timepiece was indispensable, it was included within the term working tools in *Bitting v. Vanderburg*, 17 How. Pr. (N. Y.) 80. But in *Rothschild v. Boelter*, 18

The tools of one who abandons his trade are no longer exempt.¹ A mere suspension of operation, however, does not constitute such an abandonment as will render them liable to execution.²

Minn. 361, it was held that the watch of a cigar-maker, used by him to time his workmen, was not exempt as an instrument used for the purpose of carrying on his trade. "His workmen could make as many, and as good cigars, if he were to keep their time and 'regulate his duties,' whatever that may mean, by the sun."

Dentists' tools come within the meaning of mechanical tools. "A dentist, in one sense, is a professional man, while in another sense his calling is made mechanical, and the tools he employs are used in mechanical operations." *Maxon v. Perrott*, 17 Mich. 342. See also *Duporron v. Communi*, 6 La. Ann. 789. But see *Whitcomb v. Reed*, 31 Miss. 567, where it was held that dentistry was not a trade, nor a dentist a mechanic.

Miscellaneous.—A hunter's gun has been regarded as a tool, *Choate v. Redding*, 18 Tex. 581; also a fisherman's net and boat, *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444; a canal boatman's towline has been exempted as a working tool, *Fields v. Moul*, 15 Abb. Pr. (N. Y.) 6; a barber's chair and foot-rests, are tools. *Allen v. Thompson*, 45 Vt. 472.

The abstracts, a cabinet, and a table of an abstractor of titles, have been held to be tools and instruments exempt from execution. *Davidson v. Sechrist*, 28 Kan. 232.

Cheese vats, presses, and knives of a person engaged in making cheese, have been held exempt from execution. *Fish v. Street*, 27 Kan. 270.

The surgical instruments of a physician have been held to be exempt as his tools. *Robinson's Case*, 3 Abb. Pr. (N. Y.) 416. And so the office furniture of a practicing lawyer. *Abraham v. Davenport*, 73 Iowa 111. But a lawyer's library was not exempt under a statute exempting "the common tools of a man's trade." *Lenoir v. Weeks*, 20 Ga. 596.

Shop or Building.—In *Holden v. Stranahan*, 48 Iowa 70, it was held that the building in which a photographer or mechanic carries on his business, even though it be personal property, is not exempt from execution as tools.

1. *Willis v. Morris*, 66 Tex. 629;

Norris v. Hoyt, 18 N. H. 196; *Davis v. Wood*, 7 Mo. 196. See also *Miller v. Menke*, 56 Tex. 539; *McDonald v. Campbell*, 37 Tex. 614. See *EXECUTIONS*, vol. 7, p. 135.

2. *Harris v. Hayne*, 30 Mich. 140.

In *Caswell v. Keath*, 12 Gray (Mass.) 352, it was said that, "The distinction between withdrawing from the pursuit of a particular trade or occupation, with the determination never to resume it, and a temporary diversion from its prosecution, while engaged in conducting some other business or enterprise not intended to be of permanent or durable continuance, is clear and definite. . . . To secure to himself the privileges and benefits intended to be conferred by the provisions of the statute, an artisan is not required to ply his trade without any possible interruption or the occurrence of any interruption in its pursuit. If, for instance, owing to the general stagnation of business, he cannot, for a season, find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, as long as he entertains an intention to return, as soon as circumstances will permit, to occupation and employment in his trade, be said to have given up or abandoned it. The tools and instruments requisite to carry it on in the usual and ordinary manner in which such business is conducted are, in the meantime, still things of necessity to him within the meaning of the law." The court further says that the provisions of all the statutes upon this subject are intended for the relief and benefit of persons possessed of little property, and dependent upon their daily labor, or the moderate income derived from their usual and ordinary avocations, and should be so interpreted as to effectuate this obvious purpose of their enactment.

A carpenter who enlisted as a volunteer in time of war does not so abandon his trade as to render the tools thereof liable to seizure under execution. *Abrams v. Pender*, Busb. (N. Car.) 260.

TORTS.

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I. DEFINITION.—"The word tort means nearly the same thing as the expression civil wrong. It denotes an injury inflicted otherwise than by mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties."¹

II. DISTINGUISHED FROM CONTRACTS AND CRIMES.—A tort may be distinguished from a contract, in that a contract involves the agreement of at least two parties, whereas a tort, as such, involves no agreement.² Persons jointly committing torts are, as a rule, severally liable without any right of contribution from each other.³ In many cases, persons under disability to make contracts are nevertheless liable for their torts;⁴ and at common law

1. Bish. on Non-contract Law, § 4. The author adds: "Of course the wrong must be of a sort which the law redresses; not a mere infraction of good morals."

"The word torts is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor rights from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of contracts, torts, and crimes. Contracts include agreements, and the injuries resulting from their breach. Torts include injuries to individuals; and crimes, injuries to the public or the state." Bouv. L. Dict., *tit.* "Torts;" 1 Hill on Torts, 1.

"A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract." Pollock on Torts, 4.

"In general it may be said, that whenever the law creates a right, the violation of such right will be a tort; and wherever the law creates a duty, the breach of such duty, coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute." Bouv. L. Dict., *tit.* "Torts."

Scope of this Title.—As the whole law of torts has been treated, or will be treated, in various titles throughout this work, it is deemed unnecessary to attempt a comprehensive treatment of the subject here. But it is believed that an analysis, accompanied by specific cross-references to other titles where the law will be found, will be helpful to those who consult this title.

2. See CONTRACTS, vol. 3, p. 823. See also Pollock on Torts, p. 1.

3. CONTRIBUTION, vol. 4, p. 12.

4. CONTRACT, vol. 3, p. 862; IN-

the death of either party destroys the right of action for a tort.¹ The line of demarkation between contracts and torts is not, however, perfectly defined. Many torts arise out of a state of facts which constitutes also a breach of contract, and in that event, the injured party may elect to bring his action either *ex contractu* or *ex delicto*.² Again, there are cases in which a tort may be so committed as to give rise to an implied contract; as where one wrongfully disposes of the property of another and receives the consideration therefor. In such cases the injured party may waive the tort, and sue on the contract for the consideration received by the wrongdoer.³

So, too, the same state of facts may constitute a crime for which the offender may be prosecuted at the suit of the public or state, and a tort for which the injured party may maintain a civil action for damages.⁴

It was once supposed to be the law in *England*, that if the crime amounted to a felony, the injured party's civil remedy was merged in the felony,⁵ but it has long been settled that in such

FANTS, vol. 10, p. 668; MARRIED WOMEN, vol. 14, pp. 604, 647; INSANITY, vol. 11, pp. 132, 144.

1. See SURVIVAL OF ACTIONS, vol. 24, p. 1027.

2. ELECTION, vol. 6, p. 247.

Judge Cooley says: "It is customary in the law to arrange the wrongs for which individuals may demand legal redress, into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner which puts the contract out of view. Imperfect as it is, however, the classification has been found sufficient for judicial purposes. And where forms of action have been abolished by statute, the old distinctions are still kept in view in giving redress, and while thus the common law classified wrongs, it appropriated the generic term to one class of wrongs only. Breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically, wrongs or torts, and the actions by which redress was to be obtained, were called actions for torts, or

actions *ex delicto*." Cooley on Torts (2d ed.) 2.

3. ASSUMPSIT, vol. 1, p. 888; ELECTION, vol. 6, p. 247.

4. 3 Bl. Com. 122.

"The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals merely as individuals. Public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." 4 Bl. Com. 5.

Judge Cooley says: "Certain acts or omissions are made public offenses by the common law or by statute, either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them, and penalties are attached to them, which are imposed on public grounds. These, according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But where the same wrongful acts cause damage to private individuals, they come directly within the definition of torts, and are such." Cooley on Torts (2d ed.) 84.

5. In *Higgins v. Butcher*, 1 Yelv. 89;

cases, the trial of the civil action may be suspended only until the offender has been prosecuted for the felony.¹ The latter rule has found support in some jurisdictions in the *United States*,² but in others, it is held that the civil remedy is in no way dependent upon the prosecution of the offender to conviction or acquittal.³

1 Brownl. 205, there is the following *dictum* by Tanfield, J., to which Fenner and Yelverton, JJ., are said to have assented: "If a man beats the servant of J. S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of service, because, the servant dying of the battery, it has now become an offense to the crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before; his action is thereby lost."

1. Crosby v. Leng, 12 East 409; Goightly v. Ryn, Lofft. 88; Lutterell v. Reynell, 1 Mod. 282; White v. Spettigue, 13 M. & W. 603; Osborn v. Gillett, L. R., 8 Exch. 88; Wells v. Abrahams, L. R., 7 Q. B. 554.

In Crosby v. Leng, 12 East 409, Lord Ellenborough, C. J., said: "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution."

2. Hutchison v. Bank of Wheeling, 41 Pa. St. 42; 80 Am. Dec. 596; Foster v. Tucker, 3 Me. 458; 14 Am. Dec. 243; Boody v. Keating, 4 Me. 164; Crowell v. Merrick, 19 Me. 392; Belknap v. Milliken, 23 Me. 381; McGrew v. Cato, 1 Minor (Ala.) 8; Middleton v. Holmes, 3 Port. (Ala.) 424; Blackburn v. Minter, 22 Ala. 613; Martin v. Martin, 25 Ala. 201; Nelson v. Bondurant, 26 Ala. 341; Morton v. Bradley, 27 Ala. 640.

In *Maine*, it has been held, that the rule that a civil action in behalf of the party injured, is suspended until the criminal prosecution has been commenced and disposed of, is limited to larcenies and robberies. Boody v.

Keating, 4 Me. 164; Crowell v. Merrick, 19 Me. 392; Nowlan v. Griffin, 68 Me. 235; 28 Am. Rep. 45. But in that state it has been provided by statute, that an action for the recovery of property stolen, may be maintained by the owner against the person liable therefor, although the thief is not convicted. Rev. Sts. 1883, ch. 120, § 14. See Howe v. Clancey, 53 Me. 130; Carleton v. Lewis, 67 Me. 76.

In Neal v. Farmer, 9 Ga. 559, it was held that in cases of treason, and such crimes as are felonious by the common law, the person injured is not entitled to an action, until the offender is prosecuted to a conviction or acquittal. But in McBain v. Smith, 13 Ga. 315, it was held that one from whom personal property had been stolen in another state, might bring trover for the recovery of the same, before the thief had been prosecuted.

3. Green v. Hudson River R. Co., 28 Barb. (N. Y.) 9, 17; *aff'd* 2 Abb. App. Dec. (N. Y.) 277; White v. Fort, 3 Hawks (N. Car.) 251; Pettingill v. Rideout, 6 N. H. 454; 25 Am. Dec. 473; Quimby v. Blackey, 63 N. H. 77; Boston, etc., R. Co. v. Dana, 1 Gray (Mass.) 83, 96; Hyatt v. Adams, 16 Mich. 180. See also MERGER, vol. 15, p. 358.

In Pettingill v. Rideout, 6 N. H. 454, Richardson, C. J., said: "We are by no means satisfied that the rule is of any practical use in any country. But, however that may be, we are very well satisfied that the people of this state want no additional stimulants to prosecute offenders. Rogues are almost the only game our people have to pursue, and they are by no means backward in that chase. We do not believe that if the civil action and the criminal prosecution go forward together, the public justice will sustain any detriment whatever from that circumstance."

In Quimby v. Blackey, 63 N. H. 77, the court said: "The ancient rule, requiring a criminal prosecution of the offender before allowing a civil action, is not adapted to our situation and circumstances, and has not been adopted in this state. Pettingill v. Rideout, 6

III. PERSONS LIABLE FOR TORTS—1. For Their Own Torts.—As a rule, the personal status of a tort-feasor is immaterial in law in determining his liability, but capacity may be material as a question of fact.¹ Private corporations, as well as natural persons, are liable in damages for their torts,² and the rule, in a modified form, extends even to public corporations.³ Professional men are required to exercise such a degree of care and diligence as prudent men of fair ability in their respective professions would exercise, and for failure to do so, they are liable in damages.⁴ In many cases, public officers are liable for a failure to perform their official duties, and for wrongful acts in excess of their power when damages result therefrom.⁵

2. For the Torts of Others.—A parent may be held liable for the torts of his child, committed in the parent's service, and in doing work authorized or commanded by the parent.⁶ Likewise, the

N. H. 454; 25 Am. Dec. 473; *Hollis v. Davis*, 56 N. H. 74, 85. So far as *Grafton Bank v. Flanders*, 4 N. H. 239, may seem to hold otherwise, it has been overruled by subsequent decisions and universal practice and understanding."

In *Boston, etc., R. Co. v. Dana*, 1 Gray (Mass.) 83, the court, after a careful examination of the authorities on the subject, and the reasons for the rule, said: "There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence."

In *Hyatt v. Adams*, 16 Mich. 188, Christiancy, J., said: "But whatever considerations of public policy may have existed, or may now exist in *England*, requiring the offender to be tried and convicted, or acquitted on the criminal charge, before the civil action is allowed, I do not think that such considerations exist here, or at least to such an extent as to justify the suspension of the civil remedy, and I think the general understanding of the courts and the profession, in this state, has been that the civil remedy was in no way dependent upon the criminal prosecution."

1. As to the liability of infants for their torts, see *INFANTS*, vol. 10, p. 668; as to the liability of married women, see *MARRIED WOMEN*, vol. 14, p. 647; as to the liability of lunatics, see *INSANITY*, vol. 11, p. 144.

2. See *CORPORATIONS*, vol. 4, p. 250; *FOREIGN CORPORATIONS*, vol. 8, p. 369; *GAS COMPANIES*, vol. 8, p. 1273; *RAILROADS*, vol. 19, p. 930, and cross-

references there made; for the wrongful expulsion of passengers for the non-payment of fare, see *RAILROADS*, vol. 19, p. 905, and *STREET RAILWAYS*, vol. 23, p. 1016. See generally, *STREET RAILWAYS*, vol. 23, p. 1004. As to the liability of corporations for libel, see *LIBEL AND SLANDER*, vol. 13, p. 448; for the liability of banks for the wrongful dishonor of checks, see *CHECKS*, vol. 3, p. 225.

3. See *MUNICIPAL CORPORATIONS*, vol. 15, p. 1141; *quasi*-corporations, see *COUNTIES*, vol. 4, p. 364; *TOWNS AND TOWNSHIPS*, vol. 26.

4. For the liability of attorneys, see *ATTORNEY AND CLIENT*, vol. 1, p. 961; for the liability of physicians and surgeons, see *MALPRACTICE*, vol. 14, p. 76. See generally, *NEGLIGENCE*, vol. 16, p. 386.

5. As to the liability of public officers for malicious prosecution, see *MALICIOUS PROSECUTION*, vol. 14, p. 41; for the liability of notaries public, see *NOTARY PUBLIC*, vol. 16, p. 779; for the liability of judicial officers, see *JUDGE*, vol. 12, p. 32; as to the liability of sheriffs, see *SHERIFFS*, vol. 22, p. 529; for the liability of jailers for false imprisonment, see *FALSE IMPRISONMENT*, vol. 7, p. 685; for the liability of military officers for false imprisonment, see *FALSE IMPRISONMENT*, vol. 7, p. 685; and for the liability of such officers for their torts generally, see *MILITARY LAW*, vol. 15, p. 430. See generally, *PUBLIC OFFICERS*, vol. 19, p. 483.

6. See *PARENT AND CHILD*, vol. 17, p. 392, where the subject is thoroughly discussed.

master is liable for the torts of his servant, committed by the latter while acting within the scope of his employment;¹ and a principal may, under similar circumstances, be liable for the torts of his agent.² And on the principle that each partner is the agent of the firm, a partnership is liable for the torts of its members, committed within the scope of their agency.³ At common law, the husband is liable for the torts of his wife.⁴ In some jurisdictions, counties and municipalities are made liable by statute for damages caused within their borders by riotous mobs.⁵

IV. WRONGS AFFECTING PERSONAL SAFETY AND SECURITY.—1. Assault and Battery.—An attempt to do hurt to the person of another within reach, is an assault, and to strike or touch another in rudeness, anger, negligence, or in the commission of an unlawful act, is a battery. Both of these are personal wrongs for which a civil action will lie.⁶

2. False Imprisonment.—The total, or substantially total, restraint of one's freedom of locomotion, by threats or force, without authority of law and against his will, is a tort, for the commission of which the wrongdoer is answerable to the aggrieved party in damages.⁷

3. Malicious Prosecution.—One who maliciously institutes a prosecution against another, without a reasonable and probable cause, is guilty of a tort for which the party aggrieved may bring a civil action for damages after the termination of such prosecution.⁸

V. LIBEL AND SLANDER.—"Slander and libel are different names

1. See MASTER AND SERVANT, vol. 14, p. 804.

For the liability of the master for the willful and malicious acts of his servant, see MASTER AND SERVANT, vol. 14, p. 815; for the liability of corporations for the torts of their officers, agents, and servants, see CORPORATIONS, vol. 4, p. 251; MASTER AND SERVANT, vol. 14, p. 813; PUBLIC OFFICERS, vol. 19, p. 514; STREET RAILWAYS, vol. 22, p. 1086 *et seq.*; as to the liability of a master for torts committed by one servant against another, see FELLOW SERVANTS, vol. 7, p. 821.

2. See AGENCY, vol. 1, p. 417.

3. See PARTNERSHIP, vol. 17, p. 1065.

4. See HUSBAND AND WIFE, vol. 9, p. 822.

5. See COUNTIES, vol. 4, p. 368; MUNICIPAL CORPORATIONS, vol. 15, p. 1157.

6. See ASSAULT, vol. 1, p. 778; PRIZE FIGHT, vol. 19, p. 157; PARENT AND CHILD, vol. 17, p. 388; SCHOOLS, vol. 21, p. 767; RECAPTION, vol. 19, p. 1109; MITIGATION OF DAMAGES,

vol. 15, p. 684; SELF-DEFENSE, vol. 21, p. 1058; TRESPASS.

For injuries caused by spring guns and traps, see NUISANCES, vol. 16, p. 957; for liability of corporations, see CORPORATIONS, vol. 4, p. 254; as to administering poison with an intent to injure, see MEDICAL JURISPRUDENCE, vol. 15, p. 251; for joinder of parties plaintiff, see PARTIES TO ACTIONS, vol. 17, p. 601.

7. See FALSE IMPRISONMENT, vol. 7, p. 661; ARREST, vol. 1, p. 750; PUBLIC OFFICERS, vol. 19, p. 516; for the liability of corporations, see CORPORATIONS, vol. 4, p. 254; STREET RAILWAYS, vol. 23, p. 1088.

8. See MALICIOUS PROSECUTION, vol. 14, p. 16; for liability of corporations, see CORPORATIONS, vol. 4, p. 257; for measure of damages, see DAMAGES, vol. 5, p. 48; for joinder of parties plaintiff, see PARTIES TO ACTIONS, vol. 17, p. 601; as to the admissibility of evidence of the bad character of the plaintiff in mitigation of damages, and as tending to show probable cause, see CHARACTER, vol. 3, p. 113.

for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight."¹

VI. DECEIT.²

VII. WRONGS AFFECTING DOMESTIC RELATIONS—1. Of Husband and Wife.³

2. Of Parent and Child.⁴

3. Of Guardian and Ward.⁵

4. Of Master and Servant.⁶

VIII. INJURIES TO REAL PROPERTY.⁷

1. Cooley on Torts (2d ed.) 225. The author adds: "By defamation is understood a false publication calculated to bring one into disrepute." See *LIBEL AND SLANDER*, vol. 13, p. 292; *LIBERTY OF THE PRESS*, vol. 13, p. 510; *MERCANTILE AGENCIES*, vol. 15, p. 280; for slander of title, see *DECEIT*, vol. 5, p. 340; for the measure of damages, see *DAMAGES*, vol. 5, p. 46; as to enjoining the publication of libel and slander, see *INJUNCTIONS*, vol. 10, p. 985; *PATENT LAW*, vol. 18, p. 124; for the joinder of parties plaintiff, see *PARTIES TO ACTIONS*, vol. 17, p. 601; as to pleading the truth of the alleged defamatory language in justification, see *PLEADING*, vol. 18, p. 535; for the rule as to a "reasonable doubt," where the defendant, having charged the plaintiff with the commission of a crime, attempts to justify by proving the truth of the charge, see *REASONABLE DOUBT*, vol. 19, p. 1088; for the validity of contracts to indemnify the publisher of libelous matter, see *INDEMNITY CONTRACTS*, vol. 10, p. 406; as to proving the plaintiff's general bad character in mitigation of damages, see *CHARACTER*, vol. 3, p. 112.

2. For deceit as a cause of action for the recovery of damages, see *DECEIT*, vol. 5, p. 318; *FRAUD*, vol. 8, p. 635; *FRAUDULENT SALES*, vol. 8, p. 786; *PATENT LAW*, vol. 18, p. 142; *WARRANTY*; for the liability of agents for deceit, see *AGENCY*, vol. 1, p. 407; for the liability of the principal for the agent's deceit, see *AGENCY*, vol. 1, p. 417. See also *REPRESENTATIONS*, vol. 21, p. 4; for deceit as a ground for the rescission of contracts, see *RESCISSIION*, vol. 21, pp. 27, 49; for deceit as a defense to bills for specific performance, see *SPECIFIC PERFORMANCE*, vol. 22, p. 1022.

3. For enticing and harboring, see *HUSBAND AND WIFE*, vol. 9, p. 833; for

criminal conversation, see *HUSBAND AND WIFE*, vol. 9, p. 834; *SEDUCTION*, vol. 21, p. 1053; for suits under civil-damage acts, see *HUSBAND AND WIFE*, vol. 9, p. 836; *CIVIL DAMAGE ACTS*, vol. 3, p. 257; for suits for personal injuries to spouse, see *HUSBAND AND WIFE*, vol. 9, p. 832; for wrongfully causing death, see *DEATH*, vol. 5, p. 125; for interference with the right to the custody and burial of the body of a deceased husband or wife, see *DEAD BODY*, vol. 5, p. 115; *CEMETERIES*, vol. 3, p. 51.

The wrongful dissection or mutilation of a dead body, is a tort for which the surviving husband or wife may maintain an action against the wrongdoer. *Larsen v. Chase*, 47 Minn. 307.

4. As to action for injury to child, see *PARENT AND CHILD*, vol. 17, p. 385; for seduction of daughter, see *SEDUCTION*, vol. 21, p. 1009.

5. For guardian's right of action for injuries to his ward, see *GUARDIAN AND WARD*, vol. 9, p. 104.

6. See generally, *MASTER AND SERVANT*, vol. 14, p. 740. For master's right of action for injury to servant, see *MASTER AND SERVANT*, vol. 14, p. 788; for enticing servant away, see *MASTER AND SERVANT*, vol. 14, p. 800; for the malicious procurement of a breach of contract, see *Lumley v. Gye*, 2 El. & Bl. 216; *Big. L'd'g Cas. on Torts*, 306; for servant's right of action for the malicious procurement of his discharge, see *MASTER AND SERVANT*, vol. 14, p. 800. For master's right of action for libel and slander of servant, see *LIBEL AND SLANDER*, vol. 13, p. 451. See also *STRIKES*, vol. 24, p. 123.

7. For trespass upon real property, see *TRESPASS*; for trespass in pursuit of game, see *GAME AND GAME LAWS*, vol. 8, p. 1025; for license in real-estate law, see *LICENSE*, vol. 13, p. 539; as to what constitutes a licensee a tres-

IX. INJURIES TO PERSONAL PROPERTY.¹**X. WRONGS AFFECTING EASEMENTS.²****XI. INFRINGEMENTS OF COPYRIGHTS, PATENTS, AND TRADE-MARKS.³****XII. VIOLATION OF WATER RIGHTS.⁴****XIII. DAMAGE BY ANIMALS.⁵****XIV. ESCAPE OF DANGEROUS SUBSTANCES.⁶**

XV. NUISANCES.—Nuisances are of two classes, viz., private and public. Private nuisances are always torts redressible by a civil action, whereas public nuisances constitute offenses against the public, and the offender therein is liable to indictment. Public nuisances are private nuisances as well, whenever they inflict upon a particular individual any special or peculiar damage.⁷

passer *ab initio*, see **TRESPASS**; for violations of the rights of support, see **LATERAL AND SUBJACENT SUPPORT**, vol. 12, p. 933; **PARTY WALLS**, vol. 18, p. 3; for injuries to the fee by the tenant in possession, see **WASTE**.

1. See **CONVERSION**, vol. 4, p. 104; **DETINUE**, vol. 5, p. 651; **REPLEVIN**, vol. 20, p. 1041; **TROVER**; **TRESPASS**; **BAILMENT**, vol. 2, p. 40; **PLEDGE**, vol. 18, p. 585; **CARRIERS OF LIVE STOCK**, vol. 3, p. 1; **LOGS AND LUMBER**, vol. 13, pp. 1036, 1047; for confusion of goods, see **ACCESSION**, vol. 1, p. 54; for wrongful sale of goods under execution, see **SHERIFF'S SALES**, vol. 22, p. 704; for the officer's liability to the defendant, and justification under process, see **SHERIFF'S SALES**, vol. 22, p. 703.

2. See **EASEMENTS**, vol. 6, p. 149; **PEWS**, vol. 18, p. 421; for obstruction of private ways, see **PRIVATE WAYS**, vol. 19, p. 111; see also **LATERAL AND SUBJACENT SUPPORT**, vol. 12, p. 933; **PARTY WALLS**, vol. 18, p. 3; **HIGHWAYS**, vol. 9, p. 362; **NAVIGABLE WATERS**, vol. 16, p. 270; **NUISANCES**, vol. 16, p. 971; **STREETS**, vol. 24, p. 1. For pollution of the air by smoke, cinders, etc., see **STREET RAILWAYS**, vol. 23, p. 1074.

3. For infringements of copyrights, see **COPYRIGHT**, vol. 4, p. 162; for injunction against such infringement, see **INJUNCTIONS**, vol. 10, p. 922; for infringement of patents, see **INFRINGEMENTS**, vol. 10, p. 726; **PATENT LAW**, vol. 18, p. 70; for injunction against such infringement, see **INJUNCTIONS**, vol. 10, p. 917; for infringement of trade-marks, see **TRADE-MARKS**; **LABELS**, vol. 12, p. 531; for injunction against infringement, see **INJUNCTIONS**, vol. 10, p. 930.

4. See **WATERS AND WATERCOURSES**; **UNDERGROUND WATERS**;

SURFACE WATERS, vol. 24, p. 896; **LAKES AND PONDS**, vol. 12, p. 628; **FLOODS**, vol. 8, p. 67; **NAVIGABLE WATERS**, vol. 16, p. 267; **MINES AND MINING CLAIMS**, vol. 15, p. 580; **MILLS**, vol. 15, p. 497; **BRIDGES**, vol. 2, p. 551; **DAM**, vol. 4, p. 985; as to draining surface water from one's land, see **DRAINS AND SEWERS**, vol. 6, p. 15; as to pollution of water by riparian mine owners, see **DAMNUM ABSQUE INJURIA**, vol. 5, p. 70; as to the reasonable use of water for purposes of irrigation, see **IRRIGATION**, vol. 11, p. 846.

5. For damages caused by trespassing animals, see **ANIMALS**, vol. 1, p. 576; **DAMAGES**, vol. 5, p. 53; as to the effect of statutory requirements concerning fences upon the complaining party's right of action, see **FENCES**, vol. 7, p. 900; for damages caused by vicious animals, see **ANIMALS**, vol. 1, p. 581; **DAMAGES**, vol. 5, p. 61; for owner's liability when diseased animals are allowed to run at large, see **ANIMALS**, vol. 1, p. 585.

6. As to the liability of gas companies for the escape of gas, see **GAS COMPANIES**, vol. 8, p. 1273; for explosions of dangerous substances, see **EXPLOSIONS**, vol. 7, p. 517; as to the escape of water in dangerous quantities from dams and reservoirs, see **DAM**, vol. 4, p. 979; for escape of fire, see **FIRES CAUSED BY OPERATION OF RAILWAYS**, vol. 8, p. 1; **RAILROADS**, vol. 19, p. 890. See also **NUISANCES**, vol. 16, p. 943.

7. See **NUISANCES**, vol. 16, p. 922; **NAVIGABLE WATERS**, vol. 16, p. 267; **HIGHWAY**, vol. 9, p. 414; **STREET RAILWAYS**, vol. 23, p. 1069; **BRIDGES**, vol. 2, p. 550; **GAS COMPANIES**, vol. 8, p. 1280; **LIMITATION OF ACTIONS**, vol. 13, pp. 715, 723; **LIVERY STABLES**, vol. 13, p. 935; **MARKETS**, vol. 14, p. 461; **RAILROADS**, vol. 19, p. 921; **HEALTH**,

XVI. NEGLIGENCE.—Negligence alone is not a cause of action. But there is a great variety of torts wherein one person suffers damage by reason of acts or omissions of another which are not in accordance with the conduct of a reasonably prudent and careful man. In such torts, damage is a necessary element, but negligence is the predominating feature.¹

TORT FEASOR.—A wrongdoer; one who commits, or is guilty of, a tort.²

TORTURE.³—(See also **ANIMALS**, vol. 1, p. 575.)

TOTAL LOSS.—(See **FIRE INSURANCE**, vol. 7, p. 1002; **LOSS**, vol. 13, p. 1052; **MARINE INSURANCE**, vol. 14, p. 385; **NAVIGATION**, vol. 16, p. 355.)

TOUCH AND STAY.⁴—(See also **MARINE INSURANCE**, vol. 14, p. 398.)

vol. 9, p. 318. See also **ABATEMENT**, vol. 1, p. 6.

A municipal corporation is not liable for a failure to abate a nuisance. See **MUNICIPAL CORPORATIONS**, vol. 15, p. 949. As to giving notice before commencing an action, see **DEMAND**, vol. 5, p. 528; for the liability of private corporations and their officers for the maintenance of nuisances, see **OFFICERS**, vol. 17, p. 171.

1. See **NEGLECTANCE**, vol. 16, p. 386; **ACCIDENTS**, vol. 1, p. 82; **ACT OF GOD**, vol. 1, p. 173; **AUCTIONS AND AUCTIONEERS**, vol. 1, p. 980; **ATTORNEY AND CLIENT**, vol. 1, p. 961; **BRIDGES**, vol. 2, p. 562; **COMPARATIVE NEGLIGENCE**, vol. 3, p. 367; **CONTRIBUTORY NEGLIGENCE**, vol. 4, p. 15; **COUPLING CARS**, vol. 4, p. 417; **CROSSINGS**, vol. 4, p. 906; **DAM**, vol. 4, p. 979; **DRAINS AND SEWERS**, vol. 6, p. 25; **DEATH**, vol. 5, p. 125; **EXPLOSIONS**, vol. 7, p. 517; **FELLOW SERVANTS**, vol. 7, p. 821; **FIRES CAUSED BY THE OPERATION OF RAILWAYS**, vol. 8, p. 1; **HIGHWAY**, vol. 9, p. 376; **INNS AND INN KEEPERS**, vol. 11, p. 49; **LATENT DEFECTS**, vol. 12, p. 910; **LAW OF THE ROAD**, vol. 12, p. 957; **LETTERS**, vol. 13, p. 258; **MALPRACTICE**, vol. 14, p. 76; **MASTER AND SERVANT**, vol. 14, p. 804; **MUNICIPAL CORPORATIONS**, vol. 15, p. 1141; **PILOTS**, vol. 18, p. 455; **STREETS**, vol. 24, p. 1; **STATIONS**, vol. 23, p. 128; **SUNDAY**, vol. 24, p. 528; **TELEGRAPHS AND TELEPHONES**, vol. 25, p. 744; **WAREHOUSES**.

For negligence by carriers, see **CARRIERS OF PASSENGERS**, vol. 2, p. 738; **CARRIERS OF GOODS**, vol. 2, p. 770; **CARRIERS OF LIVE STOCK**, vol. 3, p. 9; **RAILROADS**, vol. 19, p. 903; **STREET RAILWAYS**, vol. 23, p. 1004; **LATERAL**

OR BRANCH RAILROADS, vol. 12, p. 948; **SHIPS AND SHIPPING**, vol. 22, p. 752; **EXPRESS COMPANIES**, vol. 7, p. 546; **FERRIES**, vol. 7, p. 947; as to responsibility for collisions on the water, see **NAVIGATION**, vol. 16, p. 337; for negligence in launching vessels, see **NAVIGATION**, vol. 16, p. 347.

2. Bouvier's L. Dict.

3. Under statutes providing that every person who shall maliciously and cruelly maim, beat, or torture any horse, ox, or other cattle, whether belonging to himself or another, shall, on conviction, be adjudged guilty of a misdemeanor, etc., an indictment charging that the defendant did unlawfully and maliciously and cruelly torture, etc., the horses of one Samuel Hearrell . . . by then and there tying brush and boards to the tails of said horses, was held to be insufficient. The court said: "In all acts of this character, the means of producing the torture must be averred, and the court must see that such means have the inevitable act and tendency to produce the effect of which the criminal charge consists. . . . The torture here alluded to must consist of some violent, wanton, and cruel act, necessarily producing pain and suffering to the animal." *State v. Pugh*, 15 Mo. 509.

In the *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y.) 51, it was held that the driving of a horse while ignorant of the fact that it was sick or sore, is not *per se* tormenting or torturing it within the meaning of the act relating to the powers of agents of the American Society for the Prevention of Cruelty to Animals.

4. Under a liberty to touch and stay at all ports for all purposes whatsoever,

TOWAGE; TUGS AND TOWS.—(See CARRIERS OF GOODS, vol. 2, p. 785; MARITIME LIENS, vol. 14, pp. 434, 436; NAVIGABLE WATERS, vol. 16, p. 262; NAVIGATION, vol. 16, pp. 319, 326; SALVAGE, vol. 21, p. 676; SHIPS AND SHIPPING, vol. 22, p. 710.)

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I. DEFINITION.—The employment of one vessel to expedite the voyage of another vessel, when nothing more is required than the acceleration of her progress, is termed towage.¹

the stay must be for some purpose connected with the furtherance of the adventure, and whether the purpose is within the scope of the policy, is a question for the court. *Longhorn v. Allnutt*, 4 Taunt. 511.

So under a policy of insurance of goods at and from London to any port, or ports in the Baltic, with leave to touch and stay at any ports and places for all purposes whatsoever, the insured may wait at any port for information to what port in the Baltic the ship may safely proceed to discharge her cargo. *Rucker v. Allnutt*, 15 East 278. But in *U. S. v. Shearman, Pet. C. C. (U. S.)* 98, it was held that the liberty in a policy of insurance "to touch" a place, did not justify trading there, and that trading would be a deviation and avoid the policy.

And in *Maryland Ins. Co. v. Leroy*, 7 Cranch (U. S.) 23, where the terms of a policy were "with liberty of touching at the Cape Verde Islands on her outward passage for stock and to take in water," it was said that, "touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case. Construing

the license according to the subject-matter, and in its necessary connection with the offer on the freight (in the order of insurance), it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape Verde Islands."

The liberty to touch and stay is always construed to be subordinate to the voyage insured, and to the usual course of that voyage, for purposes connected with it. It does not extend to ports or places opposite to, or wide of, the usual course, or wholly unconnected with the voyage insured. 3 Kent's Com. 315; *Emerigon* Tom. II., ch. 13, §§ 6, 8; *Valin* Tom., 2, 78, 79. See also *Hammond v. Reed*, 4 B. & A. 72; *Lolly v. Whitmore*, 5 B. & A. 45.

If there be several ports of discharge mentioned in the policy, and the insured goes to more than one, he must go to them in the order in which they are named, or if not specifically named, he must generally go to them in the geographical order in which they occur. 3 Kent's Com. 315.

1. *Century Dict.* See also *The H. B. Foster*, Abb. Adm. 222; *The Wil-*

II. TUG AND TOW ONE SHIP.—(See *NAVIGATION*, vol. 16, p. 319.)

III. TOWAGE CONVERTED TO SALVAGE.—(See *SALVAGE*, vol. 21, p. 676.)

IV. CONTRACTS OF TOWAGE—1. **In General.**—A contract to tow, in law, implies an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug, and that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.¹ Ordinarily it covers merely the furnishing of propelling power to move a boat or vessel from one place to another.² The contract does not constitute a warranty to tow to destination, but an engagement to use best endeavors and competent skill for that purpose with a vessel properly equipped.³ It has been held that where a specified vessel is designated by the towage contract, there is no implied warranty of the vessel's fitness for the service required.⁴

liams, 1 Brown Adm. 218; *The Kelly*, 1 Eng. L. & Eq. 596; *McConnochie v. Kerr*, 9 Fed. Rep. 53; *The Princess Alice*, 3 W. Rob. 140; *The Reward*, 1 W. Rob. 177.

1. *The Julia*, 14 Moo. P. C. C. 210; *Lush*, 224.

Termination of Contract.—A contract for towing a vessel into a position which would enable her to be beached, does not end when the anchor is cast on her arrival in shoal water, but when her kedgie anchor is sent out to haul her stern around to enable her to be properly put aground. *Wilmington Transp. Co. v. The Old Kensington*, 39 Fed. Rep. 496.

Substitution of Tugs.—In order to hold a tug, which took the place of the tug of a railroad company, liable for damages to a tow received after being left at the mouth of a creek, it must be shown that the tug, in some way, made herself a party to the tow's contract with the railroad company to have the barge towed to a point some distance up the creek. *The Mary*, 14 Fed. Rep. 584.

Refusal of Services.—If a tug makes three unsuccessful attempts to heave a line to a schooner, and there is danger of the schooner stranding, she is justified in accepting the services of another tug, and it is the duty of the first tug to get out of the way when requested. *The E. D. Holton*, 55 Fed. Rep. 1010.

Towage and Salvage Service.—The towing of a vessel whose propeller is broken, but who is otherwise in good

condition, is towage, not salvage service. *The Emily B. Souder*, 15 Blatchf. (U. S.) 185.

2. *The Fox*, 15 Fed. Rep. 639.

3. *The Minnehaha*, *Lush*, 335; 15 Moo. P. C. C. 133; 30 L. J. Adm. 211; 7 Jur. N. S. 1257; 4 L. T. N. S. 810; 9 W. R. 925.

Deviation.—It is no breach of a towage contract for a tug to deviate from its direct course to land a barge, when nothing was said about holding a direct course when the boats were taken in tow. *The Mary McKillop*, 23 Fed. Rep. 829. But in *Phillips v. The Sarah & The Tucker*, 38 Fed. Rep. 252, a tug was held liable for the loss of a barge which sprang a leak and sank while the tug had stopped over night to deliver a cargo. If a tug has more than one vessel in tow, it must not risk the safety of some in order to land one. *White v. The Lavergne*, 2 Fed. Rep. 788.

A deviation of three miles in a course of nine, is negligence, although it is foggy and the tidal currents are variable. *The Webb*, 14 Wall. (U. S.) 406.

4. *Robertson v. Amazon Tug & Lighterage Co.*, 7 Q. B. Div. 598.

Towage by Stages.—If a towage contract is to be performed by stages and does not specifically designate the tug to be used, the one towing in the last stage is not liable *in rem* for delays due to default of tugs employed on previous stages. *The E. A. Packer*, 22 Fed. Rep. 668.

2. Power of Master to Contract.—It is not necessary that a master should have express instructions from his owners to tow. He has a general authority to do so,¹ but an agreement, to bind his owners, must be reasonable, and likely to inure to their benefit.²

3. Contracts Limiting Liability.—A special contract that towing shall be done at the risk of the owner of the tow, does not exempt the tug or her owners from liability for loss or injury attributable to negligence.³

V. RESPONSIBILITY OF TUG—1. In General.—It is the duty of those engaged in towage service to see that the tug is properly manned,⁴ and that she is of sufficient power and capacity to tow

1. *The Thetis*, L. R., 2 A. & E. 365; 38 L. J. Adm. 42.

A tug which accepts employment from a person who has no authority to contract, is liable for the loss of the tow, if it is taken through a place obviously unsafe and cut by the ice so as to sink. *The James A. Wright*, 10 Blatchf. (U. S.) 160.

Liability of Master for Injury to Tug.—If the pilot house of a tug is carried away by contact with the anchor fluke of a schooner she is towing, and the master of the tug, who is a member of the corporation owning and operating the tug, admits that the damage was due to his fault, and declares his intention to pay personally for the damage, the promise is made under a valid consideration and is binding. *Gillingham v. Charleston, etc., Transp. Co.*, 40 Fed. Rep. 649.

2. *The Alfred*, 50 L. T. 511; *The Renpor*, 8 Prob. Div. 115.

3. *The Bordentown*, 40 Fed. Rep. 682; *The Syracuse*, 6 Blatchf. (U. S.) 2; *The M. J. Cummings*, 18 Fed. Rep. 178; *Deems v. Albany Canal Line*, 14 Blatchf. (U. S.) 474; *The Rescue*, 24 Fed. Rep. 190; *The James Jackson*, 9 Fed. Rep. 614; *Ulrich v. The Sunbeam*, 1 N. J. L. 141; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559. *Contra The United Service*, L. R., 9 Prob. Div. 3.

In *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180, the court held that an agreement, whereby the owner of the tow covenanted to have a competent helmsman, a seaworthy boat, and to exempt the tug from all liability, would not excuse the tug if the tow were injured by its negligence. See also *Wooden v. Austin*, 51 Barb. (N. Y.) 9; *Wells v. Steam Nav. Co.*, 8 N. Y. 375.

If a towage contract reads "this boat towed at risk of owners," it means

that the towing company does not assume the liability of common carrier, and does not reduce the liability of the towers from ordinary to gross negligence. *Delaware, etc., Towboat Co. v. Starrs*, 69 Pa. St. 36.

A contract of towage stipulating that it shall be at the risk of the masters and owners of the tow, renders the tug responsible only for the lack of ordinary skill and diligence in her navigation. *The Princeton*, 3 Blatchf. (U. S.) 54. See also *The American Eagle*, 54 Fed. Rep. 1010.

Where the captain of a tow agreed to assume the risk from ice, the tug is not to be held responsible in damages for a mistake of judgment on the part of those in charge, but she is not to be absolved from the duty of exercising reasonable care to avoid unnecessary hazard. *The Packer*, 28 Fed. Rep. 456; *The Syracuse*, 6 Blatchf. (U. S.) 2.

The master of a tug cannot obtain exemption from liability by giving notice at the commencement of a voyage that the towage shall be at the risk of the owner of the tow. *The Vanderslice*, 4 Pa. L. J. 388.

In *Hibernia Ins. Co. v. New Orleans Transp. Co.*, 17 Fed. Rep. 478; *aff'd* 120 U. S. 166, it was held that a clause in a towage contract exempting the tug from liability "from the damages of navigation and other known or unknown obstacles," relieved the tug from damages due to the loss of a barge sunk by running into a tree, recently submerged in the channel by a landslide, if its presence was not known to the pilot.

Burden of Proof.—The burden of proof is on a towboat asserting a special contract that the tow is to be carried at the owner's risk. *The James Jackson*, 9 Fed. Rep. 614.

4. In *The Victor*, 1 Brown Adm. 449, Longyear, J., said: "The responsible

the vessel to the place of destination. They must exercise ordinary skill and prudence in selecting the proper time to make the voyage, keeping in view the craft to be towed, the wind and tide, and other ordinary peculiarities of navigation;¹ the right and power to determine the proper management and navigation of both tug and tow, and the responsibility for their safety, resting chiefly upon the master of the tug.²

2. In Making Up Tow.—In making up a tow those in charge must act with that reasonable and ordinary care which a prudent man exercises for the preservation of his own property,³ taking care that the tow is properly made up and secured with lines of proper strength.⁴

character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service." And in *The Coleman and Foster*, 1 Brown Adm. 456, it was held that proof of a custom for the master to act as helmsman would not be received. See also *The Armstrong*, 1 Brown Adm. 130; *Kenah v. The John Markee*, 3 Fed. Rep. 45.

Liability for Tolls.—A towboat cannot be held liable for tolls except on its own measurement, unless the liability can be shown to exist by an implied or special contract. *The Fox*, 15 Fed. Rep. 639.

1. In *The Merrimac*, 2 Sawy. (U. S.) 586, Deady, J., said: "The master of a tug being a bailee for hire, and, as such, responsible for ordinary skill and diligence in the performance of his contract, what was his duty in the premises? Impliedly he undertook to furnish a tug properly equipped and of sufficient capacity and power to take the scow to the cape, and for the exercise of ordinary skill and prudence in selecting the proper time to make the voyage with reference to the craft to be towed, and the wind and tide, or other ordinary peculiarities of navigation, and in the conduct of the enterprise in case of any unlooked for or extraordinary emergency." See also *Bouker v. Smith*, 40 Fed. Rep. 839; *The Burlington*, 137 U. S. 386; *The Adelia*, 1 Hask. (U. S.) 505.

2. *The Joggin's Raft*, 43 Fed. Rep. 309; *White v. The Laverne*, 2 Fed. Rep. 788; *The Fannie Tuthill*, 12 Fed. Rep. 446.

The master of the tug is charged with the selection of the route and should

keep in mind the condition of the tug, tow, weather, etc. Where his discretion has been *bona fide* exercised, the tug will not be responsible when it is shown that he acted with reasonable skill and discretion. *The James P. Donaldson*, 19 Fed. Rep. 264. See also *The Brooklyn*, 2 Ben. (U. S.) 547; *Dutton v. The Express*, 3 Cliff. (U. S.) 462; *The Mohawk*, 7 Ben. (U. S.) 139; *The Venture*, 18 Fed. Rep. 462.

If a master of a tug takes the more unsafe of two passages open to him, and after gaining shelter puts out into the open where the tow would be exposed to the heavy sea then running, the tug is liable for loss of a barge by swamping. *The Burlington*, 137 U. S. 386.

3. *The Bordentown*, 40 Fed. Rep. 682.

In getting a vessel out of her berth, stern first, on the New York side, a tug was negligent in imparting to her such headway as carried her to the Brooklyn side, where she hit a pier, before the tug could get to her bow and make a line fast. The failure of the vessel's sailors to catch the line when first thrown from the tug constitutes no defense. *The M. A. Lennox*, 4 Ben. (U. S.) 190.

If a tug assumes entire charge of the operation of getting a vessel out from a pier, it is incumbent on her to adopt a method which will result in no injury to the vessel. *The M. M. Caleb*, 4 Ben. (U. S.) 15.

If the master of a tug fails to make an examination of a brick-laden scow before he takes her in tow, the tug is liable if on the voyage part of the deck-load is lost by her careening. *The Favorite*, 50 Fed. Rep. 569.

4. *The Pres. Briarly*, 24 Fed. Rep. 478; *The Quickstep*, 9 Wall. (U. S.) 665; *The Sweepstakes*, 1 Brown Adm. 509.

A tug is negligent in placing a spile-

3. In Navigation.—A tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed water-ways and channel, the depth of the water, the nature and formation of the bottom, whether in its natural state, or as changed by permanent excavations.¹ If a tug is engaged in towing vessels on a river the navigation of which is impeded by bridges, the master is chargeable with notice of the width of his tug and its tow, and must know whether he can run it safely between the bridge piers through which he attempts to pass. He is bound to know the direction of the currents about the piers in the different stages of

driver, which carried no crew and was an unwieldy craft, behind a barge and in such a position that if the backing line of the spile-driver broke, the wind, which was deadastern, would drive her forward into the barge. *Bust v. Cornell Steam Boat Co.*, 24 Fed. Rep. 188.

Where a tow has a long bowsprit, a tug is not negligent in using a hawser of sufficient length to keep the end of the bowsprit forty feet from the stern of the tug. *Gray v. The Jessie Russell*, 5 Fed. Rep. 639.

If the towing hawser is insufficient, and the tow pound, and is so damaged that several boats are sunk, the tug is liable. *The Francis King*, 7 Ben. (U. S.) 11.

Putting a deeply-laden open-decked canal boat in the hawser tier when the wind is blowing from sixteen to twenty-one miles an hour, is negligence. *The Niagara*, 20 Fed. Rep. 152.

If in taking a vessel out from her berth, the tug receives the hail, "all right, go ahead," she is under no obligation to see that all lines on the vessel are cast off, and if a barge made fast to the ship is injured, the tug is not responsible. *The Jack Jewett*, 23 Fed. Rep. 927.

It is negligence to place a barge known to steer wildly in such a position as to interfere with the steering qualities of the tow. *The Orhanovich v. The America*, 4 Fed. Rep. 337.

If the owner of a barge gives notice that a boat is unfit to be placed in the front tier, the tug is bound by the notice, and liable for non-compliance. *The Niagara*, 20 Fed. Rep. 152.

In *Transportation Line v. Hope*, 95 U. S. 297, Hunt, J., said: "When a master of a tug undertakes to transport a barge, he must supply the means for that purpose; he must furnish not only motive power, but he must direct her location, whether on the port or starboard side, whether she should be the

inside boat or the outside one, when and how she should be lashed to other boats, with what fastenings she should be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbor, how long remain there, and what shall be the course of navigation."

1. *The Henry Chapel*, 10 Fed. Rep. 777; *The Margaret*, 94 U. S. 494; *The James H. Brewster*, 34 Fed. Rep. 77; *The Effie J. Simmons*, 6 Fed. Rep. 639; *The Robert H. Burnett*, 30 Fed. Rep. 214; *The Delaware*, 20 Fed. Rep. 797.

Shifting Channel.—When a channel is constantly changing or moving, the tug is not bound to know it. *The Mosher*, 4 Biss. (U. S.) 274.

Running a barge upon a sunken pier when the captain knew of the existence of the obstruction, renders the tug liable, and the liability is not affected by the fact that the towage was gratuitous or that the movement of the tug at the critical moment was influenced by the owner of the tow. *The Deer*, 4 Ben. (U. S.) 352. See also *Pettie v. Boston Tow Boat Co.*, 49 Fed. Rep. 464; *The Mascot*, 48 Fed. Rep. 917.

If the persons in charge of the tug have exercised reasonable diligence in familiarizing themselves with all dangerous obstructions, the tug is not liable for injuries received by the tow in running on a concealed snag. *The America*, 6 Ben. (U. S.) 122. See also *The Angelina Corning*, 1 Ben. (U. S.) 109.

If a tug negligently runs aground while towing a barge up a narrow creek, and the towline is cast off by the orders of the tug captain, so that the barge, after her momentum is spent, runs aground and is injured by being left high and dry at low tide, the tug is liable in damages for the consequences of her faulty navigation. *The Vigilant*, 8 Fed. Rep. 921

water, and to know whether at high water a steamer can pass with its tow over obstructions which in low water would render the passage impossible.¹ If the towage service is performed on waters where the tide ebbs and flows, the master is bound to know the usual course of, and perils due to, the tides.² In towing

If a tow strikes an obstruction, is injured, and the tug is libelled for damages, the discovery, just before the trial, of a rock previously unknown to navigators at the precise spot where the tow was injured, will excuse the tug from liability, it appearing that her pilot pursued the customary course. *The James A. Garfield*, 21 Fed. Rep. 474. See also *The Pierpont*, 42 Fed. Rep. 687; *The Mary N. Hogan*, 30 Fed. Rep. 927; *reversed* in 35 Fed. Rep. 554.

Leaving Helm to Incompetent Person.—If in navigating a tortuous channel known to be shallow, the master of the tug turns the helm over to an incompetent person simply because he imagines he is familiar with the channel, the tug is liable if she grounds and allows the tow to be delayed and wrecked by an approaching storm. *Bouker v. Smith*, 40 Fed. Rep. 839. As to unskillful pilot, see *The Geo. H. Dentz*, 12 Fed. Rep. 575; *The Frank G. Fowler*, 8 Fed. Rep. 360; *unlicensed pilot*, *The E. M. Norton*, 15 Fed. Rep. 686.

If the pilot engaged by a tug negligently runs a schooner upon a quicksand and she is lost, the tug is liable. *The Martin Klabfleisch*, 55 Fed. Rep. 336.

If a tug miscalculates and the hawser kinks, allowing a barge in tow to run against a pier, it appearing that the blow was harder than the usual contacts of navigation, the tug is liable in damages. *O'Neil v. The I. M. North*, 57 Fed. Rep. 270. As to miscalculating tide, see *The Brazos*, 14 Blatchf. (U. S.) 446.

Where a canal boat, while being towed over a perfectly safe and familiar course, hits some obstruction and springs a leak, the burden of proof is upon the tug to account for the injury, or to satisfy the court by a reasonable and consistent account of the trip that she has not failed in her duty to avoid dangerous points, and that the injury arose from no lack of duty, care or skill in her navigation. *The Ellen McGovern*, 27 Fed. Rep. 868; *The Harry and Fred*, 49 Fed. Rep. 681.

Where a tug sheers out of the channel a considerable distance in a short

run, and grounds her tow on a reef, the accident will not be attributed to the landmarks being obscured by a snowstorm, but to the failure of the tug's pilot to proceed under a slow bell, using a good compass. *The Frank G. Fowler*, 8 Fed. Rep. 360; *The Gratitude*, 25 Fed. Rep. 160.

As to defective compass, see *The Webb*, 14 Wall. (U. S.) 406.

If experts differ as to the safer course, the master of the tug is not guilty of negligence in towing boats two abreast instead of in single file through a dangerous place. *Taft v. Carter*, 59 Barb. (N. Y.) 67.

Loading a tug so heavily as to render her unable to give sufficient headway to her tow, renders the tug liable for the loss of the tow if it sheers and strikes on rocks and is lost. *The Geo. Farrell*, 4 Ben. (U. S.) 316; *O'Brien v. New York, etc., Transp. Co.*, 31 Fed. Rep. 494.

1. *The Lady Pike*, 21 Wall. (U. S.) 1; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Wilson v. Chicago*, 42 Fed. Rep. 506.

The practice of running canal boats and vessels, whether new or old, against other vessels or piers for the purpose of rapid handling, is dangerous, and when approaching anything like a forcible blow, must be held to be at the risk of those who practice it. *The Syracuse*, 18 Fed. Rep. 828; *The Nebraska*, 2 Ben. (U. S.) 500; *The Harry*, 15 Fed. Rep. 161.

A tug which goes over a dam in order to escape detention at the locks, and injures the tow by running into a bridge pier, is responsible for the injury. *The Venture*, 18 Fed. Rep. 462.

2. *The Delaware*, 20 Fed. Rep. 797.

A tug whose tow is nearly two thousand feet long should get help to prevent the tail of the tow from swinging out of line when a brisk breeze springs up. If the tug fails to do so and a barge at the tail of the tow swings out of line and is injured by running over a channel buoy, the tug is liable. *O'Brien v. New York, etc., Transp. Co.*, 31 Fed. Rep. 494.

If a tug which has her tow com-

vessels without motive power, the tug is regarded as a dominant mind or will in the adventure, and the tow is bound to follow as closely as possible in her wake, and conform to her directions.¹ It is the paramount duty of the tug to consult the safety of her tow and run no avoidable risk.²

a. ABANDONMENT OF TOW.—To justify an abandonment of the tow by a tug, the obstacles in the way of the performance of the towage contract must be at least of an extreme character, if not absolutely insurmountable.³

pletely under control carries it so near a shoal that the swash from a passing vessel, whose coming was seen, coupled with the action of the tide, is sufficient to ground a barge, the tug is liable for the damage sustained. *The Minnie*, 20 Fed. Rep. 543.

If a tug has attached her tow by means of long hawsers, she is guilty of negligence, if, in rounding a dangerous point, the hawsers are allowed to slacken so that the tow by the action of the tide is carried upon rocks and lost. *The C. B. Sanford*, 13 Fed. Rep. 910.

1. *The Fannie Tuthill*, 12 Fed. Rep. 446.

The details of the immediate navigation of the tug, with reference to approaching vessels, must necessarily be left, to a great extent, to those on board of her. *The Civilita and The Restless*, 103 U. S. 699; *Hayes v. Paul*, 51 Pa. St. 134.

Defective Appliance.—If an injury is caused a tow by breaking of the tug's rudder chain, which was defective, and the defect should have been known, the tug is liable. *The M. M. Caleb*, 10 Blatchf. (U. S.) 467, *aff'd* 5 Ben. (U. S.) 163.

2. In *The Delaware*, 12 Fed. Rep. 571, it was held that the paramount duty of a tug was to secure the safety of her tow by any and every means in her power, and to run no avoidable risk, and that the tug would accept at her own peril a risk for any injury that might ensue, to proceed against a strong ebb tide with a certain and obvious danger of her tow's being swung against a steamer at anchor, unless there was no other alternative involving less danger. See also *Gray v. The Jessie Russell*, 5 Fed. Rep. 639; *The Brooklyn*, 2 Ben. (U. S.) 547; *The Baltic*, 2 Ben. (U. S.) 452; *The Lady Franklin*, 2 Low. (U. S.) 220; *The F. W. Vosburgh*, 50 Fed. Rep. 239.

If a towboat voluntarily assumed a needless hazard, and injury to the tow

resulted, she must bear the consequences of the master's temerity. *The Venture*, 18 Fed. Rep. 462.

If a barge is injured by being run against a wharf, a defense by the tug that the barge was old and rotten was unavailable where no reason was given for the blow. *The Workman*, 1 Low. (U. S.) 504.

If a barge, while being towed around the Battery, roll badly and lose part of her deckload and sink, the tug will be held liable if it appear that she did not slacken her speed, and that no attention was paid to the probable effect on the tow. *The Trojan*, 8 Ben. (U. S.) 498.

If a tug without authority adopts the dangerous manœuvre and puts the pilot on the tow in a situation *in extremis*, even if the pilot makes an error of judgment in not acquiescing instantly and without protest, it is not his legal fault. The fault belongs to the party who wrongfully brings the other into that situation. *The Elizabeth Jones*, 112 U. S. 514; *The Bywell Castle*, 4 Prob. Div. 219; *The Strathay*, 27 Fed. Rep. 562; *The Gorgas*, 10 Ben. (U. S.) 541; *The Fannie Tuthill*, 12 Fed. Rep. 446.

It is negligence for a tug to tow a lighter through the swells of a passing steamboat at such a rate of speed as would cause the lighter to ship water. *The J. J. Driscoll*, 27 Fed. Rep. 521.

If the captain of a tug sees his tow steering directly into danger, he must warn her against it. *The Atlas*, 12 Fed. Rep. 798.

A tug must keep far enough away from a lee shore to enable her to turn to windward without stranding the tail of her tow. *The Elfinmere*, 39 Fed. Rep. 909. As to keeping far enough off shore to prevent a tow from grounding, see *The Atlas*, 12 Fed. Rep. 798.

3. While a tug which abandons its tow is bound to show a sufficient excuse

b. CONDITION OF WEATHER.—A tug is not liable for a tow wrecked by sudden squalls, or rapidly approaching storms when, at the time of starting, the weather was fair and there was no indication of approaching atmospheric disturbances.¹

for the abandonment, yet, if during a storm, the towline parts and the tug is not able to find the tow, the tug is excused from liability. *The Clematis*, 1 Brown Adm. 499.

If a sudden squall comes up and it is necessary to drop the tow astern, and the persons in charge of the tow refuse to remain on board to steer for fear of being washed overboard, and it is impossible to handle the tow without a helmsman, the tug is not liable for their loss by being turned adrift, when it appears that she was reasonably adapted for the purpose of towing on the route she was engaged upon. *The Allie & Evie*, 24 Fed. Rep. 745. See also *The Royal v. The Challenger* (V. A. C. 1888), 14 Q. L. R. 135.

The master of a tug is not guilty of negligence in cutting a tow adrift after signaling it, when tug and tow are in danger of being driven on a lee shore by a fierce storm. *SonSmith v. The J. P. Donaldson*, 21 Fed. Rep. 671.

To leave a tow unattended in a harbor unsafe in a storm from one quarter, is negligence. *Connolly v. Ross*, 11 Fed. Rep. 342; *The Charles Runyon*, 46 Fed. Rep. 813; *The Battler*, 55 Fed. Rep. 1006. But it is not negligence to temporarily leave a tow moored to a platform to search for another tow which has been carried adrift by an extraordinary storm. *The Mechanic*, 9 Fed. Rep. 526.

It is not negligence for the master of a tug to leave a tow in a safe place. *The P. C. Shultz*, 10 Ben. (U. S.) 536.

If a tug intends to cast off her lines, she must give notice to the tow and must allow sufficient time to elapse before doing so to enable the tow to take measures for her safety. The failure of the tug to do so constitutes a breach of the duty owed by tug to tow. *The A. M. Ball*, 43 Fed. Rep. 170.

Tying up tows to a river bank, leaving them without lines or watchman, renders the tug liable for their loss by breaking adrift, and the custom of tugmen to act in such a manner will not lessen its liability. *The American Eagle*, 54 Fed. Rep. 1010.

If a tug is engaged to tow a vessel to sea, and on the way out there is a dispute as to the amount to be paid, and

the master of the tug casts off the towline, and the vessel, though using every effort, is carried by wind and tide against docks and injured, the tug is liable. *The A. M. Ball*, 43 Fed. Rep. 170.

For a tug under contract to tow a raft to its destination, to leave its tow *en route* and not wait to see if it has the means to stop and make fast, is negligence. *The Henry Buck*, 38 Fed. Rep. 611.

Leaving a tow at the mouth of a creek under a promise to return the next day, and failing to do so, is such an abandonment as renders a tug liable for the loss of the barge during her absence by the ice driving against her sides, cutting them so she sinks. *Cokeley v. The Snap*, 24 Fed. Rep. 504.

If a tug engaged in towing scows to sea loses one of them by the bitts pulling out, and the water is shoal, and it is dangerous to make an attempt to pick her up, the tug is not guilty of negligence in first taking the barges in tow to a safe place and then returning and finding the barge which broke loose at anchor, and, if it was impossible to approach her on account of the sea, in returning to her owners and reporting her condition as soon as possible. *The R. C. Veit*, 56 Fed. Rep. 122.

1. Where the atmospheric conditions at the time of sailing showed no indication of an approaching squall, a tug is not liable for boats swamped by high seas encountered during the voyage. *The Geo. L. Garlick*, 16 Fed. Rep. 704; *The Mechanic*, 9 Fed. Rep. 526.

In the absence of all other indications of probable bad weather, short towing trips are not to be condemned, even if the barometer is low, though rising, and cautionary signals are displayed. *The Allie & Evie*, 24 Fed. Rep. 745.

A tug may, without fault, take a coal-laden barge, the sides eighteen inches from the water, around the Battery and under the lee of Manhattan Island, when the wind is blowing twenty-two miles an hour. *The Snap*, 24 Fed. Rep. 292.

If there is no clear evidence that the weather indications were such as should deter a tug from holding her course instead of seeking harbor, and it appears

4. As Common Carrier and Insurer.—In the discharge of the duty of towing vessels, tugs are not to be regarded as common carriers, or insurers, or held to accountability as such.¹

that the tug was in charge of a competent and skilled pilot, the tug is entitled to the benefit of any doubt arising from the testimony. *The Frederick E. Ives*, 25 Fed. Rep. 447. See also *The Argus*, 31 Fed. Rep. 481; *The Wilhelm*, 47 Fed. Rep. 89.

If, after a tug had taken a bark in tow, a squall was seen coming, the tug was negligent in not coming to anchor instead of attempting to make the Erie Basin. *The Young America*, 25 Fed. Rep. 207.

When the opportunity offers, neglect to take shelter renders a tug liable for the swamping of a barge in a storm. *The Frank G. Fowler*, 8 Fed. Rep. 340.

A tug is guilty of negligence in taking a tow to sea when a storm is raging. *The Blanche Page*, 4 Ben. (U. S.) 186.

If a tug unreasonably delays a tow, and a sudden and unexpected squall comes up, which the tow would have escaped but for the delay, and the tow is lost, the tug is liable. *The W. E. Cheney*, 6 Ben. (U. S.) 178.

Where a storm is of uncertain duration, a tug, after rounding to to readjust her deckload, may, without negligence, proceed on her voyage. *The Wilhelm*, 52 Fed. Rep. 602.

The owners of a tug are liable for the negligence of the master in taking a tow across New York Bay in a gale of wind, whereby the tow was generally broken up. He ought to have ascertained the state of the weather before leaving shelter. *The Bordentown*, 40 Fed. Rep. 682.

Where it is the usual practice for tugs to wait at a bar for the rising tide, a tug while so waiting is not liable for a tow lost by swamping, when it appears that the tug drew less water than other tugs usually employed in taking barges across the bar. *The Roberts Burnett*, 56 Fed. Rep. 266.

Ice.—A tug towing a vessel through the Narrows is not liable for the loss of a barge which was driven on the rocks off Staten Island by the unexpected meeting of an ice floe and lost. *The Young America*, 31 Fed. Rep. 749. See also as to loss of tow by ice, *The William McCandless*, 10 Ben. (U. S.) 453; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *The Alfred & Edwin*, 7

Ben. (U. S.) 137; *The U. S. Grant*, 7 Ben. (U. S.) 337.

If the river or canal, on which towage service is to be performed, suddenly freezes, it is such an act of God as will excuse performance of the contract. *Worth v. Edmonds*, 52 Barb. (N. Y.) 40.

1. *The Fannie Tuthill*, 12 Fed. Rep. 446; *The Webb*, 14 Wall. (U. S.) 406; *The Margaret*, 94 U. S. 494; *The Annie Williams*, 20 Fed. Rep. 866; *The D. Newcomb*, 16 Fed. Rep. 274 (bailee for hire); *The James Jackson*, 9 Fed. Rep. 614; *The M. J. Cummings*, 18 Fed. Rep. 178; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *Brawley v. The Jim Watson*, 2 Bond (U. S.) 356; *Powell v. The Willie*, 2 Fed. Rep. 95; *aff'd* 8 Fed. Rep. 768; *The Lyon*, 1 Brown Adm. 59; *The Stranger*, 1 Brown Adm. 281; *The Oconto*, 5 Biss. (U. S.) 460; *The R. L. Stevens*, 11 L. R. N. S. 41; *The Princeton*, 3 Blatchf. (U. S.) 54; *The Mary R. McKillop*, 23 Fed. Rep. 829; *The Snap*, 24 Fed. Rep. 292; *The B. B. Saunders*, 25 Fed. Rep. 727; *The Bordentown*, 16 Fed. Rep. 270; *Molenbrock v. St. Louis, etc., Packet Co.*, 16 Fed. Rep. 878; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505; *The Young America*, 26 Fed. Rep. 174; *The Wm. N. Beach*, 29 Fed. Rep. 303; *The Brazos*, 14 Blatchf. (U. S.) 446; *The Neaffie*, 1 Abb. (U. S.) 465; *The Angelina Corning*, 1 Ben. (U. S.) 109; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Caton v. Rumney*, 13 Wend. (N. Y.) 387; *Alexander v. Greene*, 3 Hill (N. Y.) 9; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Leonard v. Hendrickson*, 18 Pa. St. 40; *Brown v. Clegg*, 63 Pa. St. 51; 3 Am. Rep. 522; *Leech v. The Miner*, 1 Phila. (Pa.) 144; *Parmalee v. Wilkes*, 22 Barb. (N. Y.) 539; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Transportation Line v. Hope*, 95 U. S. 297; *Delaware, etc., Towboat Co. v. Starrs*, 69 Pa. St. 36. *Contra*, it seems a steam tug is a common carrier. *White v. The Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523. See also *Clapp v. Stanton*, 18 La. Ann. 683; *Vanderslice v. The Superior*, 3 L. R. N. S. 399.

In the case of *The Niagara*, 20 Fed. Rep. 152, *Brown, J.*, said: "Owners of tugs are not insurers of the tows in

5. For Negligence.—A tug is not responsible for injuries to the tow unless the injury is the immediate result of a violation or neglect of some duty incumbent on the tug.¹ The obligation of

their charge. They are, indeed, answerable for negligence only, but the negligence consists in the want of ordinary skill in navigation and of the exercise of such care and diligence in handling a tow as a man of ordinary prudence would exercise in the preservation of his own property. Where the trip undertaken will occupy a considerable time, they are bound to take all such safeguards as are necessary to preserve the tow from loss or injury other than any of the contingencies which may ordinarily be expected to arise upon the trip." See also *The Ellen McGovern*, 27 Fed. Rep. 868; *The Allie and Evie*, 24 Fed. Rep. 745.

Towboats are not held to the strict rule applicable to common carriers. Their duties are not confined to the less onerous obligations which a master owes to his employés. They occupy a middle ground between the two. They are bailees for hire, having life and property in their keeping, and are required to exercise ordinary care, skill, and prudence in arranging and navigating the tow. *Bust v. The Cornell Steam-Boat Co.*, 24 Fed. Rep. 188.

In dealing with the question of negligence, the tug cannot be treated as a common carrier. *The Henry Buck*, 38 Fed. Rep. 611.

1. *The Stranger*, 1 Brown Adm. 281; *The Anglo-Australian Steam Nav. Co.*; *Cornell Steam-Boat Co.*, 32 Fed. Rep. 798; *The Quickstep*, 9 Wall. (U. S.) 670.

If a tow under complete control of the tug as to motive power is lost, a presumption of negligence arises against the tug. *The Delaware*, 20 Fed. Rep. 797. See also, as to presumption of negligence, *Wilson v. Sibley*, 36 Fed. Rep. 379; *The Quickstep*, 9 Wall. (U. S.) 665; *The M. J. Cummings*, 18 Fed. Rep. 181; *The Delaware*, 12 Fed. Rep. 571; *The Seven Sons*, 29 Fed. Rep. 543.

If the weather is fair, a presumption that a tug is negligent arises if she allows her tow to come in contact with a pier. *Western Assur. Co. v. The Sarah J. Weed*, 40 Fed. Rep. 844.

If a tow is lost by striking a ledge, negligence may be established against the tug, by a clear preponderance of

testimony. *The Narragansett*, 20 Fed. Rep. 394.

In the performance of a towage contract, a tug is bound to exercise ordinary care, skill and diligence. *Mollenbrock v. St. Louis, etc., Packet Co.*, 16 Fed. Rep. 878.

It is negligence for the master of a tug to unnecessarily expose a barge in his tow while making a landing at an intermediate stopping place. *White v. The Laverne*, 2 Fed. Rep. 788.

If a tow grounds in such a position as to make it probable that she will safely float at high water, and the tug, in attempting to pull her off, changes her position so that she strains and breaks, the tug is negligent and liable for the damages. *The Effie J. Simmons*, 6 Fed. Rep. 639.

For a tug, in hitching onto a barge, to collide with it, and then to handle it in a reckless manner and to unnecessarily expose it to danger, is negligence, and will render the tug liable for the resulting damages. *Wagner v. The W. M. Wood*, 45 Fed. Rep. 774.

If a tug negligently strands a tow, she must pay for the injury sustained by the boat while so stranded, unless she can make it clear that such injuries would not have been sustained if the tow had been seaworthy. *The Vigilant*, 10 Fed. Rep. 765. See also *The Jonty Jenks*, 54 Fed. Rep. 1021.

It is negligence for a tug to leave a tow fast to a pier, when the master of the tug knows that there is not sufficient water at the pier at low tide to float the tow, and it appears that the master of the tow gave notice of the danger. *Morse v. The Chas. Runyon*, 56 Fed. Rep. 312.

If an oil barge leaks, and spreads oil over the waters in the vicinity of the tug and tow, it is negligence for a fireman on the tug to throw a shovel of ashes on the water, and the tug is liable for damages caused by the igniting of the oil. *The James Jackson*, 9 Fed. Rep. 614.

For a tug, after replacing a hawser that had parted, to start with a sudden jerk, thereby tearing out a corner post of the tow and causing her to sink, is negligence. *The E. Luckenback*, 15 Fed. Rep. 924; *aff'd* 23 Fed. Rep. 725.

the tug not to injure her tow does not arise from contract, but is imposed by law.¹

VI. RESPONSIBILITY OF TOW—1. In General.—Masters of vessels in tow are bound to obey all the proper orders of the master of the tug, and if the master of the tow refuses such obedience, or is

See also *Wilson v. Sibley*, 36 Fed. Rep. 379.

In *The R. C. Veit*, 56 Fed. Rep. 122, a tug was held not liable for the loss of a scow which went adrift by the pulling out of her stern bitts, some jerking in a heavy sea being unavoidable.

Failure to carry a sufficient supply of coal to enable a tug to lie over with steam up for ten or twelve hours, is negligence, and renders the tug liable for the loss of a barge by abandonment. *The Frank G. Fowler*, 8 Fed. Rep. 340.

It is negligence for a tug to so slacken her speed as to cause a ship in tow to lose her steerage way, by reason of which she grounded. *The Farnsworth*, 6 Fed. Rep. 307.

Owners of tugs are chargeable with negligence in undertaking a towage of a vessel upon trips for which their unfitness is obvious. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404; *Williams v. The William Cox*, 3 Fed. Rep. 645; *aff'd* 9 Fed. Rep. 672.

Steam tugs having boats in tow are bound to exercise all reasonable care and skill in everything relating to the work until it is accomplished, and are chargeable for the want of either to the extent of the damage sustained, and this liability continues, although it may appear that the negligence or unskillfulness of those managing the tow contributed to the collision. *The Annie Williams*, 20 Fed. Rep. 866.

In taking a schooner through a draw she got away from the tug before she drifted more than twice her length. The tug caught her, made fast, and prevented her from grounding on the southern shore. She then pulled the schooner around and pointed her toward the northern shore, but by negligence or mismanagement pushed her too far and grounded her. It was held that the tug was liable. *Grand Trunk R. Co. v. Griffin*, 21 Fed. Rep. 733.

Proof of the custom of towing barges with uncovered hatches to save the expense of trimming their cargoes of coal, will not exonerate a tug from liability for one lost while being taken across New York Bay in a gale of

wind. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404.

As to uncovered hatches establishing contributory negligence, see *The Oswego*, 8 Ben. (U. S.) 129.

The stranding of a vessel upon a well-known shoal, by two tugs which were, by the usage of the port, in command of the captain of the tug first engaged, is negligence, and renders both tugs liable. *The Arturo*, 6 Fed. Rep. 308. Where a landing place has been chosen by the tow which looked as if it were suitable for the purpose chosen, a tug is not guilty of negligence in running on a hidden obstruction. *Powell v. The Willie*, 2 Fed. Rep. 95.

A tug which attempts to heave a line to a schooner and is prevented by the interference of another tug until the schooner grounds, is not guilty of such negligence as will render her liable to the schooner. *The E. D. Holton*, 55 Fed. Rep. 1010.

If a tow is struck by a raft set adrift by a sudden freshet, and there is no negligence on the part of the tug, the tug is not liable. *McGovern v. Lewis*, 56 Pa. St. 231; 94 Am. Dec. 60.

1. In *The Brooklyn*, 2 Ben. (U. S.) 547, Blatchford, J., said: "In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage any more than the obligation of a third vessel meeting a canal boat on her trip, not to collide with her, arose out of such contract or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle applicable in all cases of tort—*sic utere tuo ut non alienum laedas*. Her duty did not result from the consideration paid or to be paid for the towage. It was imposed by the law and would have existed even though her service had been gratuitous. If the libellant's property was lawfully where it was, the steamboat owed a duty toward it independent of any contract of towage, and is liable for collision and the consequent damage to such property caused by negligent navigation amounting to a breach of such duty.

guilty of negligence, or carelessness, or want of due skill and care in the performance of his duties, the owners of the tug are not liable for the consequences to the owners of the tow.¹ It is incumbent upon the tow to be steered properly, to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the tow.²

2. Contributory Negligence of Tow.—If those in charge of a tow are guilty of contributory negligence, there can be no recovery against the tug for injuries received.³

The duty was of the same character as that imposed by the law upon a third and stranger vessel."

1. *Dutton v. The Express*, 3 Cliff. (U. S.) 462; *The Annie Williams*, 20 Fed. Rep. 866; *The Brooklyn*, 2 Ben. (U. S.) 547.

2. *Stretch v. The Margaret*, 2 Fed. Rep. 255.

Where the master of the tug gives the master of the tow express directions to follow in the wake of the tug, if the tow, after observing a change of course in the tug, fails to follow, but steers off and strands, the tug is not liable. *The Jacob Brandow*, 39 Fed. Rep. 831.

A vessel being towed must keep close watch and obey all signals. *The Maria Martain*, 2 Biss. (U. S.) 41.

If a tow, while under the control of the tug, follows in her wake as closely as possible, she is not liable for any injury that may happen to her by running against an obstruction. *The T. J. Schuyler v. The Isaac H. Tilyer*, 41 Fed. Rep. 477.

3. *Ferris v. The Alida*, 13 Rep. 677; *The Margaret*, 2 Flip. (U. S.) 640.

If a man in charge of a barge throws off a line without authority, and damage results, the barge is, to that extent, in fault. *The Pres. Briarly*, 24 Fed. Rep. 478. See also *Dutton v. The Express*, 3 Cliff. (U. S.) 462.

If a tug leaves a barge at a stake-boat over night, and the barge rolls heavily and loses her deckload, the loss being due to her being improperly loaded and rendered top-heavy, though the leaving of the barge was the remote cause, yet her top-heavy condition is the proximate cause, and exonerates the tug from liability. *The King Kalakau*, 43 Fed. Rep. 172.

Placing coal in the stable of a canal boat, and then trying to balance the weight by putting coal on the after-deck, is such contributory negligence on the part of the master of the tow as will compel a division of dam-

ages in case the barge is sunk by the deckload washing overboard and the weight in her stable causing her to ship water and swamp. *Connolly v. Ross*, 11 Fed. Rep. 342.

If the owners and captain of a barge, knowing there are no means on the barge of signaling the tug, allow her to be taken in tow, and she is lost, they are guilty of contributory negligence. *The M. J. Cummings*, 18 Fed. Rep. 178.

It is incumbent on the owner of an old boat to give notice of her condition to the master of the tug. In case he does not, the tug is liable only for want of ordinary care in handling her. *The Syracuse*, 18 Fed. Rep. 828.

If the captain of a rotten old canal boat refuses to be towed to a place of safety after being jammed against a wharf, but demands to be towed to his destination, and the barge sinks *en route*, no recovery can be had against the tug. *The George W. Mead*, 8 Ben. (U. S.) 481.

Leaving the tiller of a canal boat is gross negligence on the part of the helmsman. *The Jonty Jenks*, 54 Fed. Rep. 1021.

If the captain of the tow knows that the tug master is violating the orders of his owners in towing to the place agreed on, no recovery can be had for the loss of the tow. *The R. F. Cahill*, 9 Ben. (U. S.) 352.

Carrying too much sail at a critical point is contributory negligence on the part of the tow. *The Margaret*, 2 Flip. (U. S.) 640.

If a tug leaves its tow in a safe place, it is negligence on the part of the master of the tow to remove it to an unsafe place. *The P. C. Schultz*, 10 Ben. (U. S.) 536.

When Tow Not Guilty of Contributory Negligence.—It is not contributory negligence for a schooner, which has signaled for a tug, to use a towline one hundred feet long when it appears that the line had been used before in towing

VII. MUTUAL RESPONSIBILITY OF TUG AND TOW.—When special dangers arise which were not contemplated by the original towage contract, and the captains of the tug and tow agree to assume them, the consent of the tow-owners not having been obtained, they are mutually at fault, and each barge is chargeable with one-half the loss.¹

VIII. REMUNERATION FOR TOWAGE—1. In General.—The owners of a tug will be entitled to recover the sum agreed to be paid them for the services rendered to the tow. If no sum has been agreed upon, they can claim such a sum as will constitute fair and reasonable remuneration for the services rendered.² But an agreement made under circumstances of distress, to pay an exorbitant amount, will not be enforced.³ Where a fixed sum for towage has been agreed on, the owners of the tug will be bound thereby, and cannot claim extra remuneration in conse-

with the same tug; where the weather is not heavy enough to make navigation difficult or perilous, although she has another new line used only in stormy weather; especially when the tug whose services have been accepted had been obstructed in making fast to the schooner by the endeavors of a rival tug to take the tow. *The E. D. Holton*, 55 Fed. Rep. 1010.

Contributory negligence cannot be imputed to the captain of a tow for not protesting against the exposure of his boat, unless the danger is very obvious. *White v. The Laverne*, 2 Fed. Rep. 788; *distinguishing* *Mason v. The William Murtaugh*, 3 Fed. Rep. 404.

If the captain of a tug fails to have lights on his boat, the master of the tow cannot be charged with negligence. *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559.

Failure of Charterer to Furnish Provisions.—If the charterer of a tug bound himself to furnish provisions and failed to do so, he cannot recover against the tug for failure to perform the services agreed upon when such failure was caused by a lack of provisions. *Ferris v. The Alida*, 13 Rep. 677.

As to control of charterer over pilot of the tug charter, see the *Martin Kalbfleisch*, 55 Fed. Rep. 336.

1. *The E. A. Packer*, 22 Fed. Rep. 668.

It is negligence in both the owner of the tow and tug to proceed on a voyage, where the tow is known to be unfit to encounter the hazards of the trip. *Mason v. The William Murtaugh*, 3 Fed. Rep. 404; *Williams v. The William Cox*, 3 Fed. Rep. 645; *Connolly v. Ross*, 11 Fed. Rep. 342.

While it is negligence for the master of a tug to put an old boat, weak and more deeply laden than others, in the front tier of the tow, if the owner of the barge does not object to proceeding with his boat so placed, he will be deemed to have acquiesced, and if she is lost, it is a case of concurrent negligence in both parties. *The Borden-town*, 16 Fed. Rep. 270.

2. Where the master of a vessel does not stipulate with the tug, when the towage is payable, the custom of the port respecting contracts for round towage will govern and the towage is payable at the port just before the vessel is towed back to sea. *The Queen of the East*, 12 Fed. Rep. 165.

For towing a vessel into New York harbor from a point about 125 miles from Sandy Hook, the weather being fair and the vessel towing sustaining no damages, \$3,750 is a fair compensation. *The Leipsic*, 5 Fed. Rep. 108.

The master's certificate as to the amount agreed upon to be paid for towage, is generally conclusive. *The Senator*, 1 Brown Adm. 544.

Where a barge laden with wood was driven ashore, and the owner of the wood offered to unload it at his expense, but the master refused to permit it, a tug sent to pull the barge off must look to the barge and not the load of wood for its compensation. *The Eugene Vesta*, 28 Fed. Rep. 762.

3. See *The Sophia Hauson*, 16 Fed. Rep. 144; *The Jacob E. Ridgeway*, 8 Ben. (U. S.) 179; *The Homely*, 8 Ben. (U. S.) 495; *The Remnants of Jeremiah*, 10 Ben. (U. S.) 338, when agreements were set aside as extortionate, and a fair amount allowed.

quence of delay occurring without fault of either the tug or tow.¹ In case a tug is carried away from her ordinary employment to a foreign port, and detained there for a time, remuneration will be awarded her at an extraordinary rate, and not mere ordinary towage.² The burden of showing an agreement as to remuneration for towage services lies, in all cases, upon the party setting it up.³

2. **Lien for.**—The sum payable for towage creates a maritime lien on the vessel towed, which lien will travel with the *res*, and rank for payment equally with a lien for salvage or pilotage.⁴ The towage service must be actually rendered in order to create the lien; an unexecuted contract to tow is not enough.⁵ The lien, however, when acquired, must be enforced without delay, or it will be considered waived as against a purchaser without notice.⁶

IX. ACTIONS FOR TOWAGE OR DAMAGES—1. **Jurisdiction.**—The courts of admiralty have jurisdiction to hear and determine all claims or demands arising from towage contracts, whether the service is rendered on the high seas, or on navigable rivers lying within the body of the country.⁷ Tort is usually the proper

1. *The Betsey*, 2 W. Rob. 167.

2. *The Batavier*, 1 Spinks 174.

3. *The Minnehaha*, 15 Moo. P. C. C. 133; *Lush*, 335.

4. *The W. J. Walsh*, 5 Ben. (U. S.) 72; *The Mystic*, 30 Fed. Rep. 73; *The James McMahon*, 10 Ben. (U. S.) 103; *The Alabama*, 22 Fed. Rep. 449.

In the absence of proof of a general custom to the contrary, a maritime lien will attach to a ship for towage services. *Learmouth v. The Yuba* (V. A. C. 1888), 14 Q. L. R. 132.

Under the general maritime law, no lien attaches to a vessel for towage services rendered in its own port. *The Daniel Kaine*, 31 Fed. Rep. 746.

When the amount of a towage bill is not disputed, but the respondent sets up certain claims against the tug for damages to barges other than the one for which towage is claimed, and offers to pay the amount due less the claims, coupled with a demand for a receipt in full, it is not a sufficient tender to destroy the lien of the tug on the barge for the towage. *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

Where there is a towage contract from sea to sea, the contract must be treated as a whole and cannot be said to be unexecuted where there is a part performance. A lien will, therefore, attach to the ship for the full amount due the tug. *The Queen of the East*, 12 Fed. Rep. 165.

If towage service was rendered on the credit of an ice company, and the

master of the schooner told the tug captain that the ice company would pay, and the ice company did in fact pay a portion of the towage bills, the tug cannot have a lien on the schooner for towage services which were not paid for by the ice company on account of its failure. *The Sarah Cullen*, 45 Fed. Rep. 511.

5. *The Prince Leopold*, 9 Fed. Rep. 333.

6. *The Frank*, 25 Fed. Rep. 287.

7. In *The W. J. Walsh*, 5 Ben. (U. S.) 72, *Benedict, J.*, said: "There is no room to contend that the towage contracts, set up in the libel, are not maritime contracts. A maritime contract in law, as now understood, is any contract which necessarily is appurtenant to navigation, such as the transportation of passengers or freight on navigable waters, or the navigation of vessels on such waters, or supplying the necessities of vessels used on such waters. A contract to furnish the motive power to a vessel so used is of the same class. It appertains to navigation in the strictest sense, and is as distinctly maritime in character as a contract to steer the boat or to carry cargo in her. The steamboats which tow the boats and barges, by means of which commerce between *New Jersey* and *New York* is transacted, are as much engaged in navigation as are the boats in which the cargoes are placed, and it is not only navigation but commerce among the states. Indeed, the contract

in question contains almost all the features formerly considered necessary in a maritime contract under a much narrower view of jurisdiction than at present prevails. I am, therefore, at a loss for any ground upon which it can be held that here is not a maritime contract."

Towage Services Are Maritime in Their Character. — The *Acadia*, 1 Brown Adm. 73.

In *The Brooklyn*, 2 Ben. (U. S.) 547. Blatchford, J., said: "It is contended that, in view of the decision of the supreme court, in *Allen v. Newberry*, 21 How. (U. S.) 244, to the effect that a district court has no jurisdiction over a contract of affreightment of goods between two ports in the same state, and of the decision of the same court, in *Maguire v. Card*, 21 How. (U. S.) 248, to the effect that a district court has no jurisdiction over a contract for supplies furnished to a vessel engaged in the business of navigation and trade between ports exclusively within the same state, this court has no jurisdiction to award damages in this suit for the loss sustained by the libellants. It is true that this court did, in the case of *Poag v. The McDonald* (April, 1859), dismiss the libel for want of jurisdiction, on a state of facts precisely like that in the present case, the decision being founded on a supposed effect of the decisions in *Allen v. Newberry*, 21 How. (U. S.) 244, and *Maguire v. Card*, 21 How. (U. S.) 248. It is also true that Mr. Justice Nelson, in the circuit court, on an appeal taken in *Poag v. The McDonald* (in Aug. 1860), sustained the dismissal of the libel for want of jurisdiction, on the view that, even though the suits were to be regarded as founded in tort, for negligence and carelessness, the district court had no jurisdiction of it because both of the vessels were, at the time of the commission of the tort engaged solely in the internal commerce of the states. But this view has, since that time, been departed from, in practice both by this court and by the circuit court. In *Langley v. The Syracuse* (March, 1867), which was a suit brought in this court, by the owner of a canal boat towed from Albany to New York, against the steamboat which towed her, to recover damages occasioned through the wrongful and tortious act of the steamboat, by the sinking of the canal boat while in tow of her, the same judge (Judge Betts)

made a decree in favor of the libellant who had dismissed the libel in *Poag v. The McDonald*, and that decree was affirmed by Mr. Justice Nelson, in the circuit court as recently as in November, 1867. *The Syracuse*, 6 Blatchf. (U. S.) 2. Such I understand to be the settled law and practice of this court, and of the circuit court, in cases of like character; and I know that Mr. Justice Nelson does not adhere to the views expressed by him in his opinion delivered in the case of *Poag v. The McDonald* so far as they apply to the question of jurisdiction involved in that case." See also *The Commerce*, 1 Black (U. S.) 574.

In *England*, by the statute 3 & 4 Vict., ch. 65, § 6, the admiralty division of the high court has jurisdiction to hear and decide upon all claims or demands in the nature of towage, whether the services were rendered on the high seas or in the body of a county. Thus the admiralty division can hear an action instituted by the owners of a tow against her tug for negligently towing her so as to cause her to come into collision with another vessel or to damage herself. *The Energy*, L. R., 3 A. & E. 48; *The Nightwatch*, Lush. 542, 8 Jur. N. S. 1161. The jurisdiction of the admiralty court existed in respect of claims for towage services rendered, not in respect of claims against the owner of the towing vessel for breaches of contract. It follows that an action by the vessel towed against her tug for negligence in making the vessel take the ground, could not, previously to the adjudication acts, be brought in the admiralty court. *The Robert Pow*, 2 B. & L. 99; 9 L. T. N. S. 237.

A county court having admiralty jurisdiction will have jurisdiction to hear and determine any claim for towage, the amount of which does not exceed £150, or any claim whatever to an amount, when the parties agreed by memorandum signed by them, their solicitors, or agents, that the county court shall have jurisdiction to hear it. *The Hjemetts*, 5 Prob. Div. 227; 42 L. T. 514.

Under 26 Vict., ch. 24, § 10, the various vice-admiralty courts abroad have jurisdiction to hear and determine any claims in respect to towage. The admiralty court has, however, concurrent jurisdiction with the vice-admiralty courts. *The Peerless*, Lush. 103.

form of action,¹ and the burden of proof is ordinarily on the libellant.²

2. Parties.—If the claim is for damages for an injury sustained by a tow through the negligence of another vessel, the suit ought to be against all the parties concerned, in order that the rights of the parties may be determined in a single suit, and the loss imposed where it belongs.³ Where a suit is for earnings from towage, the mortgagee in possession has a right to file a libel *in rem*.⁴ The owner of a tug being a bailee of its tow, may maintain an action for injury to it by collision, without regard to any right of subrogation to the claim of the owner by payment to the latter of the damages sustained, or to the fact whether or not he has made such payment.⁵

3. Lien for Damages.—The lien for damages claimed against a tug for injuries to the tow must be taken subject to all the liens to which the tug was subject at the time of the injury.⁶

4. Evidence.—In actions based on negligence, if the evidence disclose no injury traceable to the negligence complained of, the libel will be dismissed.⁷

1. In *Ashmore v. Pennsylvania Steam Towage, etc., Co.*, 28 N. J. L. 180, it was held that the proper form of action against the owners of a tow boat for the negligence of their agent was tort, although there might be an express contract touching the towage.

2. In actions for negligent towage, the burden of proof is ordinarily on the libellant. *The Princeton*, 3 Blatchf. (U. S.) 54. But when the case discloses that the towage service miscarried because an immediate peril was encountered, which both parties deemed imminent, the presumption of negligence on the part of the tug is materially weakened. Under such circumstances, it is not unreasonable to require the party who imputes the fault to the other to locate the fault with precision. *The Packer*, 28 Fed. Rep. 156.

Defense.—It is no defense in an action for injury to a tow to say that the master of the tow gave the pilot of the tug certain directions which he followed at the time of the accident. *Hill v. Rogers*, 1 Pittsb. (Pa.) 163.

3. *The Marshall*, 12 Fed. Rep. 921.

4. *Kearney v. A Pile-Driver and Stage*, 3 Fed. Rep. 246.

A suit *in rem* cannot be maintained against a steamboat for damages to the tow when it appears that the tow was injured by other tugs employed to turn it around, and that the damage was done before the steamboat took charge. *The Syracuse*, 36 Fed. Rep. 830.

5. *The Jersey City*, 2 C. C. A. 365.

An insurer may maintain an action for damages against the offending vessel in his own name after payment of the loss. He is the party really entitled to damage and the party in whose name actions should be more properly brought. *The Monticello v. Mollison*, 17 How. (U. S.) 152; *Fretz v. Bull*, 12 How. (U. S.) 468; *The Frank G. Fowler*, 8 Fed. Rep. 360.

If a barge is injured by the negligence of a tug, the bailees of the barge may have an action *in rem* against the tug to recover damages for the injury. *The Venture*, 18 Fed. Rep. 462. The owners of a tug which leaves a tow in an exposed position, are liable *in personam* to the owners of a barge sunk by a storm coming up during the absence of the tug. *Connolly v. Ross*, 11 Fed. Rep. 342.

Burden of Proof.—The burden of proof is upon the barge owner to show that the negligence of the tug was the proximate cause of the injury to the tow. *The Mary*, 14 Fed. Rep. 584.

6. *The Grapeshot*, 22 Fed. Rep. 124. See also *The Frank G. Fowler*, 17 Fed. Rep. 653; *The Samuel J. Christian*, 16 Fed. Rep. 796.

7. *The Aurora v. The Republic*, 25 Fed. Rep. 778; *The Nellie Flag*, 23 Fed. Rep. 671; *The Charles Allen*, 23 Fed. Rep. 407.

In actions to recover damages for the alleged negligence of a tug, the burden

X. MEASURE OF DAMAGES—1. For Injuries.—The measure of damages is the loss sustained over and above what would have been sustained if reasonable care and skill had been exercised.¹ If the owners of the tug put the tow in as good condition as she was before the accident, damages can only be recovered for the delay.²

2. For Violation of Towage Contract.—The measure of damages for the violation of the towage contract is the contract price less the expense necessary to complete the contract. But where the master of the vessel to be towed refuses to state what he paid to other tow boats for the same labor, the court will award the contract price as damages.³

XI. DIVISION OF DAMAGES.—Where both parties are at fault, the damages will be divided.⁴ So where the injury is attributable to negligence in the management of the tug and enhanced by the

of proof is on the libellants to show such negligence. And where there is no proof of negligence on the part of the tug, the libel will be dismissed. *Ritcher v. The Olive Baker*, 40 Fed. Rep. 904.

Where a towage contract stipulated that a barge should be landed at a particular place, and the tug landed her at a different place, and she was sunk and lost, evidence that she was not injured by sinking at the latter landing, that by ordinary care of plaintiff she could have been saved, that plaintiff was offered one-half her value as she lay, that sunken she was worth one-half of her value, that she was allowed to lie until her cargo was stolen, and that she was sold for wharfage, is irrelevant. *Barnhill v. Haigh*, 53 Pa. St. 165.

1. McCormick v. Jarratt, 37 Fed. Rep. 380; *Pettie v. Boston Tow-Boat Co.*, 44 Fed. Rep. 382.

The indemnity payable to the owner of a tow injured by the negligence of a tug is the value of the tow at the time and place she was injured, payable in the currency of the place where she was injured. *Cramer v. Allen*, 5 Blatchf. (U. S.) 248.

Where there is no agreement to the contrary, the owners of the tow boat are liable for all damages occasioned by the negligence of their agent. *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

If a vessel, towed in so negligent a manner as to be grounded, employs another tug to help get her off, she can recover the amount paid as salvage from the tug that grounded her. *The C. F. Ackerman*, 8 Ben. (U. S.) 496.

2. The James H. Brewster, 34 Fed. Rep. 77.

If a canal boat is sunk slowly by the fault of the tug, and is afterwards repaired at the tug's expense, the owners of the tow can only hold the tug responsible for the value of personal property on board at the time of the accident, and loss and demurrage for the barge from the time of the accident till the time she was let off the ways. *O'Hare v. The Brilliant*, 3 Fed. Rep. 719.

3. The Vincenz Pinotti, 16 Fed. Rep. 926.

A tow boat is liable *in rem* for a breach of towage contract. *The James McMahon*, 10 Ben. (U. S.) 103.

Damages for Detention.—Damages for detention are not recoverable where there was an agreement between the tug and vessel that the vessel should anchor to sheathe, and the evidence shows no unreasonable delay in sheathing. *The Sebastian Bach*, 12 Fed. Rep. 172.

4. The Young America, 20 Fed. Rep. 926; *The W. A. Levering*, 36 Fed. Rep. 511; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505.

Where an attempt was made to run past certain bridge piers on a bad night, and the tow went on the piers, but the impact was so slight that had she been a sound boat no damage would have resulted, and sank, negligence will be imputed to both tug and tow, and the damages will be divided. *The William Kraft*, 33 Fed. Rep. 847.

Where a boat in tow is separated by the fault of the tug, but it appears that she could have been saved if she had been provided with an anchor, the dam-

weak condition of the tow, of which the owner had neglected to inform the master of the tug, only one-half damages will be allowed.¹ But a previous condition of weakness on the part of the vessel negligently sunk will not constitute such a fault in the vessel sunk as will permit a division of damages, where it is shown that such a condition did not contribute to the accident or induce the fault, and it not being possible that any express notice of such condition could have affected the navigation.²

TOWARDS.³—(See also **TO**.)

TO-WIT—(See **SCILICET**, vol. 21, p. 851).—That is to say, namely, the same as *videlicet* or *scilicet*.⁴

ages will be divided. *Cramer v. Allen*, 5 Blatchf. (U. S.) 248.

In *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30, *aff'g* 5 Ben. (U. S.) 244; 6 Ben. (U. S.) 272, while a tow was found to be solely in fault for her unseaworthy condition, which caused her to be cast off to sink, yet the tug was found to have cast her off in a negligent manner, and the damages were apportioned. *The Bordentown*, 16 Fed. Rep. 270.

In *Connolly v. Ross*, 11 Fed. Rep. 342, where a tug was condemned for leaving canal boats unattended and helpless, moored in a harbor unsafe in one quarter, and the boats were held negligent for overloading and improper loading, the damages were divided.

1. *The Bordentown*, 16 Fed. Rep. 270.

The owner of a boat is bound to give notice of any infirmity about his boat, if she be not staunch and strong. And where this is not done, he must be held jointly or solely responsible for injuries received according to the circumstances of the case. *The Syracuse*, 12 Fed. Rep. 828. See also *The M. J. Cummings*, 18 Fed. Rep. 178.

2. In *Pettie v. Boston Tow-Boat Co.*, 44 Fed. Rep. 382, Brown, J., said: "Upon all the testimony in this case, I cannot resist the conclusion that the inability to raise the libellant's barge was because she was weak and rotten about her deck and water-ways, so that she could not sink with a hole in her bottom and lie in a moderate tide even in mild weather without partially breaking up, and thus become incapable of being raised. This previous condition, however, in no way contributed to the accident or induced the fault of the tug, nor could any notice of this condition be supposed possibly to have affected the navigation of the tug. I cannot find, therefore, that the barge was partially in fault so as to direct

any division of the damages." See also *The Granite State*, 3 Wall. (U. S.) 310.

3. The word "toward," in a statute making insulting language toward a female relative of the prisoner a mitigation of homicide from murder to manslaughter, was held not to mean simply "to," but to include insulting words about a female relative, whether she was present or absent. *Hudson v. State*, 6 Tex. App. 565.

4. The office and effect of the phrase "to-wit," or *videlicet*, as it is called, is to particularize what is too general in a preceding sentence, and render clear and of certain application that which might otherwise seem doubtful or obscure. *Buck v. Lewis*, 9 Minn. 314.

An imperfect particular description after the phrase, "to-wit," or *videlicet*, will not control a sufficient general description. It was so held in a case where a will was in controversy. *Agnell v. Abnett*, 4 Mod. 411.

In Pleading.—The phrase "to-wit," or *videlicet*, is used in pleading to avoid any variance between the averments and proof; and its effect is to sustain the positive averments in declarations which require strict proof. See *Brown v. Berry*, 47 Ill. 175; *Waller v. Ellis*, 2 Munf. (Va.) 88; *Paine v. Fox*, 16 Mass. 128.

But, where time is material to the merits, the substance of the issue must be strictly proved, and the insertion of a *videlicet* will not help. *Steph. Pl.* 293, 4; *Min. Inst.*, vol. 4, p. 66; *Brimwood v. Barrett*, 6 T. R. 462.

So, also, where the place is a matter of description, it must in all cases, notwithstanding the use of a *videlicet*, be stated truly and according to the fact. Under peril of a variance, if an issue should be adjoined thereon. *Steph. Pl.* 291, 2.

See **PLEADING**, vol. 18, p. 467.

TOWNS AND TOWNSHIPS.—(See MUNICIPAL CORPORATIONS, vol. 15, p. 949.)

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I. DEFINITIONS—1. "Town" in England.—Towns of different countries differ in character, powers, and organization.¹ In *England*, originally, "town" was synonymous with "ville."² The Saxon word "tun" meant a walled place.³

But in modern British legislation, a "town" means the space covered by, or occupied as accessory to, a collection of houses sufficient to be designated in popular parlance, a town, including also lands not built on, that may lie within the ambit thereof, but not lands outside such ambit, though within a borough.⁴

2. "Township" in England.—A township generally denotes a district containing a town and under the same administration.⁵

1. "Town corporations in *America* are as different from those of *England* as the latter are from similar corporations in *Scotland* and *Holland*." Grimke, J., in *Rosebauch v. Saffin*, 10 Ohio 31.

2. "*Villa est ex pluribus mansionibus vicinata, et collecta ex pluribus vicinis*."

... It cannot be a town in law, unless it hath, or in time past hath had, a church and celebration of divine service, sacraments, and burials." Co. Litt. 115, b. This, however, Blackstone regards as rather an ecclesiastical than a civil distinction. "The word has become a general term." 1 Bl. Com. 113. In *Elliott v. South Devon R. Co.*, 17 L. J. Exch. 262, the court, by Parke, B., said: "A

town is a place with a constable or a church."

3. Webster Dict. "Upland towns, which are not governed as boroughs, are but towns, though inclosed with walls." Finch 80.

"Tun"—an obsolete form of "town." Cent. Dict.

4. Towns Improvement Cl. Act, 10 & 11 Vict., ch. 34; *Falkner v. Somerset, etc.*, R. Co., L. R., 16 Eq. 458. Similarly in a Turnpike Act, 3 & 4 Vict., ch. 61, § 1; *Reg. v. Cottle*, 16 Q. B. 412. And see *Wilb. Stat. Cl.* 122.

5. When a hamlet is adjacent to a town, but governed by separate officers, it is to some purposes in law, looked upon as a distinct township. 1 Bl. Com. 115.

In some statutes the word township is nearly synonymous with parish.¹

3. "Town" in the United States.—In the *New England* states, a town is a political unit, an incorporated subdivision of a county. In some other states, where the county is the unit, the town is a mere subdivision, having in some matters local self-government. Where the subdivisions are called "townships," the word "town" is used somewhat generically, to designate a village, borough, or smaller city.²

4. "Township" in the United States.—In *New England*, a township is one of the units of survey into which a county is divided. In states surveyed under the public-land system of 1796, such

1 *E.g.*, "township, parish, or place," in the beer license law. 3 & 4 Vict., ch. 61, § 1; *Preston v. Buckley*, L. R., 5 Q. B. 391.

2 In *Alabama*, a town or other municipality is strictly a political institution—a part of the internal government of the state. *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611.

In *Arkansas*, a "town" cannot properly be a very small village. *Murray v. Menefee*, 20 Ark. 561.

In *California*, in a statute inhibiting the requirement of bonds in civil actions against certain municipal corporations, the expression "county, city, or town" was held to include the "city and county" of San Francisco. *Morgan v. Menzies*, 60 Cal. 341.

In *Colorado*, in the absence of statutory limitation, a town may embrace only sixteen acres of territory. *Guebelle v. Epley*, 1 Colo. App. 199.

In *Connecticut*, "towns are territorial corporations into which the state is divided by the legislature from time to time, at its discretion, for political purposes and the convenient administration of government." Gray, J., in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

In *Illinois*, under the township system for the division of a county into "towns," the word means municipal corporations; a "town" generally embracing a township according to government surveys. In *Illinois Rev. Stat.* 1845, p. 111, "town" simply means the collection of residences which in the earlier statute is called "an incorporated town," and in the later, a "village." *Martin v. People*, 87 Ill. 524. In the statutes, "incorporated town" seldom if ever designates a township. *Harris v. Schryock*, 82 Ill. 119. As to the difference between a township and

an incorporated town, see *People v. Harvey*, 142 Ill. 573.

In *Indiana*, as to a civil town distinct from the town incorporated upon the same territory for school purposes, see *Indiana Rev. Stat.* (1888), § 4438; *Huntington v. Day*, 55 Ind. 7; *Noblesville v. McFarland*, 57 Ind. 335; *Inglis v. State*, 61 Ind. 212; *Harris Tp. v. McGregor*, 67 Ind. 380. In a statute prohibiting shooting in a "town or village," "town" is generic, and includes cities. *Flinn v. State*, 24 Ind. 286. Compare *State v. Craig*, 132 Ind. 54.

In *Iowa*, there can be no definite distinction between the two, based on size or employment. Ordinarily, a village is the smaller, and is occupied more by agriculturists. *Truax v. Pool*, 46 Iowa 256. In a stipulation not to resume business in the same "town," the word has been held to include the vicinity. *Steyer v. Dwyer*, 31 Iowa 20.

In *Maine*, acceptance of the act of incorporation is not necessary to the existence of a town. *Gorham v. Springfield*, 21 Me. 58. "Town" is of late often colloquially used in *New England* as a short synonym of municipal corporation. See index of recent volume of *Maine Reports*, under "Towns."

Under the *Massachusetts* constitution, the word "town" may mean a representative district. *Williams v. Whiting*, 11 Mass. 425. In a statute for establishing truant schools, "if three or more towns in a county so require," the word "towns" may include cities. *Lynn v. Essex County*, 153 Mass. 40.

In *Minnesota*, in the special act of 1875, requiring each "town and township" to provide for the poor, in the manner of counties, the words include incorporated cities. *Odegaard v. Albert Lea*, 33 Minn. 351.

In *Mississippi*, "municipal corporations are divided into three classes, viz.: cities, towns, and villages. . . . Those having less than 2,000 and not less than 500 inhabitants are towns." *Mississippi Code* 1892, § 2911. In a statute imposing a privilege tax on a private boarding house in a "town," the word does not apply exclusively to incorporated towns. *Murphy v. State*, 66 Miss. 46.

The *Missouri* statutes punishing conversion or embezzlement by officers of "towns," cities, or counties, are held to apply also to officers of townships. *State v. Hays*, 78 Mo. 600; *State v. Cleveland*, 80 Mo. 108.

Under the *New Hampshire* statute, "town" means any incorporated place whose inhabitants are required to pay a tax. *New Hampshire Pub. Stat.* 1891, p. 49, § 5. And all places incorporated by the name of parishes with town privileges, are towns, p. 144, § 2. An act of incorporation raises no conclusive presumption that the place was not previously a corporate town. *Bow v. Allentown*, 34 N. H. 351. A township grant does not constitute a town. *Wells v. Burbank*, 17 N. H. 393. An unincorporated place may be a "town," if its inhabitants are required to pay taxes. *New Boston v. Dunbarton*, 12 N. H. 409; *Russell v. Dyer*, 40 N. H. 173. A "practical location" of a town may supersede the boundaries laid down by the charter. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

Under the *New Jersey* statutes, "towns" may include cities. *State v. Parsons*, 40 N. J. L. 4. But such meaning may be excluded by a very slight indication of purpose by the law-maker. *State v. Richards*, 42 N. J. L. 497.

In *New Mexico*, "every municipal corporation having a population of 3,000 and upwards shall be a city; of 1,500, an incorporated town." *New Mexico Comp. L.* (1884), § 1670.

In those *New York* statutes intended to have effect throughout the whole state, "town" may include city. *Charity Com'rs v. McGurrin*, 6 Daly (N. Y.) 356. In the *New York* lien law of 1854, "town" cannot include Brooklyn. *Rafter v. Sullivan*, 13 Abb. Pr. (N. Y.) 262.

By *New York Laws* (1892), ch. 569, § 2 (Am. G. L., ch. 20), p. 2227, "A town is a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such

duties of local government and administration of public affairs as have been or may be conferred or imposed on it by law." By section 134, as to strays and wrecks, villages and cities are considered towns.

In *North Carolina*, a "town" is a parcel of the state, an emanation therefrom for purposes of convenience. *Weith v. Wilmington*, 67 N. Car. 24.

Under some *Ohio* statutes, "town" may include incorporated villages. *Peck v. Weddell*, 17 Ohio St. 271.

In *Oregon*, oral evidence may determine whether a platted place has houses, etc., sufficient to be a "town" within a statute prohibiting toll-gates within a town. *Milarkey v. Foster*, 6 Oregon 378; 25 Am. Rep. 531.

In *Rhode Island*, "town" is a generic term, and, in the absence of contrary legislative indication, will embrace city. *State v. Glennon*, 3 R. I. 276.

In *Texas*, a "town," within the statute for incorporation for school purposes, is a considerable aggregation of houses in close proximity. *State v. Eidson*, 76 Tex. 302. Within the Homestead Law, a "town" may be an aggregation of houses contiguous and inhabited, though not incorporated. *Williams v. Willis*, 84 Tex. 398. The incorporation may properly include the territory inhabited by the persons attending church and school near the others, though it be not platted. *State v. Baird*, 79 Tex. 63. The attempt of Oak Cliff to become incorporated under the general law, and embrace an area of ten square miles, only two whereof were covered by the actual aggregation, was held to be void. *Ewing v. State*, 81 Tex. 172. Compare, as to Beeville, *Mathews v. State*, 82 Tex. 577. See *McCleskey v. State* (Tex. Civ. App. 1893), 23 S. W. Rep. 518.

Under the *Vermont* statutes, "town" includes city. *Vermont Rev. L.* (1880), § 19.

In *Virginia*, "town" means an incorporated town containing a population of less than 5,000; if it have 5,000 or more and a corporation or hustings court, it is a city. *Virginia Code* (1887), § 5, p. 16.

Under the *Wisconsin* statutes, "town" means a civil division composed of contiguous territory. *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189. If not repugnant to any special statutory provision, "town" may include a city, ward or district. *Wisconsin Annot. Stat.* (1886), § 4971, pl. 17. See *State v.*

unit contains thirty-six sections, each a mile square.¹ In some statutes, "township" designates a species of political corporation.²

II. CREATION.—Towns, like all other corporations, must be created by statute.³ In general, the methods of their origin or organization in different states, are not so uniform in detail as to be any more conveniently considered in some attempted classification, than successively, and in final comparison.⁴

Goldstucker, 40 Wis. 124. But compare *Beaudette v. Fond du Lac*, 40 Wis.

44. A town is not such a municipal corporation as can buy or own tax certificates. *Eaton v. Manitowoc County*, 44 Wis. 489.

1. See *SURVEYS*, vol. 24, p. 998.

2. In *Pennsylvania*, a township is a political corporation, capable of suing and being sued. Bright, *Purd. Dig. Pennsylvania Laws* (1885), p. 364, § 12. So also in *Indiana*. *Sebrell v. Fall Creek*, 27 Ind. 86. There the civil township and the "school township," though having the same limits, are not the same corporation. *Heizer v. Yohn*, 37 Ind. 415.

In *Illinois*, by the act of 1874, the adoption of township organization in any county is determined at any general election. *Illinois Rev. Stat.* (1891), p. 1486. Such organization may, on petition and election, be discontinued, p. 1489. There, a township is incorporated as a mere civil division of the state; generally not having ordinary liability as to defective highways. *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652.

The *Illinois Acts* of 1867 and 1869, empowering "villages, cities, counties, or townships," to issue bonds in aid of the *Illinois Southeastern Railway Company*, were, by a majority of the supreme court, held not to include towns; and bonds issued by Enfield were held invalid. *Welch v. Post*, 99 Ill. 471.

In *Iowa*, the "civil township" is not always identical in territory with the "congressional township." *McClain's Iowa Code* (1888), § 515; *Lones v. Harris*, 71 Iowa 478.

In *Michigan*, under the constitutional requirement that counties shall not have less than sixteen "townships," a "fractional township," as surveyed by the *United States*, is also a township. *Rice v. Ruddiman*, 10 Mich. 125.

In *Colorado*, "township" refers to an involuntary or quasi corporation,

and not to an incorporated town. *Valverde v. Shattuck* (Colo. 1893), 34 Pac. Rep. 947.

In *Nebraska*, a township precinct is a mere territorial division of a county without any corporate character. *State v. Dodge County*, 10 Neb. 20.

Under the *New Jersey* road law, "township" comprehends precinct, ward, city, borough, and town corporate. *New Jersey Revision* (1877), p. 1011, § 84.

In *Ohio*, there are two classes: "original surveyed townships," and "civil" or "new townships." *Ohio Rev. Stat.* (1890), §§ 1366, 1376. The former have corporate powers for managing the ministerial and school-land sections by means of trustees, etc. §§ 1360, 1368, 1404.

3. *Galesburg v. Hawkinson*, 75 Ill. 152.

Of the form of such statute in the older states, that of *Connecticut* may serve as a general example, namely: "Territorial divisions of the state.

. . . There shall be and remain in the state, eight counties, which shall be constituted as follows: The towns of . . . shall constitute one county by the name of . . ." *Connecticut Gen. Stat.* (1888), § 2. See also *New Jersey Revision* (1877), p. 1191.

As to a form where the county is the principal political unit, and the townships are laid off by the county commissioners, see *Indiana Rev. Stat.* (1888), §§ 4204, 3515, 5990.

In *Indiana*, the supreme court does not judicially know the names of the townships of a county. *Bragg v. Rush County*, 34 Ind. 405. The same is true in *Missouri*, as to whether a township organization has been adopted. *Rousey v. Wood*, 47 Mo. App. 465. In *Iowa*, otherwise. *State v. Reader*, 60 Iowa 527.

4. To undertake to study the subject by mere generalization, would be to verify the observation of a standard authority: "It is quite impossible in any brief space to convey an adequate idea of the exact nature and properties of

an American municipal corporation. There is nothing in the law more complex and abstruse." Dill. on Mun. Corp. (4th ed.), § 21.

In a brief collation of the distinctive statutory provisions hereon, those of the newer states will be found to be the more elastic, sometimes amounting to a delegated self-creation of a miniature city. In some states, a town differs from a city only in population. See *supra*, this title, *Definitions*, and note as to *Mississippi*. There, larger towns have certain privileges not conferred on the smaller. See *infra*, this title, *Governing Bodies*, note.

In *Alabama*, a town may be incorporated upon petition of twenty adult male inhabitants, to the judge of probate, who thereupon directs an election and records the result. *Alabama Code* (1886), § 1486 *et seq.* He cannot grant a second charter to a town already incorporated. *Ex p. Moore*, 62 Ala. 471. As to the requisites of incorporation proceedings, see *Butler v. Walker* (Ala. 1893), 13 So. Rep. 261.

The title of an act, "To incorporate the town of Munford," was held to include within its purview a section making it a misdemeanor to sell spirituous liquors within the corporate limits. *Ex p. Moore*, 62 Ala. 471.

In *Arizona*, cities and townships are created upon elections held under the direction of the board of county supervisors, on petition of one-half the property tax-payers. *Arizona Rev. Stat.* (1887), § 153 *et seq.*

In *Arkansas*, a town may be organized on petition of twenty qualified voters to the county judge, and a hearing thirty days afterwards. Thirty days after the recorder's transcript, if no objection shall have been made to the circuit court, three notices are posted for the election of officers. *Arkansas Dig. Stat.* (1884), § 785 *et seq.*

The fact that the judge is a former voter does not disqualify him to act on a question of annexation. *Foreman v. Marianna*, 43 Ark. 324.

The county court may divide the county into townships, no township line to pass through a town. *Arkansas Dig.*, § 6444.

Existence of a town corporation can be questioned only at suit of the state. *Searcy v. Yarnell*, 47 Ark. 269.

In *California*, a town having not less than 500 inhabitants, may be incorporated, on petition of 100 qualified electors directed to the board of county

supervisors, hearing notice and election. Act of 1883, *California Pol. Code* (App.), p. 737.

In *Colorado*, municipal corporations are cities of two classes and towns, the latter being those of a population of 2,000 or less. *Colorado Annot. Stat.* (1891), § 4483. A town is incorporated on petition of one-eighth of the voters, notice, and election. § 4516 *et seq.* The repeal (*Colorado Gen. Laws* 1877, § 2745), of the organization law, allowed incorporated towns to retain their then existing organization. § 4532. Previously thereto, the legislature could create a municipal corporation. *Deitz v. Central*, 1 Colo. 323.

The fact that the petition to the county court to appoint commissioners to call an election for town incorporation, was obtained secretly, was held immaterial. So also was the fact that the proposed territory did not exceed sixteen acres. *Guebelle v. Epley*, 1 Colo. App. 199.

In *Connecticut*, towns have no original or self-creative power. Hartford, Weathersfield, and Windsor were not municipal corporations until so made by a legislative act passed in 1639 under the constitution of that year. *Webster v. Harwinton*, 32 Conn. 131.

In the *Dakotas*, in order to incorporate a town, the plat must be accompanied by the affidavit of the surveyor, a census be taken, and a petition be made by one-third of the qualified voters, to the county commissioners; the board causes ten days' notice of a decisive meeting of the voters. The inspectors of election make return, and if incorporation be voted, apportion the population into districts and call an election of officers. *Dakota Comp. Laws* (1887), § 1022 *et seq.* Any town so specially incorporated may amend its charter at an election called upon a petition addressed to the board of trustees. *South Dakota Sess. Law* (1891), p. 213.

In *Florida*, twenty-five male inhabitants are necessary for the incorporation of a town, village, or hamlet. *Florida Rev. Stat.* (1892), § 658.

Over the same territory and at the same time, there may be a *de facto* corporation without right, and a legally organized corporation whose functions are in abeyance. *State v. Winter Park*, 25 Fla. 571. For an action to arrest the usurpation of a municipal franchise, see *Robinson v. Jones*, 14 Fla. 256.

In *Georgia*, when there are twenty-five male inhabitants, a majority may

petition the superior court, and upon notice and election therefor, become incorporated as a town. *Georgia Code* (1882), § 775 *et seq.*

As to the requisites of procedure in town incorporation, see *Dunden v. Toombsboro*, 81 Ga. 353.

In *Idaho*, towns are incorporated on petition of the taxable male inhabitants to the county commissioners, setting forth the metes and bounds not over six miles square. The board, if "satisfied that the prayer is reasonable," may "declare such town incorporated." *Idaho Rev. Stat.* (1887), § 2224.

In *Illinois*, a county may adopt township organization on petition of fifty legal voters to the county board, election, division by three commissioners into towns, etc. *Illinois Rev. Stat.* (1891), p. 1486 *et seq.*

Under the *Illinois Act* of 1845, if the plat is recorded before the town has a corporate existence, the fee remains in abeyance, subject to vest in the corporation as soon as created. An omission in the plat to designate a corner-stone, as required by the statute, is not fatal, if the streets, etc., can be ascertained from other monuments therein, with equal certainty. *Gebhardt v. Reeves*, 75 Ill. 301.

The incorporation of Tamaroa, *Illinois*, in 1859, "with all the rights," etc., "conferred on the town of Havana by the act approved Feb. 12th, 1853," was held not to include a power conferred upon Havana in 1857 by an act amending that of 1853. *Tatum v. Tamaroa*, 9 Biss. (U. S.) 475; 14 Fed. Rep. 103.

Mandamus lies to compel a village council to call an election for a change from special to general incorporation. *Glencoe v. People*, 78 Ill. 382.

As to what, under the original act, was a "majority of the voters," requisite for township organization, see *People v. Brown*, 11 Ill. 478. Further, as to requisites of procedure for township organization, see *People v. Garner*, 47 Ill. 246.

In *Indiana*, a town may be incorporated on making public a certified survey, map and census, and application to the board of county commissioners; election, etc. *Indiana Rev. Stat.* (1888), § 3293 *et seq.* As to township organization, see § 5987 *et seq.*

For requisites of town incorporation, see *State v. Arnold*, 38 Ind. 41.

The exercising of unquestioned corporate powers by a town for twenty years is held to preclude a private

party's questioning its incorporation. *Worley v. Harris*, 82 Ind. 493.

In *Iowa*, the procedure for town incorporation is by petition of twenty-five qualified electors directed to the proper court, with plat, proof of population, etc. Thereupon the court appoints five commissioners, who call an election, and cause certified copies of the record, etc., to be filed in the offices of the county recorder and secretary of state. *McClain's Iowa Code* (1888), § 569 *et seq.* This is not an unconstitutional delegation of power to the courts. *Ford v. North Des Moines*, 80 Iowa 626. There, moreover, a town may abandon a special charter and reorganize on petition of fifty legal voters directed to the trustees, election, etc. *McClain's Iowa Code* (1888), § 587 *et seq.*

Irregularities in the first election of its officers are held to be no ground for questioning the town's political existence, or to affect the validity of the election or acts of the subsequently elected officers. *Lones v. Harris*, 71 Iowa 478.

In *Kansas*, as to the platting, etc., of towns, see *Kansas Gen. Stat.* (1889), § 4008.

In *Kentucky*, "the county court of each county, on the application of the ostensible owner, if it deem the same advantageous and necessary to the public at large, may establish a town, and thereby vest the title of a designated tract of land in trustees and their successors for that purpose. A plat is recorded in the county clerk's office, and the lots are sold at auction by the trustees. The applicant gives the court a bond against defect of title. *Kentucky Gen. Stat.* (1887), p. 1236.

The trustees cannot convey streets and alleys. *Covington v. McNickle*, 18 B. Mon. (Ky.) 262.

In *Louisiana*, the act of 1880 for amendment of town charters, does not authorize the extension of privileges or the diminution of the parish authority. *Cook v. Dendinger*, 38 La. Ann. 261.

In *Maine*, the town corporate body consists of every male resident of full age; his consent is immaterial. *Lord v. Chamberlain*, 2 Me. 69; *Richmond v. Vassalborough*, 5 Me. 396; *Colson v. Bonzey*, 6 Me. 474.

The maxim, *omnia rite præsumuntur*, applied, after a lapse of fifty years, to the regularity of proceedings to organize a plantation for town purposes. *Prentiss v. Davis*, 83 Me. 364.

In *Maryland*, the county is the principal unit, and her public local laws (embracing municipal charters) were, in 1888, published in the alphabetical order of the counties. For a good representative thereof, see the amended charter of Hagerstown. *Maryland* Sess. Laws (1892), p. 34 *et seq.*

In *Massachusetts*, after consent had in town meetings, the legislature can erect a municipal government in a town having 12,000 inhabitants. *Massachusetts* Const. Am., art. 2.

See *Larcom v. Olin* (Mass. 1893), 35 N. E. Rep. 113, where the *Massachusetts* constitution as to the change of a town to a city is construed.

In *Michigan*, as to procedure in the creation of a township by the county board, see *Michigan* Gen. Stat. (1882), § 488. A township's corporate existence may be established by proof of many years' acquiescence in taxation, use of franchises, etc., as much as by proof of regular origination. *People v. Maynard*, 15 Mich. 473.

In *Minnesota*, a congressional township may be organized as a town on petition of twenty-five legal voters to the county commissioners, who thereupon fix the boundaries, name it and file a report with the county auditor. *Minnesota* Gen. Stat. (1891), § 1077.

In *Mississippi*, towns are created, the same as cities. See *supra*, this title, *Definitions*, note.

In *Missouri*, as to the procedure for township organization, see *Missouri* Rev. Stat. (1889), § 3424 *et seq.* There, courts will not take judicial notice of the adoption of township organization; it must be established by extrinsic evidence. *Spurlock v. Dougherty*, 81 Mo. 171; *Rousey v. Wood*, 47 Mo. App. 465. The validity of a town charter can be contested only by a *quo warranto*. *Kayser v. Bremen*, 16 Mo. 88. As to the evidence of a town's incorporation, see *Sellick v. Fayette*, 3 Mo. 99.

In *Montana*, the county board may, on a petition of fifty residents, organize a new township. *Montana* Comp. Stat. (1888), p. 845, § 757. On petition of a majority of the legal voters, the board may change the township organization of the county, § 758. The board must cause a plat of the new township to be made and filed in the office of the secretary of state, §§ 769, 773.

In *Nebraska*, as to the procedure by the county board, see *Nebraska* Con-

sol. Stat. (1891), § 916. As to the construction of the *Nebraska* Township Organization acts of 1879 and 1891, see *Albert v. Twohig*, 35 Neb. 563.

Only where a *bona fide* contract cannot otherwise be enforced will a municipal corporation be held to have been created by implication. Thus, the *Nebraska* statute empowering the county commissioners to issue special bonds for a precinct did not import its corporation. *Citing* 1 Dill. on Mun. Corp., § 22; *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Blair v. West Point Precinct*, 2 McCrary (U. S.) 459.

In *Nevada*, as to the procedure by the county board, see *Nevada* Gen. Stat. (1885), §§ 2024, 2079.

In *New Hampshire*, a mistake in a township charter cannot be corrected by a court in a suit between individuals. *Enfield v. Permit*, 5 N. H. 280. A quasi corporation for the sale and partition of lands does not create a statutory town. *Wells v. Burbank*, 17 N. H. 393.

A mistake in a township charter cannot be corrected by a court of law in a suit between individuals. *Enfield v. Permit*, 5 N. H. 280.

In *New Jersey*, as to the requisites for the incorporation of a village under the *New Jersey* Act of 1891, see *State v. Van Valen* (N. J. 1893), 27 Atl. Rep. 1070.

In *New Mexico*, as to proclamation, election, and other procedure for town organization or reorganization, see *New Mexico* Comp. L. (1884), § 1692 *et seq.*

In *New York*, as to the formation of a new town by the supervisors, clerk and assessors, see *Bird* *New York* Rev. Stat. (1890), p. 930, § 32.

The *New York* Act of 1847, authorizing the electors of a village to adopt into their charter any section of the general act, was held constitutional. *Bank of Chenango v. Brown*, 26 N. Y. 4675.

The statutory method for determining the validity of a village incorporation, is exclusive of any other proceeding. *Gardiner v. Christian*, 70 Hun (N. Y.) 547.

In *North Carolina*, the county commissioners may, on petition of three freeholders of each township to be affected, and on notice and hearing, "erect a new township or divide an existing township, or change the name, or alter the boundaries thereof." *North Carolina* Code (1883), § 707, pl. 14. A grant

of town commons, *ipso facto*, creates a town body politic for the purposes thereof. *Bath v. Boyd*, 1 Ired. (N. Car.) 194; *Trenton v. McDaniel*, 7 Jones (N. Car.) 107.

In *Ohio*, as soon as there are four electors in a township, or fractional township having a section 29 or 16 reserved, etc., the same may become incorporated, on petition to the county commissioners; hearing, etc. *Ohio Rev. Stat.* (1890), § 1360. For a classification of municipal corporations, see *Ohio Rev. Stat.* (1890), § 1546.

In *Oklahoma*, as to proceedings of the county commissioners for the incorporation of towns, see *Oklahoma Stat.* (1890), § 665 *et seq.*

In *Pennsylvania*, new townships may be erected by the courts of quarter sessions, on petition; commission to "three impartial men;" election, etc. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 371. As to the procedure and requisites in the erection thereof, see *Com. v. Fullerton*, 12 Pa. St. 266; *Ryon Tp.*, 24 Leg. Int. (Pa.) 272; 1 Walk. (Pa.) 137.

For the requisites of procedure in incorporating a borough that shall include part of another, see *Darby v. Sharon Hill*, 112 Pa. St. 66.

In incorporating a borough, the statutory requirements must be strictly complied with. The foreman's endorsement, "approved," is held to be an insufficient certificate of the grand jury. *In re Summit*, 114 Pa. St. 362. So also as to the division of a borough into wards. *Brown v. Fowzer*, 114 Pa. St. 446.

In *South Carolina*, as to the procedure in the county commissioner's change of name of any township, see *South Carolina Gen. Stat.* (1882), § 641.

In *Rhode Island*, "the inhabitants of every town shall continue to be a body corporate," etc. *Rhode Island Pub. Stat.* (1882), p. 101, § 1.

In *Tennessee*, a municipality may be incorporated on application to the clerk of the county court, or nearest resident justice, of fourteen freeholders, with a list of possible voters, notification, election, etc. *Tennessee Code* (1884), § 1575 *et seq.* The town incorporation law of 1849 does not contravene *Tennessee Const.*, art. 11, § 7, as a delegation of the legislature's powers. *Morristown v. Shelton*, 1 Head. (Tenn.) 24.

In *Texas*, a town or village, when containing more than 200, or less than 10,000 inhabitants, may be incorporated on the petition of twenty resident vot-

ers, filed in the county court; election, etc. *Texas Rev. Civ. Stat.* (1889), art. 506 *et seq.*

For statutory requisites of town reorganization as to population, etc., see *Harness v. State*, 76 Tex. 566.

In *Utah*, a town with a population of not less than 300 may be incorporated on petition of a majority of the taxpayers, directed to the county court, setting forth the boundaries, etc. *Utah Comp. L.* (1888), § 1819.

In *Vermont*, as to the procedure for town organization, see *Vermont Rev. L.* (1880), § 2654. As to notice of petition to the general assembly for the creation of a new town, see § 129. A town's legal organization may be presumed from proof of long action as such, appointment of officers, etc. *Londonderry v. Andover*, 28 Vt. 416.

In *Washington*, any portion of a county containing not less than 300 inhabitants, and not incorporated, may become incorporated on petition of sixty resident electors to the county board; election, etc. *Washington Gen. Stat.* (1891), § 493 *et seq.*

In *Virginia*, as to the survey, etc., of towns, see *Virginia Code* (1887), § 1014.

The *West Virginia* constitution inhibits local or special legislation for incorporating any city, town or village, or for amending the charter of any containing a population of less than 2,000. *West Virginia Code* (1891), p. 32. Any district of not less than one quarter of one square mile, and not included within any incorporated town, village, or city, and containing not less than a hundred inhabitants, may become incorporated on notice, and petition to the circuit court, with map, etc., p. 421 *et seq.*

In *Wisconsin*, as to the organization of towns by the county supervisors, see *Wisconsin Annot. Stat.* (1889), § 670. The validity of the organization is beyond question after two years, § 674.

The legislature may constitutionally restrict an act of incorporation to towns containing villages of a certain population. *Land, etc., Co. v. Brown*, 73 Wis. 294.

In *Wyoming*, territory not in any municipality and having not less than 300 residents, and in area not over two square miles, may be incorporated on petition of not less than a majority of the electors, to the county board, setting forth the boundaries, etc. *Wyom-*

If the powers conferred upon residents of a town or district cannot be carried into effect without acting in a corporate capacity, a corporation is, to this extent, created by implication.¹

III. BOUNDARIES; DIVISIONS—1. In General.—Before the adoption of the governmental system of surveys, the boundaries of towns and townships were fixed by the general or special statute creating them.² In the states thereafter admitted, the boundaries of the territorial township were governed thereby; and those of the political township were generally identical therewith.³ But towns and cities are often incorporated with no regard to townships.⁴ The statutory provisions of the older and the younger states are diverse as to the monuments for designating town lines, the means of their perpetuation, perambulating, processioning, etc.⁵

ing Rev. Stat. (1887), § 445 *et seq.*, Amendment Sess. L. (1890), ch. 25 (1891), ch. 89.

1. So held as to a paving contract by the village of Carlstadt. *State v. Van Valen* (N. J. 1893), 27 Atl. Rep. 1070, citing 1 Dill. on Mun. Corp., § 42, and Fourth School Dist. *v. Wood*, 13 Mass. 193.

2. See *supra*, this title, *Creation*.

3. See SURVEYS, vol. 24, p. 998.

4. See MUNICIPAL CORPORATIONS, vol. 15, p. 958; BOUNDARIES, vol. 2, p. 499.

5. See SURVEYS, vol. 24, p. 1008.

In *Alabama*, ancient municipal boundaries that have ceased to be marked by visible boundaries, may be established by general reputation. *Morgan v. Mobile*, 49 Ala. 349. Further, as to boundaries, see *Luverne v. Shows* (Ala. 1893), 13 So. Rep. 509.

In *Arkansas*, no township line shall pass through any town. *Arkansas Dig. Stat.* (1884), § 6444.

In *Connecticut*, a town must set out its bounds "by a large heap of stones, or a ditch six feet long and two and a half feet wide, of ordinary depth;" a borough, by stone pillars, etc. Quinquennially the selectmen of adjoining towns, and the wardens and burgesses of each borough shall cause the lines to be perambulated, and the monuments to be renewed. In case of their disagreement as to the place of a divisional line, the superior court shall appoint a committee to fix it. *Connecticut Gen. Stat.* (1888), § 182 *et seq.*

In *Illinois*, after a county has voted to adopt township organization, the county board appoints three commissioners who divide the county into

towns, "making them conform to the townships according to government surveys. . . . When a creek or river so divides a township that it is inconvenient for transacting town business, then such creek or river may be made the town boundary, and the fractions so formed may be disposed of as other fractional townships." *Illinois Rev. Stat.* (1891), p. 1487.

By the act of 1889, the county board may, on certain notice and hearing, alter town boundaries to suit the convenience of the inhabitants; but each new town must have not less than ten square miles, nor less than fifty legal voters. *Illinois Stat. Supp.* (1892), p. 1266.

The act of 1887, amending that of 1874, is within the scope of the title as to uniting towns or transferring territory. *Donnersberger v. Prendergast*, 128 Ill. 229.

The act of 1883, adapting the general town system to territory under city organization, is valid. *People v. Hazelwood*, 116 Ill. 319.

In *Indiana*, marking streets upon the plat of a town, or an addition thereto, and a sale of lots with reference thereto, may import a dedication. *Wolfe v. Sullivan*, 133 Ind. 331.

In *Iowa*, "The board of supervisors of each county shall divide the same into townships, as the convenience of the citizens may require, accurately defining the boundaries of the townships, as it may deem proper; provided, however, that if the congressional township lines are not adopted and followed. the board of supervisors shall not change the lines of any civil township so as to divide any school district, or

sub-district, unless a majority of the voters of such district or sub-district shall petition therefor. *McClain's Iowa Code* (1888), § 516; *Lones v. Harris*, 71 Iowa 478.

A municipality, which for thirty years subjected land platted as streets and a public square to taxation as private property, was held estopped to claim title thereto. *Smith v. Osage*, 80 Iowa 84, citing *Simplot v. Dubuque*, 49 Iowa 630; *Getchell v. Benedict*, 57 Iowa 121; *Waterloo v. Union Mill Co.*, 72 Iowa 437; *Pella v. Scholte*, 24 Iowa 283; 95 Am. Dec. 729.

In *Kansas*, the statutory procedure for platting controls, and no acts of third parties will effect a division into blocks and lots. *Sullivan v. Davis*, 29 Kan. 28.

In *Louisiana*, the rule that, on the division of a municipal corporation into two separate communities, each holds in severalty the public property that falls within its limits, was applied to a parish courthouse in the town of Floyd, on carving the parish of West Carroll out of Carroll. *West Carroll Parish v. Gaddis*, 34 La. Ann. 928.

In *Maine*, municipal officers shall cause town lines to be perambulated quinquennially, with the exception of "towns which since March 22d, 1828, have perambulated, or shall perambulate their lines as by law prescribed, and set up stone monuments, at least two feet high, at all the angles, and where the lines cross highways, or on or near the banks of all rivers, bays, lakes or ponds which said lines cross, or which bound said lines, except once every ten years, commencing ten years from the time that the stone monuments were so erected." *Maine Rev. Stat.* (1883), p. 88. The proceedings of commissioners appointed to ascertain a town line, were held to be only presumptive evidence of the actual boundary. *Magoon v. Davis*, 84 Me. 178.

A township bounded easterly and northly on Schoodic river, carries the grant to the middle thread above tide-water. *Granger v. Avery*, 64 Me. 292.

The record of a meeting for organization of a plantation for township purposes, need be only as explicit in description of limits as that in a deed by the state. *State v. Woodbury*, 76 Me. 457. As to procedure in establishing town boundaries, see Anonymous, 31 Me. 592.

In *Massachusetts*, as in *Maine*, the selectmen cause town lines to be per-

ambulated quinquennially, and erect monuments. *Massachusetts Pub. Stat.* (1882), p. 226.

As to a common boundary of towns being the middle of a stream, see *Flynn v. Boston*, 153 Mass. 372. As to a boundary upon flats, tidewaters, etc., see *Tappan v. Boston Water Power Co.*, 157 Mass. 24; *Russ v. Boston*, 157 Mass. 60.

In *Michigan*, as to the requisites of the laying out of a township line road, see *Michigan Gen. Stat.* (1882), § 1305; *Brewer v. Gerow*, 83 Mich. 250.

In *Missouri*, where the charter of a municipality is amendable by "the law-making authorities" thereof, a change made by them in the boundaries fixed in the charter, constitutes an amendment of the charter. *Westport v. Kansas City*, 103 Mo. 141.

A false description in an order of the county court incorporating a town—e. g., "Section 24," instead of "Section 23"—may be stricken out, provided enough remains to ascertain the location. *Woods v. Henry*, 55 Mo. 560.

In *Montana*, the county commissioners may "change the boundaries of townships in their respective counties." *Montana Comp. Stat.* (1887), p. 845, § 756.

In *Nebraska*, when a surveyed township shall have too few inhabitants for a separate organization, it may be added to some adjoining town, or temporarily divided between two or more towns; and a creek or river so dividing a township as to make it inconvenient for transacting town business may be made the town boundary. *Nebraska Consol. Stat.* (1891), § 949.

In *New Hampshire*, the town lines are septennially perambulated by the selectmen. Where a place on a county line is unorganized, the county commissioners perambulate. *New Hampshire Pub. Stat.* (1891), p. 173. As to the procedure, see *Boscawen v. Canterbury*, 23 N. H. 188; *Campton v. Holderness*, 25 N. H. 225; *Gorrill v. Whittier*, 3 N. H. 267. As to the determination of the true boundary of a town from records of ancient perambulations, see *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

In *New York*, as to special surveys of town bounds, see *Bird*. *New York Rev. Stat.* (1890), p. 2759, § 3.

In *Ohio*, the marked corner is controlled by the actual division lines. *Reed v. Marsh*, 8 Ohio 147. As to the requisites of the petition to change township boundaries, see *Russell v.*

2. Enlargement; Severance—*a.* IN GENERAL.—The statutory and the constitutional provisions of the different states concerning consolidation of municipalities, and the addition and subtraction of town territory, are not alike; nor are the adjudications thereon uniform, especially as to the proper limit of legislative interference.¹

Fulton County, 6 Ohio Cir. Ct. Rep. 185.

In *Oklahoma*, as to the survey, plating and registration of towns, see *Oklahoma Stat.* (1890), § 732 *et seq.*

In *Pennsylvania*, township boundaries may be altered by the courts of quarter sessions, on petition; commission to "three impartial men;" election, etc. Bright, *Purd. Dig. L.* (1885), p. 371. As to the procedure and requisites in the alteration, see *In re Henderson Tp.*, 2 Watts (Pa.) 269; *In re Harrison Tp.*, 5 Pa. St. 447; *In re Limestone Tp.*, 11 Pa. St. 270; *In re Norwegian Tp.*, 20 Pa. St. 324; *In re Clay Tp.*, 33 Pa. St. 366; *In re Wetmore Tp.*, 68 Pa. St. 340; *In re Line*, 4 Lanc. L. Rev. (Pa.) 269; *In re Exeter Tp.*, 8 Co. Ct. Rep. (Pa.) 524. For requisites of establishment of township lines, see *In re Plunkett's Creek Tp.*, 148 Pa. St. 299.

In *South Carolina*, the county commissioners may change the name of any township in their county. *South Carolina Gen. Stat.* (1882), § 641. As to the proper riparian boundary, under a statute's direction to commissioners to lay off, for a town, a tract two miles square on a certain river, see *State v. Columbia*, 27 S. Car. 137.

In *Utah*, an owner of land may get it surveyed, platted, etc., and "such maps and plats when made, acknowledged, filed and recorded with the county recorder, shall be a dedication of all such avenues, streets, commons, or other public places or blocks, and sufficient to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses for the inhabitants of such town and for the public, for the uses therein named or intended. If any person shall sell or offer for sale any lot so platted according to said plat within any town or addition, before the map or plat thereof is made out, acknowledged, filed and recorded as aforesaid, such person shall forfeit to the county in which such town or addition is located, a sum not exceeding \$300, for every lot which he shall sell." *Utah Sess. L.* (1890), ch.

50. The name of a town may be changed on petition of three-fourths of the legal voters. *Sess. L.* (1888), ch. 21.

In *Vermont*, as to the duties of the selectmen in adjusting a divisional line, see *Vermont Rev. L.*, § 2755 *et seq.* Recognition by adjoining proprietors, for twenty years, of a stone wall as the town line, was held not to bind the towns. *Smith v. Rockingham*, 25 Vt. 645. See requisites of description of village boundaries, in *Cutting v. Stone*, 7 Vt. 471. For requisites of procedure to establish a divisional line between towns, see *Somerset v. Glastenbury*, 61 Vt. 449.

In *Virginia*, the recorded plan of a town "shall be evidence of the boundaries of the lots, streets and alleys thereof." *Virginia Code* (1887), § 1014.

In *Washington*, as to the procedure in vacating part of a town plat, see *Washington Gen. Stat.* (1891), § 749.

In *West Virginia*, the name of a town or village may be changed on petition to the county court, notice and hearing. *West Virginia Code* (1891), p. 1025.

In *Wisconsin*, the *United States* surveys govern in proving the areas of townships. *Wisconsin Annot. Stat.* (1889), § 4196.

1. See MUNICIPAL CORPORATIONS, vol. 15, pp. 1008, 1013.

In *Alabama*, the name or boundaries of a town may be changed on petition of ten adult male inhabitants thereof to the judge of probate. *Alabama Code* (1886), § 1516.

The policy of a change of boundaries by the general assembly cannot be inquired into by the courts. *Scruggs v. Huntsville*, 45 Ala. 220.

In *Arkansas*, the act vesting the power in the courts has been upheld. *Foreman v. Marianna*, 43 Ark. 324. Only residents or property owners of the old town or of the territory sought to be annexed, can petition for *certiorari* thereon. *Perkins v. Holman*, 43 Ark. 219.

The legislature may amend town charters, extend or reduce the boundaries, and divide, consolidate, or abolish,

according to public convenience and with the consent of the body politics. *Eagle v. Beard*, 33 Ark. 497.

The *Arkansas* Act of 1873, assuming to cut off "Du Val's addition" to Little Rock, was held to be unconstitutional. *Little Rock v. Parish*, 36 Ark. 166.

For the construction and effect of the *Arkansas* Act of 1875, as to annexation of contiguous territory to a town, see *Dobson v. Fort Smith*, 33 Ark. 508.

As to procedure upon annexation, see *Gunter v. Fayetteville*, 56 Ark. 202; *Vogel v. Little Rock*, 55 Ark. 609; *Woodruff v. Eureka Springs*, 55 Ark. 618.

In *California*, as to legislative control of the matter, see *Santa Rosa v. Coulter*, 58 Cal. 537.

As to the requisites of procedure on change of municipal boundaries, see *Wiedwald v. Dodson*, 95 Cal. 450.

In *Colorado*, as to the annexation of contiguous towns, see *Colorado* Sess. L. (1893), ch. 156; also *Valverde v. Shattuck* (Colo. 1893), 34 Pac. Rep. 946.

In *Connecticut*, as to the effect of the division of a town upon a pauper's settlement, see *East Hartford v. Hunn*, 29 Conn. 500.

As to extending city limits, see *Randell v. Bridgeport*, 62 Conn. 440.

The town of East Haven, shortly before the chartering of the borough of Fair Haven East, so constructed a highway, afterwards within the borough, and filled an excavation with stones, that surface water finally overflowed and damaged an abutter's cellar. It was held that the borough could not be adjudged liable therefor without proof of its knowledge of the nuisance. *Morse v. Fair Haven East*, 48 Conn. 220.

In the *Dakotas*, as to the procedure under *Dakota* Comp. L., § 705, for division of townships having two or more villages, see *Territory v. Armstrong*, 6 Dak. 226.

In *Florida*, as to the power of the county board in the matter, see *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492. As to legislative control, see *Saunders v. Pensacola*, 24 Fla. 226. As to the procedure for the contraction or expansion of a town, see *Florida* Dig. L. (1881), pp. 254-5.

In *Idaho*, "The board of trustees or council may, by ordinance, include in the corporate limits of the city or town, all territory contiguous or adjacent

thereto which has been at any time, by the owner or proprietor thereof, or by anyone by his authority or acquiescence, laid off or subdivided into lots or blocks containing not more than five acres of land each, whether the same shall have been so laid off, subdivided, or platted in accordance with any statute of this state or otherwise;" and the board may compel such owners to lay out streets, etc., corresponding in width, direction, etc. *Idaho* Am. Rev. Stat., § 2238; Sess. Laws (1891), p. 159.

In *Illinois*, on petition of three-fourths of the legal voters and of the owners of three-fourths in value of the property in any territory contiguous to any incorporated town, the board of trustees may, by ordinance, annex such territory, on filing the ordinance with a certified map in the county recorder's office. *Illinois* Rev. Stat. (1891), p. 265, § 200. Incorporated towns may be annexed to each other, § 201. A hearing may be had, and an appeal from the decision of the board may be heard, by a court or by a jury of non-residents, § 202 *et seq.* The act of 1889 provides for the procedure on petition to the county court for an election, p. 268, § 210a *et seq.* As to payment of the corporation debts, see § 210d. As to change of name, see p. 269, n. As to division of incorporated towns, see p. 269j *et seq.* As to the power of the county board to enlarge and divide towns, see p. 1490, § 26. As to legislative control generally, see *Covington v. East St. Louis*, 78 Ill. 548; *People v. Couchman*, 15 Ill. 142.

Where, upon change of Quincy under the *Illinois* Act of 1877, authorizing the organization of township territory into towns, the territory was found co-extensive, a majority of the court held that the city treasurer might be town collector. *People v. Hazelwood*, 116 Ill. 319.

As to the requisites of procedure in dividing towns, see *Woo-Sung v. People*, 102 Ill. 648.

On division under the *Illinois* Act of 1874, both the resulting towns become new ones, and each must contain at least seventeen square miles. *Jefferson v. People*, 87 Ill. 503.

A village is not exonerated from liability for the unsafe condition of a bridge, by the wrongful act of the town highway commissioners. *Marseilles v. Howland*, 23 Ill. App. 101.

An election under an unconstitutional enabling act, was held inopera-

tive of town annexation. *Hyde Park v. Chicago*, 124 Ill. 156.

Under the rule that, in the absence of a contrary provision, upon the annexation of part of a township to a city, the residue retains its property, the *Illinois* Act of 1869, extending the western limits of Chicago, left the rents, issues and profits of Section 16, Tp. 39, to be administered by the trustees of schools thereof for their own uses. *People v. School Trustees*, 86 Ill. 613.

In *Indiana*, as to legislative control, and as to annexation of platted lots under the act of 1852, see *Jeffersonville v. Weems*, 5 Ind. 547; *Taylor v. Fort Wayne*, 47 Ind. 274; *Stilz v. Indianapolis*, 55 Ind. 515; *Cicero v. Williamson*, 91 Ind. 541; *Terre Haute v. Beach*, 96 Ind. 143; *Logansport v. La Rose*, 99 Ind. 117; *Strosser v. Fort Wayne*, 100 Ind. 443; *Delphi v. Startzman*, 104 Ind. 343; *Huff v. La Fayette*, 108 Ind. 14; *Wiley v. Bluffton*, 111 Ind. 152.

In *Indiana*, a town and a city may be consolidated upon an agreement between the city council and the town trustees' president, as to the conditions, and an election in favor of the annexation. *Indiana Rev. Stat.* (1888), § 3233 *et seq.* "In proceedings before the county commissioners for the annexation of territory to cities and towns, against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court," pending which, the proceedings are to be suspended. § 3243 *et seq.* As to the disannexation of suburban tracts, see § 3248. As to construction of the statutes upon annexation, see *Elston v. Crawfordsville*, 20 Ind. 272.

On severance, each township holds in severalty, public property within its territorial limits, and money, choses in action, etc., are to be equitably divided. *Towle v. Brown*, 110 Ind. 65.

In *Iowa*, a township of 1,500 inhabitants may be divided by the county board on petition, notice, hearing, etc. McClain's *Iowa Code* (1888), § 519. The county board, if it refuses a proper petition, may be compelled to make the division. *Henry v. Taylor*, 57 Iowa 72. As to the procedure for annexation, see McClain's *Iowa Code* (1888), § 579. As to severance, see § 593; and McKean v. Mt. Vernon, 51 Iowa 306. As to legislative control, see *Murford v. Unger*, 8 Iowa 82; *Buel v. Ball*, 20 Iowa 282; *Deeds v. Sanborn*, 22 Iowa 214; *Tubbesing v. Burlington*, 68 Iowa 691; *Ford*

v. North Des Moines, 80 Iowa 626. As to the effect on homestead rights, see *Finley v. Dietrick*, 12 Iowa 516; *Truax v. Pool*, 46 Iowa 256.

Severance in the business portion of a town was held properly refused. *Monk v. George* (Iowa 1892), 53 N. W. Rep. 240. Annexation of territory in another county was held unauthorized. *Tabor, etc., R. Co. v. Dyson* (Iowa 1892), 53 N. W. Rep. 245.

Severance of two villages whose centers were a mile apart, was held to be properly granted. *Ashley v. Calliope*, 71 Iowa 466.

A town ordinance prohibiting the sale of intoxicating liquors "within the limits of said town," passed before the act extending jurisdictions of towns two miles beyond their limits, was held to apply to the extension. *Toledo v. Edens*, 59 Iowa 352.

In an agreement for division of a district township, a provision that it draw all the "fund due," was held to embrace assets thereafter to become available; *e. g.*, a railroad tax, assessment thereof had been omitted by mistake. *Jasper D. Tp. v. Sheridan D. Tp.*, 47 Iowa 183.

As to requisites of municipal extension, see *Glass v. Cedar Rapids*, 68 Iowa 207.

In *Kansas*, as to the necessity of contest, see *Topeka v. Gillett*, 32 Kan. 431. As to the effect on homestead rights, see *Emporia v. Smith*, 42 Kan. 433. As to when the enlargement does not extend a county seat, see *State v. Atchison County*, 44 Kan. 186. An ordinance adding lands not properly subdivided, was held void. *Stewart v. Adams*, 50 Kan. 560.

In *Kentucky*, additions may be made to towns, upon advertisement and application to the county court, the order whereof "shall vest the title of the land so added in the trustees of the town," *Kentucky Gen. Stat.* (1887), p. 1242. But see *Courtney v. Louisville*, 12 Bush. (Ky.) 419, as to constitutional restriction of unequal compulsory taxation. On petition of town trustees, the county court may cause streets to be extended to a river near the town, p. 1242. As to legislative control, see *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 223.

In *Louisiana*, as to legislative control, see *Stoner v. Flournoy*, 28 La. Ann. 850.

In *Maine*, on severance, the original

town retains all its property, powers, rights, and obligations, unless otherwise provided in the act of separation. *North Yarmouth v. Skillings*, 45 Me. 133; 71 Am. Dec. 530; *Frankfort v. Winterport*, 54 Me. 250. As to the rights of election by any resident as to which town he will belong, upon the division line being drawn, see *Blanchard v. Cumberland*, 18 Me. 113. Conveyance of a suburban lot with reference to a plat, passes an easement in the streets, which neither the plat nor his successors can interrupt or destroy. *Bartlett v. Bangor*, 67 Me. 460.

A legislative provision assigning absentees to the town to which the fractional part was to be annexed, was held valid. *Wilton v. New Vineyard*, 43 Me. 315.

A privilege in the provision law for dwellers on the line to elect to which town their land should belong, was held to be a definitive and perpetual change of the line of territorial jurisdiction. *Cumberland v. Prince*, 6 Me. 410.

A town's duty to construct a highway as decreed by the county commissioners, is not affected by a severance incorporating that district into a new town. *Page's Petition*, 37 Me. 553.

In an act of severance, the words, "all paupers whose legal settlement is upon said territory," was held to mean only those then actually chargeable as paupers. *Castine v. Winterfort*, 56 Me. 319.

In *Maryland*, in *Prince George County v. Bladensburg*, 51 Md. 468, the court, by Irving, J., said: "It is certainly not within the power of the legislature to give to a municipal corporation the power of absorbing as much of the property, and as many of the people, of a county, as it may suit the wishes of the municipal authorities to make subjects of their taxation and ordinances."

In *Massachusetts*, the legislature can erect a municipal government in a town containing 12,000 inhabitants, after consent had in town meeting. *Massachusetts Const. Am.*, art. 2. This does not apply to annexation of a town to a city. *Chandler v. Boston*, 112 Mass. 200. It is no obstacle that the annexed portion lies in another county. *Justices' Opinion*, 6 Cush. (Mass.) 578. But no right of representation must be suspended. *Warren v. Charlestown*, 2 Gray (Mass.) 84. There, an annexation act may take effect for different

purposes at different times. *Stone v. Charlestown*, 114 Mass. 214.

Upon severance, in absence of contrary provision, lands held for public uses go to the town within whose limits they fall. *Lynn v. Nahant*, 113 Mass. 433. As to the effect on the title to flats and seashore, see *Com. v. Roxbury*, 9 Gray (Mass.) 451. The severance does not necessarily effect severance of the judicial district of a district court. *Com. v. Brennan*, 150 Mass. 63. As to the proportionate division of indebtedness, and the remedy to get the excess reimbursed, see *Brewster v. Harwich*, 4 Mass. 278.

In the absence of express contrary provision, the old town retains all its property, powers, and privileges. *Windham v. Portland*, 4 Mass. 384; *Richards v. Dagget*, 4 Mass. 539; *Minot v. Curtis*, 7 Mass. 441; *Hampshire v. Franklin County*, 16 Mass. 86.

Where part of a town was incorporated as a new town, a pauper whose then residence could not be ascertained, was held chargeable to the old town. *Westport v. Dartmouth*, 10 Mass. 341.

Acquiescence for eighty years, was held to ratify annexation proceedings. *Cobb v. Kingman*, 15 Mass. 197.

Town division was held not to vacate an equity suit by the old town as to a highway falling within the new town. *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.

The *Massachusetts Act of 1772*, having provided for the incorporation of twelve persons as overseers of the town of Boston, and the act of 1822 changing the town to a city, having provided for the election of a board of overseers for the city, "who shall have all the powers, and be subject to all the duties, now appertaining to the overseers of the poor for the town of Boston," it was held that this was a continuance and not a dissolution or suspension of the corporation of 1772; that the bodies were corporations aggregate with perpetual succession; "that a grant to them of real estate carried a fee without being to their successors; that in a writ of right, they can count only upon their own seisin within thirty years." *Shaw, C. J.*, in *Boston v. Sears*, 22 Pick. (Mass.) 122.

In *Michigan*, the county board of supervisors may divide a township, on application of twelve freeholders, notice, hearing, etc. *Michigan Gen. Stat.* (1882), § 486 *et seq.*

A town treasurer, on the annexation of the territory including his residence, to a city, was held not entitled to receive from the county treasurer, moneys of the township. *Youngblood v. Stellwagen*, 33 Mich. 1.

Where a municipality is incorporated from part of a township, the latter's property rights can be altered only by express statutory provision. A burying-ground was held not affected by *Michigan Comp. L.*, § 766, which applies not to such case, but simply to township division. *Board of Health v. East Saginaw*, 45 Mich. 257.

One township cannot bind another carved therefrom, on a cause of action arising before the division; and the latter is not bound, if not a party to the judgment. *Pierson Tp. v. Reynolds Tp.*, 49 Mich. 224.

In *Minnesota*, as to the requisite procedure for severance, see *State v. Mantor*, 14 Minn. 437; *Maple Lake v. Wright County*, 12 Minn. 403. The action of the county board in dividing a town is legislative and not judicial, and is not reviewable on *certiorari*. *Christlieb v. Hennepin County*, 41 Minn. 142. An unplatted homestead, brought within a town by an enlargement act, cannot be reduced by contiguous platting by another than the claimant. *Baldwin v. Robinson*, 39 Minn. 244. But compare *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323.

For requisites of proceedings on severance, see *State v. Martin*, 14 Minn. 437.

In *Mississippi*, "to enlarge or contract the boundaries of a city, town, or village, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in, or exclude from, the corporate limits, and also defining the entire boundary as changed. The ordinance shall not become operative until one month after its passage, and until it shall have been published for three weeks in some newspaper," etc. Any person interested may prosecute an appeal to the circuit court on giving an appeal bond. *Mississippi Code* (1892), § 2912. A citizen believing the limits unreasonably extended or contracted, may, within five years, on petition and bond, obtain relief, § 2916. The mayor and aldermen of the town are "to provide that any person desiring to subdivide a tract of land within the corporate limits, or to be included therein, shall

submit a plat or map of such subdivision, and a correct abstract of title of the land platted, to the mayor and board of aldermen, to be approved by them before the same shall be filed for record in the record of deeds of the county," § 2937. As to the procedure in altering or vacating a plat, see § 4404. As to legislative control, see *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661.

In *Missouri*, the county court may alter the boundary of townships and increase or diminish their number, on petition, notice and election, if the alteration be ratified by a two-thirds majority of the voters affected. *Missouri Rev. Stat.* (1889), § 8432. The *Missouri Act* of 1885—allowing annexation to a city having more than 20,000, and less than 250,000 inhabitants—has been upheld; the court, however, declaring that the power must be exercised reasonably. *Kelly v. Meeks*, 87 Mo. 398. The reasonableness of the extending ordinance is open to judicial scrutiny. *Plattsburg v. Riley*, 42 Mo. App. 18. Compare *Kansas City v. Richards*, 34 Mo. App. 521.

In the *Missouri* annexation act, "commons" means not farm lands, but lands included in, or belonging to a town, set apart for public use. *State v. McReynolds*, 61 Mo. 203.

In *Nebraska*, fractions of townships caused by the county lines not being in accordance with the surveyed townships, and not having enough inhabitants for a separate town, may be annexed by the county board to adjoining towns. *Nebraska Consol. Stat.* (1891), § 949. The county board may annex to an adjoining town a town which, through failure of its officers to qualify, cannot be organized. § 959.

In *New Hampshire*, as to legislative control, proceedings by the selectmen, etc., see *Londonderry v. Derry*, 8 N. H. 320; *Boody v. Watson*, 64 N. H. 162. Upon severance, no property of the original town belongs to the new corporation, except as expressly provided in the act of separation. *Greenville v. Mason*, 53 N. H. 515. Compare, the case of municipal war expenditures, *Sanbornton v. Tilton*, 55 N. H. 603.

In *New Jersey*, where one township is created out of parts of others, and an assignment of a public road is made between them, each has the same power, *e. g.*, to remove encroachments, over the part assigned to it that is given by law over roads entirely within its territory. *State v. Van Derveer*,

47 N. J. L. 259. The legislative body must require the consent of the corporators. *Paterson v. Society, etc.*, 24 N. J. L. 385.

In *New York*, on severance, the supervisors and overseers of the poor agree upon the disposition of the town lands, and the apportionment of the proceeds. *Bird. New York Rev. Stat.* (1890), p. 3075, § 4. Similarly, in case of annexation, § 5. As to the requisites of the procedure of the board, see *People v. Carpenter*, 24 N. Y. 86.

As to disposition of town property upon alteration of town boundaries, see *New York Laws* (1892), ch. 569, § 3; *Am. G. L.*, ch. 20, p. 2228.

It has been held that a village having a special charter cannot be enlarged by the county board. *People v. Mabie* (Supreme Ct.), 26 N. Y. Supp. 450.

The legislature, in abridging the terms of town officers by annexation to a city, does not thereby contravene the constitutional inhibition of abolishing or shortening a term of office. *Gertum v. Kings County*, 109 N. Y. 170.

In *New York*, a constitutional provision prohibiting any statute embodying part of an existing law, was held not to be contravened by the act of 1875, ch. 400, for setting off Wappinger, and continuing in force laws applicable to Fishkill. Nor does the provision continuing the town officers contravene the inhibition of appointment by the legislature. *People v. Hayt*, 7 Hun (N. Y.) 39.

In *North Carolina*, the general assembly may extend town limits, without the consent of the inhabitants of the addition. *Manly v. Raleigh*, 4 Jones Eq. (N. Car.) 370.

In *Ohio*, the county commissioners may, on petition, hearing, etc., make partition of civil townships, or annexation thereto. *Ohio Rev. Stat.* (1890), § 1377. Alteration of township lines does not change the liabilities of any part thereof, § 1385.

As to cessation of authority of township officers within an included city, see *State v. Ward*, 17 Ohio St. 543.

The *Ohio Act* of 1890, detaching territory from Findlay and annexing it to the original township, was held constitutional. *Metcalf v. State*, 49 Ohio St. 586.

In *Oklahoma*, as to the procedure for extension of town limits, see *Oklahoma Stat.* (1890), § 751 *et seq.*

In *Oregon*, the legislature can divide

towns and counties, and apportion the common property as it seems reasonable and equitable. *Morrow County v. Hendryx*, 14 Oregon 397.

In *Pennsylvania*, a township may be annexed to a city on petition of three-fifths of the taxables, to the city council, with certified plat, etc. From the council's action an appeal may lie to the court of quarter sessions. *Bright. Purd. Pennsylvania Dig. L.* (1885), pp. 373-4. As to the procedure and requisites in division of a township, annexation, etc., see *In re Wyalusing Tp.*, 2 S. & R. (Pa.) 402; *In re Macungie Tp.*, 3 Rawle (Pa.) 459; *In re Green Tp.*, 9 W. & S. (Pa.) 22; *In re Greenwood Tp.*, 3 Grant's Cas. (Pa.) 261; *In re Bethel Tp.*, 1 Pa. St. 97; *In re Harrison Tp.*, 5 Pa. St. 447; *In re Catharine Tp.*, 31 Pa. St. 303; *In re Alba Tp.*, 35 Pa. St. 271; *In re North Whitehall Tp.*, 47 Pa. St. 156; *In re Wetmore Tp.*, 68 Pa. St. 340; *In re Plum Tp.*, 83 Pa. St. 73; *In re Valley Tp.*, 146 Pa. St. 111; *In re Plymouth Tp.*, 5 Kulp. (Pa.) 211.

The *Pennsylvania Act* of 1889, concerning the annexation of "any borough or township," adjoining any city of the third class, is construed not to provide for annexing part of a borough. *In re Dunmore*, 154 Pa. St. 24.

The *Pennsylvania Act* of 1889 (P. L. 280) was construed to permit the annexation of a portion of a borough. *McAskie's Appeal*, 154 Pa. St. 24, following *Pittsburg's Appeal*, 79 Pa. St. 317.

Where a new township is erected from part of an old one, the legislature may empower the voters to decide by ballot whether the old one shall be continued or annulled. *Com. v. Judges*, 8 Pa. St. 391.

Legislative authority for the quarter session court to incorporate any town or village containing 300 inhabitants, on petition, etc., was held not to allow incorporating into a borough distinct villages and open country. *In re West Philadelphia*, 5 W. & S. (Pa.) 281.

The division of a town was held not to vacate the commission of a justice of the peace for the district. *Com. v. Sheriff*, 4 S. & R. (Pa.) 275.

A petition to change the name of a borough from "East Stroudsburg" to "Penn City," was refused as misleading. *In re East Stroudsburg*, 9 Co. Ct. Rep. (Pa.) 559.

In *Tennessee*, adjoining territory may be added on the petition of five freeholders thereof, election, etc. *Tennes-*

b. APPORTIONMENT OF INDEBTEDNESS.—Inequalities in the burdens of indebtedness and of taxation have sometimes constituted an objection to town annexation; especially in case of annexation of rural territory sparsely populated. It has been found difficult to formulate any general statute that would equitably reach all circumstances.¹ Where a township is divided by the

see Code (1884), § 160 *et seq.* Property owners may resort to the courts to test the validity of the election for annexation. *Morris v. Nashville*, 6 Lea (Tenn.) 337.

Alteration of the town limits can be made in chancery only upon application of the town authorities. *Mason v. London*, 8 Baxt. (Tenn.) 94.

In *Texas*, as to the half-mile restriction, see *East Dallas v. State*, 73 Tex. 371. The *Texas* act extending Marshal, did not render a country homestead a town homestead, until survey, ordinance, etc. *Taylor v. Boulware*, 17 Tex. 74; 47 Am. Dec. 642. The courts cannot review the legislature's decision upon the extent of the enlargement. *Madrey v. Cox*, 73 Tex. 538.

The wish for annexation under *Texas* Rev. Stat., art. 503, may be signified either by petition or by formal election. *Graham v. Greenville*, 67 Tex. 62.

In *Vermont*, a legislative act setting off part of one town to another, transfers only municipal jurisdiction; it affects no vested right of proprietorship—*e. g.*, under a charter reservation of lands for the use of schools. *White v. Fuller*, 38 Vt. 193. As to the effect of annexation under certain special acts of the general assembly, see *Hunter v. West Windsor*, 24 Vt. 327; *Stowe v. Luce*, 27 Vt. 605; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Wilmington v. Somerset*, 35 Vt. 232; *Collins v. Burlington*, 44 Vt. 16.

An imperfect division of a town, acquiesced in by the proprietors, was held good against a stranger. *Sawyer v. Newland*, 9 Vt. 383. As to evidence admissible upon such acquiescence, see *Hubbard v. Austin*, 11 Vt. 129.

In *Washington*, as to the procedure for enlargement, see *Washington* Gen. Stat. (1891), § 501. As to the effect of consolidation of municipalities upon corporate indebtedness, see § 502. As to the procedure for the reduction of town territory, see § 673. The consolidation act of 1890 applies to municipalities under special charter as well

as to others. *State v. New Whatcom*, 3 Wash. 7.

In *West Virginia*, as to legislative control in cases of division, see *Barker Dist. Board v. Valley Dist. Board*, 30 W. Va. 424.

For requisites of procedure in changing town boundaries, see *Davis v. Point Pleasant*, 32 W. Va. 289.

In *Wisconsin*, a town may be divided on petition of thirty resident freeholders and one-third the legal voters, to the county board, notification, election, etc. *Wisconsin* Annot. Stat. (1889), § 671. As to legislative control, see *Smith v. Sherry*, 54 Wis. 114; *Washburn v. Oshkosh*, 60 Wis. 453.

The legislature may constitutionally prescribe that the question of severance of a town be submitted to vote, on petition of two-fifths of the legal voters. *State v. Forest County*, 74 Wis. 610.

The requirements as to "division," *Wisconsin* Rev. Stat., § 671, do not apply to the vacation of a town and annexation of its territory to others. *State v. Wood County*, 61 Wis. 278.

For requisites of procedure in changing town boundaries, under *Wisconsin* Rev. Stat., § 670, see *Smith v. Sherry*, 54 Wis. 114. Further, as to annexation, see *State v. Pierce*, 35 Wis. 93.

A resident and elector of an organized village cannot vote for officers of the town from which the village was set off. *Jones v. Kolb*, 56 Wis. 263.

A town is liable for injury from a defect in a bridge in a village within the town limits, unless the village charter otherwise provides, or unless the bridge is on a village street and not on a town, county or state road. And this, though the village may have occasionally made slight repairs on the bridge. *Spearbracker v. Larrabee*, 64 Wis. 573.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1013.

In *Ohio*, it is no constitutional objection to compulsory annexation that the new property so brought in must be taxed to discharge pre-existing municipal indebtedness. *Powers v. Wood County*,

8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96. It is not to be presumed that there was not a benefit commensurate with the debt. *U. S. v. Memphis*, 97 U. S. 284. So, also, in *Virginia*, *Wade v. Richmond*, 18 Gratt. (Va.) 583. And in *Pennsylvania*, *Kelly v. Pittsburg*, 85 Pa. St. 170; 27 Am. Rep. 733; 104 U. S. 78. So, also, in *Nebraska*, *Turner v. Althaus*, 6 Neb. 54.

In *Kentucky*, it is now held otherwise. *Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Parkland v. Gaines*, 88 Ky. 562. In *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, the court, by Hargis, C. J., said: "If all property is to be taxed because it is profitable to own by reason of the patronage of the city, then we can see no escape for suburban property, which, it is well known, gradually declines in value as its distance from the city's population increases. Where, then, would the supposed corresponding benefits of the city's patronage cease? To answer this question, would be the ceaseless work of litigation, fomented by unnecessary extension of municipal boundaries for the embracement of taxable subjects." Farming lands within the town limits, but without city population, cannot be taxed for municipal purposes. *Parkland v. Gaines*, 88 Ky. 562. Compare *Henderson v. Lambert*, 8 Bush (Ky.) 607.

In *Alabama*, the new corporation with different boundaries, but with substantially the same population and taxable property, was held liable for the debt of the old one. *Mobile v. Watson*, 116 U. S. 289.

In *Colorado*, as to the bonded indebtedness on consolidation, see *Colorado Sess. L.* (1893), p. 458, § 17.

In *Illinois*, the assumption of indebtedness, the tax levy, etc., on annexation, are very explicitly provided for by the act of 1889. *Illinois Rev. Stat.* (1891), p. 269b, § 210c *et seq.*

In *Indiana*, in case of the annexation of a town to a city, "the city shall be liable for all debts, contracts, and liabilities of the town, and shall be entitled to all the rights, credits, moneys, effects, and property of the town; and may sue and be sued in relation thereto in the name of the city." So, also, in case of consolidation, will the new city have the rights and liabilities of the constituent town and city. *Indiana Rev. Stat.* (1888), § 3242.

In *Kansas*, upon division of a township, the surplus money must be di-

vided "in proportion to the taxable property remaining, and that detached." *Kansas Gen. Stat.* (1889), § 7062.

As to interest in property on division, rights in a town hall, etc., see *Wellington v. Wellington Tp.*, 46 Kan. 213; *Miami County v. Wilgus*, 42 Kan. 457.

The fact that a city had become detached from a township, has been held not to relieve the city from a tax to pay bonds in aid of a railroad; and this, notwithstanding an agreement between officers of a city and the town assuming to adjust, etc. *Oswego Tp. v. Anderson*, 44 Kan. 214. It has also been held that a township cannot relieve itself of liability by detachment of territory from a city, etc. *Walnut Tp. v. Jordan*, 38 Kan. 562.

After a township had voted to issue bonds to build a bridge, a new township was formed embracing part of the territory. The bridge was built, and also a bridge in the new township; the people thereof no longer needing the bridge in the old one. A majority of the court held that a statute afterwards passed making them liable to assist in paying the bonds issued by the old township, was void. *Craft v. Lofinck*, 34 Kan. 365.

In *Louisiana*, there must be no parochial taxation without the municipality's representation on the police jury. *Felix v. Wagner*, 39 La. Ann. 391.

In *Maine*, the new town was held not to be bound by the old town's contract with another town as to support of a pauper family. *Veazie v. Howland*, 47 Me. 127.

The settlement of a person absent at the time of annexation, was held not to be affected thereby. *Manchester v. West Gardiner*, 53 Me. 523.

The procedure in apportionment and assessment, under the *Maine Act of 1867*, ch. 291, setting off part of Frankfort to Winterport, is given in *Vose v. Frankfort*, 64 Me. 229.

In order to establish the new town's proportionate liability, it need not be notified of an action brought against the old one. *Mount Desert v. Tremont*, 72 Me. 348.

In *Massachusetts*, under a statutory provision that if, upon severance, the towns do not agree in respect to the division of debts and unpaid taxes, the superior court may, on petition, appoint three commissioners, whose award, on acceptance by the court,

shall be final, and the decree thereon shall not be set aside except for fraud or manifest error, neither party can appeal therefrom. *Cottage City v. Edgartown*, 134 Mass. 67. Compare a case upon such report as to the provision in a *Massachusetts Stat.* (1881), ch. 172, § 6, "for the annual excess, if any, of maintaining the public schools." *Needham v. Wellesley*, 139 Mass. 372.

A public common reserved by the original proprietors of a town for public uses, was held not to be "corporate property," within the *Massachusetts Act* of 1870, ch. 35, providing for apportionment between Norfolk and Wrentham. Otherwise as to a school fund. *Wrentham v. Norfolk*, 114 Mass. 555. Compare *Yarmouth v. North Yarmouth*, 34 Me. 411; 56 Am. Dec. 666.

In *Michigan*, the annexation must not interfere with the boundaries of representative districts. *Att'y Gen'l v. Holihan*, 29 Mich. 116; *People v. Bradley*, 36 Mich. 447. There, corporate taxation cannot be forced upon rural territory except by express statute. *People v. Bennett*, 29 Mich. 451; 18 Am. Rep. 107. Compare *Smith v. Saginaw*, 81 Mich. 123.

After a new township had been set off, a judgment was rendered for a liability theretofore incurred for a highway defect. It was held that for the purpose of meeting it, the old corporation must be considered still to exist; and that *mandamus* lies to compel the clerk to issue a certificate for a tax levy to satisfy it. *Courtright v. Brooks Tp.*, 54 Mich. 182.

Mandamus lies to compel the payment of a debt apportioned on the division of a township. *Marathon Tp. v. Oregon*, 8 Mich. 372.

In *Minnesota*, as to the liability of the original town for conversion of taxes collected, see *Clayton v. Bennington*, 24 Minn. 14. The act allowing the district court to enlarge or diminish the boundaries of a village "as justice may require," is an unconstitutional delegation of legislative powers. *State v. Simon*, 32 Minn. 540.

The legislature may erect a new town out of part of the territory of an old one, without providing for the previous debts and liabilities. In such case, the old town remains solely responsible for such debts and liabilities. No contract right or obligation is impaired, though the old town's taxable resources are thereby largely dimin-

ished, and though such debts may have been incurred upon the faith of a statutory pledge that the town would provide a sufficient sinking fund, by taxation, to pay the same at maturity, it not appearing that its power so to do has been rendered ineffectual therefor. *State v. Lake City*, 25 Minn. 404.

In *Mississippi*, reincorporation with retention of name and powers, but with excision of population and territory, was held not to extinguish debts of the original corporation. *Ross v. Wimberly*, 60 Miss. 345.

In *Missouri*, the fact that the fee of an addition has been vested in the town, does not import the right of immediate taxation. *Cameron v. Stephenson*, 69 Mo. 372.

The charter of a *Missouri* town was forfeited for non-user, but its creditors were not made parties to the proceeding. Meanwhile it had issued bonds in aid of a railroad. It was held that a city afterwards incorporated, embracing the same population and territory, was liable on the bonds. *Hill v. Kahoka*, 35 Fed. Rep. 32.

A city formed from the reorganization of a *Missouri* town, becomes liable for the town's debt. *Laird v. De Soto*, 22 Fed. Rep. 421, citing *Broughton v. Pensacola*, 93 U. S. 226. And this, although the city contains 400 acres less than did the town. *Laird v. De Soto*, 23 Fed. Rep. 780.

In *Nebraska*, to justify annexation, it must appear that some part of the territory would receive material benefit therefrom, or that justice and equity require it. *Hartington v. Luge*, 33 Neb. 623.

Under the *New Jersey Act* of 1871, dividing Woodside between Newark and Belleville, and directing that its debts be paid by them in certain proportions, a creditor of Woodside may maintain an action against Newark and Belleville. *Neilson v. Newark*, 49 N. J. L. 246. It is for the legislature to determine the proportion of debts that belongs to the new town. *State v. Elvins*, 32 N. J. L. 362.

The *New Jersey Act* of 1871, dividing Hackensack township into Ridgefield, Englewood and Palisades, was held not *proprio vigore*, to render any single township liable for any particular debt—e. g., for street grading—though contracted wholly for work entirely within its territorial limits. *Vanderbeck v. Englewood*, 39 N. J. L. 345.

line of a new county, the payment by one fraction of a debt of the old township lays the foundation of a claim for contribution.¹

c. EQUALIZATION OF TAXATION.—Whether the difficulty may be obviated by boards of equalization of assessments, depends on the statutory designation of their duties.²

In *New York*, on the division of a town, the debts are apportioned in the same manner as the town's personal property, on three days' notice by the supervisor to the other members of the town boards. *New York Laws* (1892), ch. 569, §§ 4 and 5. Each of the two towns was held to succeed to the common lands within its limits, in severalty. *North Hempstead v. Hempstead, Hopk. (N. Y.)* 288; *Denton v. Jackson, 2 Johns. Ch. (N. Y.)* 320.

In *Pennsylvania*, road taxes assessed on unseated lands, before the severance, but collected after it, are payable to the old township, though the lands fall within the new one. *Barnett Tp. v. Jefferson County, 9 Watts. (Pa.)* 166. When a township is divided by the line of a new county, each fraction remains liable for the whole of a debt due by the original township. The remedy is by an action for contribution. *Plunkett's Creek Tp. v. Crawford, 27 Pa. St. 107*. As to an apportionment of the indebtedness between a township and a borough erected therefrom, see *Jenkins v. Yatesville, 1 Kulp. (Pa.)* 190.

No large body of farm lands can be included in the corporate limits. *In re West Philadelphia, 5 W. & S. (Pa.)* 281; *In re Little Meadows, 35 Pa. St. 335*; *In re Blooming Valley, 56 Pa. St. 66*; *Devore's Appeal, 56 Pa. St. 163*. The fact that the extension would withdraw the control of certain property, forms no valid objection. *In re Edgewood, 130 Pa. St. 348*. As to legislative control, see *Smith v. McCarthy, 56 Pa. St. 359*.

As to apportionment, etc., on the organization of a new borough out of an old one having a funded debt, see *Darby's Appeal, 140 Pa. St. 250*.

In *West Virginia*, a town may so extend its limits as to include a railroad bridge across the Ohio river; and proper taxation thereof is not *ultra vires*. *Point Pleasant Br. Co. v. Point Pleasant, 32 W. Va. 328*. As to the taxation of farm lands within town limits, see *Probasco v. Moundsville, 11 W. Va. 501*.

In *Wisconsin*, on severance, the county board fixes the proportion of indebted-

ness chargeable *pro rata*, according to the last assessment rolls of the old town. *Wisconsin Annot. Stat. (1889), § 672*. If there be no provision for contribution, and the old town retains all its property and franchises, the detached town is not liable for the indebtedness. *Depere v. Bellevue, 31 Wis. 120*. Compare *Goodhue v. Beloit, 21 Wis. 636*; *Knight v. Ashland, 61 Wis. 233*.

The requirement, *Wisconsin Rev. Stat., § 672*, that a new town formed out of part of an old one "pay" its proportion of the latter's indebtedness, imports power to sue the former therefor on refusal. *Ackley v. Vilas, 79 Wis. 157*.

In the absence of a contrary statutory provision, a village organized under *Wisconsin Rev. Stat., ch. 40*, is not liable to the town in which it lies for any of the town's expenses of assessment, election, or meeting. *Plainfield v. Plainfield, 67 Wis. 526*.

The transfer of a town from one county into another, does not affect its liabilities. Where *Langdale*, after contracting debts, was attached to *Richmond*, and afterwards detached and created into the new town of *Langdale*, it was held that *Richmond* still remained liable for the debts. The rule that, in the absence of contrary statutory provision, the annexed town's assets and liabilities shall become those of the annexee, does not apply when the annexation is merely for a temporary purpose; *e. g.*, *Langdale's* attachment to *Polar*, until the organization of a town government by the election of officers. *Schriber v. Langdale, 66 Wis. 616*.

On the division of *Waldwick, Wisconsin*, carving out *Moscow*, each was adjudged to pay the proportion of the debt supposed to be assumed by it in aid of a railroad, although the legality of the procedure was doubtful. *Morgan v. Waldwick, 17 Fed. Rep. 286*.

1. *Plunkett's Creek Tp. v. Crawford, 27 Pa. St. 107*. See also *North Whitehall v. South Whitehall, 3 S. & R. (Pa.) 117*; *Devor v. McClintock, 9 W. & S. (Pa.) 80*; *Gibson v. Nicholson, 2 S. & R. (Pa.) 422*.

2. See *TAXATION*, vol. 25, p. 5.

In *Illinois*, as to the duties of the

town assessor, town clerk, and supervisor, as a board to review taxation of parties aggrieved, etc., see *Illinois* Rev. Stat. (1891), p. 1246; as to equalization by the county board, see p. 1249; and by the state board, p. 1252.

In *Indiana*, as to the duties of boards of equalization, see *Indiana* Rev. Stat. (1888), §§ 3157, 6399.

Where, after the vote of an appropriation to a railroad, territory was annexed, through which the road was built without touching the original township, it was held that no tax could be levied to pay the appropriation. *Alvis v. Whitney*, 43 Ind. 83.

In *Iowa*, as to such township board, see McClain's *Iowa* Code (1888), §§ 532, 1309; county board, § 1313; state board, § 1315 *et seq.* See also *O'Hare v. Dubuque*, 22 Iowa 144; *Deeds v. Sanborn*, 26 Iowa 419; *Deiman v. Fort Madison*, 30 Iowa 542; *Hayzlett v. Mount Vernon*, 33 Iowa 229; *Durant v. Kauffman*, 34 Iowa 194; *Sears v. Iowa Midland R. Co.*, 39 Iowa 417; *Brooks v. Polk County*, 52 Iowa 460; *Evans v. Council Bluffs*, 65 Iowa 238; *Tubbesing v. Burlington*, 68 Iowa 691.

There, also, an objection that inequality would result from the fact that the annexed lands were subject to overflow, was held to be invalid. *Ford v. North Des Moines*, 80 Iowa 626.

As to liability of unplatted lands in cities and towns, see *Perkins v. Burlington*, 77 Iowa 553.

Where two townships included within a city, comprise but one assessorial district, the county board of equalization cannot equalize taxation as between them, but can act only on the whole district. *Getchell v. Polk County*, 51 Iowa 107.

In *Kansas*, it was held that it is not the duty of the officers of a new township to levy any of the taxes to pay bonds and interest voted by the old township, for the construction of a bridge, before the new one is detached and organized. *Fender v. Neosho Falls Tp.*, 22 Kan. 305.

In *Michigan*, as to the duty of the supervisors as a "board of equalizers," see *Michigan* Gen. Stat. (1882), § 325.

The old township may levy and collect taxes until the one carved therefrom is completely organized by the election of officers. *Comins v. Harrisville*, 45 Mich. 442.

Under *Michigan* Sess. L. (1861), p. 293, providing that local taxes levied in an unorganized county, attached to

an unorganized township, must be expended within the limits of the unorganized territory, a township created out of such territory cannot maintain an action against the township to which it was formerly attached, for the amount of local taxes not expended according to the statute. *Midland Tp. v. Roscommon Tp.*, 39 Mich. 424.

In *Minnesota*, the county board of equalization "shall, upon complaint of any party aggrieved, being a non-resident of the town or district in which his property is assessed, reduce the valuation of each class of personal property. . . . They may raise the aggregate valuation of such real property," etc. *Minnesota* Gen. Stat. (1891), § 1465. As to the duties of the town board of equalization, see §§ 1463-4.

A reincorporated village was held to remain liable for its proportion of the general township indebtedness previously incurred, and of certain general town charges for township purposes, not inconsistent with the general statute. *Bradish v. Lucken*, 38 Minn. 186.

In *Mississippi*, as to the power of the board of supervisors to order a new assessment amending, etc., see *Mississippi* Code (1892), § 3785.

In *Missouri*, as to the duties of the county board of equalization, see *Missouri* Rev. Stat. (1889), § 8520.

In *Nebraska*, the governor, auditor, and treasurer constitute the state board of equalization. *Nebraska* Consol. Stat. 1891, § 3973. As to the duties of the town, the city, and the county boards thereof, see § 3968 *et seq.* There the county board of equalization, in a county under the supervisor system, cannot reduce or increase the valuation of an individual assessment, unless application has been made to the township board and been rejected. *McGee v. North American Cattle Co.*, 32 Neb. 149, *distinguishing* *State v. Dodge County*, 20 Neb. 595.

In *New York*, as to taxation, see the case of a city's purchase of lands in a town, for a reservoir, etc. *Rochester v. Rush*, 80 N. Y. 302.

In *Hewitt's Appeal*, 88 Pa. St. 55, a majority of the court held that the *Pennsylvania* Act of 1871, allowing North End to be annexed to Allegheny upon a two-thirds vote, was constitutional, and that municipal taxes might be imposed on lands which, from their rural characters, could receive no appreciable benefit.

In *Rhode Island*, as to an appeal

3. Districts; Reservations—*a.* **SCHOOL-LAND SECTIONS; MINISTRY LOTS.**—The general government has made provision for the appropriation of the sixteenth and the thirty-sixth township sections, or an equivalent thereof, to the maintenance of schools.¹ Specific grants have been made in territorial organic acts, and accepted in state constitutions.²

from the board of relief on an extension of municipal limits, see *Valcourt v. Providence* (R. I. 1893), 26 Atl. Rep. 45.

For the construction and effect of the *Tennessee* Act of 1879, providing for taxing districts for communities whose charter has been abolished, see *Luehrman v. Shelby County Taxing Dist.*, 2 Lea (Tenn.) 425.

1. U. S. Rev. Stat. (1878), § 2275.

2. As to the utilization of such grant:

In *Alabama*, see *Alabama* Code, (1886), § 1023.

In *Arkansas*, see *Arkansas* Dig. Stat. (1884), p. 151.

In *California*, see *California* Pol. Code (1885), §§ 3442, 3494.

As to the prospective effect of the acts of Congress thereon, upon the vesting of such township section when she is admitted as a state, see *Doll v. Meador*, 16 Cal. 295; *Ward v. Mulford*, 32 Cal. 365. There was no vesting until selection, etc. *Megerle v. Ashe*, 27 Cal. 322; 87 Am. Dec. 76.

In *Colorado*, such township section can be sold only at the discretion of the state board; and this, only at public auction, and at not less than \$3.50 per acre. *Colorado* Annot. Stat. (1891), § 3638.

In *North Dakota*, "the board of university and school lands" "shall have control of the appraisal, sale, rental, and disposal of all school and university lands. . . . No land shall be sold for less than the appraised value, and in no case for less than \$10 per acre." *North Dakota* Const. (1889), §§ 156, 158. As to the procedure in appraisal, equalization, and leasing, see *North Dakota* Sess. Laws (1891), p. 165 *et seq.*

In *South Dakota*, as to the same, see *South Dakota* Const., art. 8, § 5; and *South Dakota* Sess. Laws (1890), p. 296 *et seq.*

In *Indiana*, if such section of the congressional township be divided by a county or civil township line, the voters designate a trustee to be the custodian thereof, and receive the revenue thereof from the county treasurer. *Indiana* Rev. Stat. (1888), § 4330.

In *Iowa*, see *McClain's Iowa* Code (1888), § 3001.

In *Kansas*, see the constitution of 1859, *Kansas* Gen. Stat. (1889), § 74; and *State v. Stringfellow*, 2 Kan. 263.

In *Maine*, as to the effect of the division of the town upon the public school lands, see *Poland v. Strout*, 19 Me. 121. As to what passes by a deed of ministerial and school lands in a town, by the municipal officers, see *Abbott v. Chase*, 75 Mo. 83; *Bucksport v. Spoford*, 12 Me. 487.

In *Massachusetts*, as to a town's rights over lands given it for school purposes, or for the use of the ministry, see *First Parish v. Dunning*, 7 Mass. 445; *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *Harrison v. Bridgeton*, 16 Mass. 16; *Humphrey v. Whitney*, 3 Pick. (Mass.) 158; *Congregational Soc. v. Curtis*, 22 Pick. (Mass.) 320; *Essex v. Low*, 5 Allen (Mass.) 595.

In *Michigan*, the minimum price of unimproved university lands is \$12 per acre; of school lands \$4 per acre. *Michigan* Annot. Stat. (1882), § 5262.

In *Minnesota*, as to the school-land sections, see *Minnesota* Stat. (1891), § 3614 *et seq.*; Act of Congress of 1851, 9 U. S. Stat. at L., p. 568, § 1.

In *Mississippi*, see *Mississippi* Code (1892), § 4144 *et seq.*

In *Missouri*, see *Missouri* Rev. Stat. (1889), § 8052.

In *Montana*, the school lands are under the management of a state-land agent, appointed by the governor and the state board of land commissioners. *Montana* Sess. L. (1891), p. 177.

In *Nebraska*, see *Nebraska* Const. (1875), art. 8, § 3; also *Nebraska* Consol. Stat. (1891), § 3829.

In *Nevada*, see *Nevada* Gen. Stat. (1885), §§ 33-5.

In *New Hampshire*, as to regulations of grants for the support of the gospel ministry in towns, see *New Hampshire* Pub. Stat. (1891), p. 420.

In *Ohio*, see *Ohio* Rev. Stat. (1890), §§ 1404, 1418.

In *Oregon*, see the Act of Congress of 1851, 9 U. S. Stat. at L., p. 568, § 1.

In *Texas*, the care of the school

b. SCHOOL DISTRICTS.—The division of township territory into school districts, as also the corporate powers thereof, are very similar in the *New England* states, but various in the other states.¹

lands is vested in the commissioners of the general land office, with the aid of the attorney-general. *Texas Rev. Civ. Stat.* (1889), art. 4039.

In *Utah*, see the organic Act of Congress of 1850, 9 U. S. Stat. at L., p. 457, § 15.

In *Vermont*, "the selectmen shall have the care of the lands in their towns granted as glebes for the use of the church of *England*, and now by law granted to such towns for the use of schools, and lands granted to the use of the ministry or the social worship of God, and lands granted to the first settled minister, and not appropriated according to law; they may lease such lands as they judge beneficial." *Vermont Rev. L.* (1880), § 2703. They can give no title except by lease. Upon an attempt to convey absolutely, equity will relieve by modifying the form of the contract. *Lampson v. New Haven*, 2 Vt. 14. As to the selectmen's distribution of the rents of ministry lands, see *First Universalist Soc. v. Leach*, 35 Vt. 108; *Victory v. Wells*, 39 Vt. 488.

In *Wisconsin*, see the Act of Congress of 1846, 9 U. S. Stat. at L., p. 58, § 7.

In *Wyoming*, the governor, the superintendent of public instruction, and the secretary of state, constitute a board of land commissioners for the management of the state lands, including those transferred from the *United States* by the State Admission Act of 1890. *Wyoming Sess. L.* (1891), ch. 79.

1. In *Alabama*, each incorporated town of 3,000 inhabitants constitutes a separate school district, and, as such, may hold real and personal property, etc. *Alabama Code* (1886), § 999.

In *Arkansas*, "no new school district shall be formed having less than thirty-five persons within the territory included in such new district, of scholastic age." *Arkansas Dig. Stat.* (1884), § 6174.

School districts, though *quasi* corporations, are not liable for trespasses committed by their officers. *School Dist. No. 11 v. Williams*, 38 Ark. 454.

In *California*, ordinarily, each town forms one school district. *California Pol. Code* (1885), § 1576. So, also, in

Nevada. *Nevada Gen. Stat.* (1885), § 1345.

In *Connecticut*, "each town shall have power to form, unite, alter, and dissolve school districts and parts of school districts within its limits; and any two or more towns may form school districts of adjoining portions of their respective towns; but no new district shall be so formed that it shall contain less than forty persons between four and sixteen years of age." *Connecticut Gen. Stat.* (1888), § 2153.

In the *Dakotas*, there are two systems, namely, the township system and the school-district system. The statutory provisions thereon are very involved. See note under § 1845 of *Dakota Comp. Laws* (1887).

In *Delaware*, the limits of school districts must be recorded in the office of the county clerk. *Delaware Laws* (1874), p. 200. As to formation of "united school districts," see p. 205, § 8.

In *Georgia*, the county board lays off the county into school sub-districts. *Georgia Code* (1882), § 1257.

In *Illinois*, as to "school townships" and fractional township consolidation, see *Illinois Rev. Stat.* (1891), p. 1365, §§ 30, 31.

In *Indiana*, "the township trustees and the school trustees of incorporated towns and cities . . . establish and locate conveniently, a sufficient number of schools for the white children therein." *Indiana Rev. Stat.* (1888), § 4444.

In *Iowa*, as to district townships and independent school districts, see *McClain's Iowa Stat.* (1888), § 2819.

Where, after organizing sub-districts into independent districts, and instituting an action at law against the debtor districts in the apportionment of assets and liabilities, the directors went out of office, it was held that the creditor districts could in equity compel an accounting and payment. *Georgia Ind. School Dist. v. Victory Ind. School Dist.*, 41 Iowa 321.

In *Kentucky*, on report of the county superintendent, the county judge appoints a discreet citizen, who, with the county surveyor, reforms the school district in any town. *Kentucky Gen. Stat.* (1887), p. 1162.

In *Maine*, "two or more adjoining towns may concur in establishing school districts from parts of each when convenient, in determining their limits, and in altering and discontinuing them." *Maine Rev. Stat.* (1883), p. 195.

In *Massachusetts*, "a town in which the school-district system exists may abolish the same by vote. No town which has so abolished said system shall thereafter re-establish school districts." *Massachusetts Pub. Stat.* (1882), p. 306.

In *Michigan*, the township board of school inspectors divide the township into school districts as necessary from time to time. *Michigan Annot. Stat.* (1882), § 5033.

In *Minnesota*, as to the adoption of the independent school-district system by any town or village, see *Minnesota Stat.* (1891), § 3327.

In the *Minnesota* law, as to pre-emption of organization of a school district after one year's exercise of its franchise, "organized" relates to its formation, and not merely to its election of school officers. *State v. School Dist. No. 152* (Minn. 1893), 35 N. W. Rep. 1122.

In *Missouri*, as to the organization of school districts, see *Missouri Rev. Stat.* (1889), § 7970 *et seq.*

In *Montana*, as to school-district boundaries, formation, etc., see *Montana Comp. Stat.* (1887), § 1178.

In *New Hampshire*, a town constitutes one school district, except as to districts organized under special legislative acts. *New Hampshire Pub. Stat.* (1891), p. 251, § 1. These, however, may be dissolved by vote, and unite with the town district, p. 253, § 14.

In *New York*, the districting is the duty of the school committee. *New York Rev. Stat.* (1890), p. 553, § 74. As to the procedure for apportionment of the school fund, on the erection of a new district, see *People v. Board of Auditors*, 126 N. Y. 528.

In *Ohio*, as to the control of districting, by the township board of education, see *Ohio Rev. Stat.* (1890), § 3921.

In *Pennsylvania*, every township, borough, and city is a school district; and a city or borough may be divided into wards for school purposes. *Bright. Purd. Pennsylvania Dig. L.*, p. 282.

A school district has been held not to be liable for personal injuries to a pupil caused by the negligence of a contractor employed to repair the schoolhouse. *School Dist. v. Fuess*, 98 Pa. St. 600; 42 Am. Rep. 627.

As to the ratio to be adopted upon a division of property between school districts, see *Darby v. Sharon Hill*, 2 Pa. Dist. Rep. 485.

In *Rhode Island*, "any town may be divided, by a vote thereof, into school districts;" and "every town shall establish and maintain, with or without forming districts, a sufficient number of public schools at convenient places." *Rhode Island Pub. Stat.* (1882), p. 138.

The provision of *Rhode Island Sess. L.* 1884, ch. 447, allowing the abolition of school districts by vote at "town meeting," does not extend to authorize such abolition by vote in a voting district meeting. *Comstock v. Lincoln School Com'rs* (R. I. 1892), 24 Atl. Rep. 145.

In *Texas*, a town or village having 200 inhabitants may be incorporated simply for free-school purposes. *Texas Rev. Civ. Stat.*, art. 541, *a*. As to the jurisdiction of the town council, see art. 3783.

The *Texas* Act of 1891, as to incorporation for school purposes, of territory not over four miles square, was held not to require the town or village to be near the center. *State v. Allegree*, 3 Tex. Civ. App. 437.

In *Virginia*, each school district is a body corporate, and may sue and be sued, contract, hold property, etc. "The districts shall correspond in boundaries with the magisterial districts, except that towns of more than 500 inhabitants shall, if the common council so elect, constitute a separate school district." *Virginia Code* (1887), §§ 1468-9.

In *Washington*, a school district means the territory under the jurisdiction of a single board of directors. New districts may be formed on petition to the county superintendent, notice, hearing, etc. *Washington Gen. Stat.* (1891), §§ 784-5.

In *Wisconsin*, as to the formation of new school districts, see *Wisconsin Annot. Stat.* (1889), § 531.

A taxpayer of a school district may maintain a bill in equity to set aside a judgment obtained against it through fraudulent collusion of its officers with an unjust claimant. *Nevil v. Clifford*, 55 Wis. 161.

In *Wyoming*, school districts are formed by the county superintendent of schools, upon notice of district meeting, etc. A majority dissatisfied may appeal to the board of county commissioners, and thence to the superintendent.

c. ROAD DISTRICTS.—In matters other than educational, the word "district" is occasionally used interchangeably with "precinct" or "plantation."¹ Sometimes a village is a single district for various purposes, including that of keeping the highways and bridges therein in repair.² In some states, the highway districting and the appointment of "overseer" or "surveyor" are made by the town meeting; in others, by the town council, or the selectmen. But in those states where the county is the principal political unit, the highway precincts are not always allotted with regard to town lines.³

ent of public instruction. *Wyoming Rev. Stat.* (1887), § 3918 *et seq.*

1. In *Massachusetts*, the inhabitants of district "plantations" have all the powers and privileges of towns, except the right of electing a representative. *Justice's Opinion*, 3 *Mass.* 568.

In *Tennessee*, as to "taxing districts," see *Tennessee Code* (1884), § 1677.

2. In *New York*, as to the apportionment of responsibility therefor between the village trustees and the town, see *Bird. New York Rev. Stat.* (1890), p. 3266, § 45, pl. 25; p. 3295, § 166.

3. As to the territories, the act of Congress of 1886, regulating territorial legislation, inhibits laws laying out roads, etc. 24 *U. S. Stat. at L.*, p. 170, § 1, pl. 3.

In *Alabama*, "For the purpose of keeping roads in repair, the court of county commissioners, at its first term in every second year, must divide the county into a convenient number of road precincts, and must, at the same court, appoint three apportioners for each election precinct, which apportioners shall forthwith proceed to appoint an overseer to each road precinct." *Alabama Code* (1886), § 1398.

In *Connecticut*, the highway districts are established by the town. *Connecticut Gen. Stat.* (1888), § 2678.

In *Maine*, "When the municipal officers are appointed surveyors of highways by a town, they may in writing delegate their power, or part of it, to others. They shall annually, before the tenth day of May, make a written assignment of his division and limits to each surveyor of highways, to be observed by him." *Maine Rev. Stat.* (1883), p. 253, § 58. As to the duty of the selectmen on the last surveyor's return of a highway tax as unpaid, see *Tufts v. Lexington*, 72 *Me.* 516.

In *Massachusetts*, "The selectmen of every town having more than one sur-

veyor of highways, shall annually, before the first day of May, assign in writing to each surveyor the limits and divisions of the highways and townways to be kept in repair by him." *Massachusetts Pub. Stat.* (1882), p. 347, § 4. Where no such assignment is made, the surveyors may act by a majority of the whole board. *McCormick v. Boston*, 120 *Mass.* 499.

In *New Hampshire*, "When the highway taxes are payable in labor, the selectmen, on or before the last Saturday in May in each year, shall limit the several surveyors' districts, and give to each surveyor a list of the persons in his district, with the highway tax against each person, and a warrant to collect the same." *New Hampshire Pub. Stat.* (1891), p. 219, § 9. The surveyor cannot arrest the body to enforce collection. *Marshall v. Wadsworth*, 64 *N. H.* 386.

In *New Jersey*, the township committee assigns the overseers to their several "divisions of the highways." *New Jersey Revision* (1877), p. 1002, § 37.

In *Iowa*, township trustees cannot make the improvement of the highways in one district a charge upon the other districts of the township. *Cass County Bank v. Conrad*, 81 *Iowa* 482.

In *New York*, the electors of a highway district may, on vote, etc., purchase fire apparatus. *New York Sess. L.* (1891), p. 477. Village trustees have not an absolute ministerial duty to erect sidewalks in streets little used; their powers are discretionary. *Cole v. Medina*, 27 *Barb.* (N. Y.) 218.

In *North Carolina*, the township board of supervisors annually divide the roads into sections, and appoint overseers. *North Carolina Code* (1883), § 1016.

In *Pennsylvania*, as to highways on township lines, see *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 1503.

In *Ohio*, the civil township trustees

d. VILLAGE DISTRICTS.—The statutes are not uniform in their definition of village. In some states, municipalities are classified without such title. In others, the word is used in a generic sense, as designating a hamlet or collection of houses. In still others, these are distinguished from "incorporated villages."¹

divide the township into road districts. *Ohio Rev. Stat.* (1890), § 1457.

In *Rhode Island*, the town council assigns the surveyors to road districts. *Rhode Island Pub. Stat.* (1882), p. 170, § 2.

In *Vermont*, "The selectmen shall divide the town into a number of highway districts, convenient for repairing highways." *Vermont Rev. Laws* (1880), § 3051. And unless the town elects street commissioners, each district has a surveyor, appointed by the town at the annual meeting. § 2658.

In *Wisconsin*, the town board divides the town into road districts. *Wisconsin Annot. Stat.* (1889), § 1223, pl. 4.

1. In *Arkansas*, municipalities are cities of the first and second classes, and incorporated towns. *Arkansas Dig. Stat.* (1882), § 722.

In *Colorado*, so, also. *Colorado Annot. Stat.* (1891), § 4482. As to the organization of villages, see § 4516.

The *Connecticut* statutes recognize "towns, cities, and boroughs, and the village of Weathersfield." *Connecticut Gen. Stat.*, § 14.

In *Georgia*, villages are incorporated like towns. *Georgia Code* (1882), § 774.

In *Illinois*, villages may be incorporated on election, etc., the ballots being "for" or "against village organization under the general law." *Illinois Rev. Stat.* (1891), p. 260, § 179.

As to what is a "village" in a requirement of cattle-guards, see *Toledo, etc., R. Co. v. Spangler*, 71 Ill. 568.

In *Indiana*, the inhibition of horse-racing and shooting at a mark within any town, applies also to villages. *Indiana Rev. Stat.* (1888), § 2160.

In *Iowa*, the name of a village may be changed by the same procedure as in case of a town. *McClain's Iowa Stat.* (1888), § 2160.

In *Maine*, as to meetings of village corporations, see *Maine Rev. Stat.* (1883), p. 78, § 9.

In *Massachusetts*, a town meeting may authorize a village or district of 1000 inhabitants to organize to maintain street lamps, libraries, sidewalks, or police. *Massachusetts Pub. Stat.* (1882), p. 230, § 27.

In *Michigan*, as to the powers and duties of villages incorporated under the general law, see *Michigan Annot. Stat.* (1882), § 2768 *et seq.* The officers of such village are a president, six trustees, a clerk, a treasurer, a street commissioner, an assessor, a constable, and a council consisting of the president and trustees, § 2776. As to the procedure for incorporation of a village by the county board, see § 2983 *et seq.*; its officers, § 2999; the powers and duties of its president and trustees, § 3008; the powers of its marshal, § 3025. Neither the state nor any person can question the regularity of a village incorporation once generally acquiesced in. *Bird v. Perkins*, 33 Mich. 28.

In *Minnesota*, as to the procedure for incorporation of villages, see *Minnesota Stat.* (1891), § 1183 *et seq.* The village officers are a president, three trustees, a treasurer, a recorder, two justices of the peace, two constables, a marshal, and a street commissioner, § 1200. The president, trustees and recorder constitute the council. As to its powers and duties, see the twenty-nine specifications in § 1208. As to the construction and constitutionality of the village incorporation act in provision for "improvement bonds," see *McCormick v. West Duluth*, 47 Minn. 272.

In *Mississippi*, municipalities are in three classes: cities, towns, and villages. Those having less than 500 and not less than 100 inhabitants are villages. *Mississippi Annot. Code* (1892), § 2911.

In *Montana*, as to the platting of villages, see *Montana Comp. Stat.* (1887), § 2031 *et seq.*

In *Nebraska*, as to the incorporation of villages, see *Nebraska Consol. Stat.* (1891), § 2877 *et seq.*

In *New Hampshire*, "Upon petition of ten or more legal voters, inhabitants of any village situate in one or more towns, the selectmen of such town or towns shall fix, by suitable boundaries, a district including the village and such adjacent parts of the town or towns as may seem to them convenient, for any or either of the following purposes:

e. ELECTION DISTRICTS.—In *New England*, ordinarily a town constitutes a single election district. In some other states the governing board divides the town into election precincts.¹

f. FIRE LIMITS.—In many states it has been held that under general charter power to provide for the safety of the inhabitants and property, a town or other municipality may establish fire limits, and prohibit erection of wooden buildings therein. In a few states, express statutory authorization is required therefor. The adjudications construing ordinances as to erection and

The extinguishment of fires, the lighting or sprinkling of streets, the planting and caring for shade and ornamental trees, the supply of water for domestic and fire purposes, the construction and maintenance of sidewalks and main drains or common sewers, and the appointing and employing of watchmen and police officers. They shall cause a record of the petition and their doings thereon to be recorded in the records of the towns in which the district is situate." Thereupon a regular town meeting is warned, to establish and name the village district, and appoint its officers to serve until its regular annual meeting. The district may increase its powers from time to time. It may, by a two-thirds vote, terminate its existence and dispose of its corporate property. *New Hampshire Pub. Stat.* (1891), p. 174 *et seq.*

A village precinct authorized by the act of 1849, must include the whole village. *Osgood v. Clark*, 26 N. H. 307.

In *New York*, localities outside, etc., of a certain area and having less than 300 residents, may be incorporated into a village. *New York Sess. L.* (1891), p. 284. A town may establish lighting districts outside of any village therein. *New York Sess. L.* (1892), p. 513.

In *Ohio*, as to the general corporate powers of villages or hamlets, see *Ohio Rev. Stat.* (1890), §§ 1549, 1552-3. Procedure for advancing to a city of the second class, § 1582. Sanitary and police powers, § 1692 *et seq.* Right of a village containing a college to ordain against liquor-selling, § 1692 *b.* In an indictment, "village" and "borough" were held to be duplicate or cumulative names of the same thing. *Brown v. State*, 18 Ohio St. 496.

In *Oklahoma*, the name of a village may be changed on petition of two-thirds of the electors to the county board. *Oklahoma Stat.* (1890), § 757.

In *Vermont*, as to the procedure for incorporation of villages, see *Vermont*

Rev. L. (1881), § 2777 *et seq.* A description is sufficient if it enables a surveyor to ascertain the lines and corners with certainty. *Williams v. Willard*, 23 Vt. 369.

In *Wisconsin*, as to the incorporation of new villages, see *Wisconsin Annot. Stat.* (1889), § 854.

1. See *infra*, this title, *Meetings*.

In *Michigan*, the township board may divide the township into election districts. *Michigan Gen. Stat.* (1882), § 124. So, also, the village board, a village, § 132.

In *Minnesota*, each organized town constitutes one election district. *Minnesota Stat.* (1891), § 1083. The general village law of 1885 does not constitute a village an election district separate from its town. *Stemper v. Higgins*, 38 Minn. 222.

In *Ohio*, each civil township is an election precinct, unless divided by a municipal corporation having its own election precincts. *Ohio Rev. Stat.* (1890), § 1388. The county commissioners, on petition, hearing, etc., erect the election precincts. § 1389.

In *New York*, in each town of 500 electors, the supervisors and town clerk form themselves a board to divide the town into election districts. *Bird. New York Rev. Stat.* (1890), p. 929, § 30.

In *Texas*, failure of the county commissioners to recognize a ward as an election precinct, does not invalidate an election held in the precincts as established. *Davis v. State*, 75 Tex. 420.

The *Utah* organic act of Congress of 1850 requires the governor and legislative council to lay off "the necessary districts," for all officers. *Utah Comp. L.* (1888), p. 44, § 7.

In *Wisconsin*, the town board divides the town into election districts. *Wisconsin Annot. Stat.* (1889), § 27.

In *Wyoming*, the county commissioners form the election precincts. *Wyoming Rev. Stat.* (1887), § 1096.

removal of buildings, and also the decisions concerning the remedies of property owners, are not entirely uniform.¹

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1170.

In *Alabama*, such an ordinance must be construed most strongly against the municipality. Thus, one prohibiting building within the fire limits any "structure of wood," or repairing "with wood or other combustible material," etc., was held not to apply to annexing to a brick depot an addition consisting of a wooden frame standing on brick pillars, and covered with corrugated iron. *Montgomery v. Louisville, etc., R. Co.*, 84 Ala. 127. Compare the case of construing against a corporation, its charter allowing transportation, etc., of dead animals, and in favor of a municipal inhibition thereof. *Northwestern Fertilizing Co v. Hyde Park*, 97 U. S. 659. Also in what cases equity will enjoin a municipality from revoking a franchise to obstruct with sidings, etc. *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115; *Forcheimer v. Mobile*, 84 Ala. 126.

In *Arkansas*, the general police power under a municipal charter includes the establishment of fire limits. *McKibbin v. Fort Smith*, 35 Ark. 352.

The *California* constitution is not contravened by a municipal ordinance establishing fire limits. *Ex p. Fiske*, 72 Cal. 125. In the absence of such an ordinance, an adjoining house-owner cannot have enjoined the continuance of a wooden building. *McCloskey v. Kreling*, 76 Cal. 511.

In *Colorado*, the town board may direct the removal of any building within the fire limits that has become "damaged by fire, decay or otherwise, to the extent of fifty per cent. of the value," and may prescribe the manner of ascertaining such damage. *Colorado* Annot. Stat. (1891), § 4403, p. 32.

In *Connecticut*, a statute prohibiting erection, within certain municipal limits, of wooden buildings or additions having "in them" a chimney, etc., was held to be violated by a wooden addition having a chimney outside opening into it. *Daggett v. State*, 4 Conn. 60; 10 Am. Dec. 100. Within such statute, conversion of an old meeting-house into a human dwelling is not an "erection." *Booth v. State*, 4 Conn. 65. The fact that there was brick and mortar four inches thick around a wooden frame, does not take

the case out of the prohibition. *Tuttle v. State*, 4 Conn. 68. Removal and repairing of a building is not an "erection" within the prohibition. *Brown v. Hunn*, 27 Conn. 332; 71 Am. Dec. 71. A statute allowing such municipal prohibition only by license, was held to import the right to charge a reasonable license fee. *Welch v. Hotchkiss*, 39 Conn. 140; 12 Am. Rep. 383. The fact that by the owner's unlawful act, the building has become real estate, affords no ground for equity's enjoining an enforcement of the fire ordinance. *Hine v. New Haven*, 40 Conn. 478.

In the *Dakotas*, the town trustees may establish such "measures of prudence for the prevention or extinguishment of fires as they shall deem proper." *Dakota Comp. L.* (1887), § 1043, pl. 3.

In *Georgia*, the right of town authorities, "analogous to the right of eminent domain," to destroy a building to stop a conflagration, is declared by statute. *Georgia Code* (1882), § 2226. Removal of a building from the fire limits was enjoined, conditional on its not being used as a blacksmith shop, or to run a forge. *Dupree v. Brunswick*, 82 Ga. 727. Under a charter giving the mayor and council of Dalton power to abate nuisances, and to pass all ordinances they "deem necessary for preserving the health, peace, good order, and good government," etc., it was held that they could prohibit the erection of a frame building within certain limits, and cause the marshal to remove it at the owner's expense. *Ford v. Thrallkill*, 84 Ga. 169.

In *Illinois*, an ordinance prohibiting the erection of wooden buildings within the fire limits, and the marshal's tearing off a wooden roof, were held to be a proper exercise of the police power. *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89. But the owner should be first directed to do the tearing away. *Louisville v. Webster*, 108 Ill. 414.

In *Indiana*, the marshal's tearing down a wooden building within the fire limits is not a forfeiture of property in the constitutional sense. *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830.

In *Iowa*, incorporated towns may, on the petition of the owner of two-thirds

of the grounds in any square or block, prohibit the erection thereon of any building, or addition thereto, not made of brick and mortar, or of iron, stone, etc. McClain's *Iowa Code* (1818), § 616. This does not import a prohibition of lumber or wood yards therein. *Des Moines v. Gilchrist*, 67 Iowa 210.

In *Kansas*, where a township has voted a fire tax, "It shall be the duty of the township trustee to make a map of his township, and to subdivide his township into suitable and convenient fire districts, and to make the roads within his township conform to the fire districts." His lines must not cross a railroad track, nor come nearer than 200 feet thereof; "this, with a view of securing such fire and road districts, and such township, from incursions of prairie fires." *Kansas Gen. Stat.* (1889), § 3130. As to the remedy of a party aggrieved from a fire set to a prairie, see *Jarrett v. Apple*, 31 Kan. 693.

In *Kentucky*, as to the municipal power to regulate citizens' property, see *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.) 417.

In *Louisiana*, the power to forbid the erection of combustible buildings in densely built-up parts of a town, does not depend on a legislative grant. *Monroe v. Hoffman*, 29 La. Ann. 651. Charter authorization to prevent reconstruction in wood, of old buildings within certain limits, was held not to import power to prevent the repairing, with wooden shingles, of roofs originally covered with such shingles. *State v. Schuchardt*, 42 La. Ann. 49.

In *Maine*, charter authorization to pass ordinances "needful to the good order of the body politic," imports power to prohibit the erection of wooden buildings within certain limits. *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188.

In *Massachusetts*, as to the organization of fire departmental districts, on petition to the town meeting, see *Massachusetts Stat.* (1882), p. 269. Cities and towns may, by ordinance, "regulate the inspection, material, construction, alteration, and use of buildings and other structures," except federal or state, etc., p. 560, § 1. The Salem ordinance prohibiting the erection of a wooden building within eight feet of another wooden one, applies to such erection, although the contract was made and work begun on the cellar, before the ordinance was enacted. *Salem v.*

Maynes, 123 Mass. 372. As to the power of town fire-wards to pull down buildings, etc., see *Coffin v. Nantucket*, 5 Cush. (Mass.) 269.

Massachusetts Stat. (1868), ch. 346, providing for the dissolution of fire districts formed of portions of more than one town, and for the division of property, was held constitutional. *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 Mass. 142.

In *Michigan*, the council of a village of 2000 people may ordain limits "within which wooden buildings and structures shall not be erected, placed, or enlarged." *Michigan Annot. Stat.* (1882), § 2964. The prohibition does not render the erection a nuisance, without adequate remedy at law. *St. Johns v. McFarlan*, 33 Mich. 72. Nor does such an ordinance render the municipality an insurer of a building erected contrary thereto. *Hines v. Charlotte*, 72 Mich. 278. As to the effect of a refusal of the consent of the council to repair, which consent is required by the Detroit ordinance, see *Brady v. Northwestern Ins. Co.*, 11 Mich. 425. The Grand Rapids ordinance thereon was held to operate a repeal of a landlord's covenant to rebuild in case the tenement be burned. *Cordes v. Miller*, 39 Mich. 581; 33 Am. Rep. 430.

In *Minnesota*, municipal establishment of fire limits is provided for by *Minnesota Stat.* (1891), § 1316. See also the eight classes of buildings, etc., § 3821 *et seq.*

In *Mississippi*, such provision is made by *Mississippi Annot. Code* (1892), § 2967. Charter authorization of a town council to provide for the prevention of fires, and to carry out the mayor's recommendation tending to security, etc., imports the right to establish fire limits. *Alexander v. Greenville*, 54 Miss. 659. Also the right to require sidewalks within the fire limits to be paved with bricks. *Macon v. Patty*, 57 Miss. 378; 34 Am. Rep. 351.

In *Missouri*, as to municipal liability for the dangerous condition of the walls of a house partially destroyed by fire, see *Grogan v. Broadway Foundry Co.*, 87 Mo. 321.

An ordinance inhibiting the erection of wooden buildings in a district, was held valid. *Eichenlaub v. St. Joseph*, 113 Mo. 395. But see *Allison v. Richmond*, 51 Mo. App. 133.

In *Montana*, as to the duties of fire

wardens, see *Montana Stat.* (1887), p. 963.

In *Nebraska*, municipalities may "prescribe limits within which no building shall be constructed except of brick, stone or other incombustible material, with fireproof roof." *Nebraska Consol. Stat.* (1891), § 2664, pl. 37. A wooden building may be removed conformably with the ordinance, from one site to another within the fire limits, for the purpose of erecting on the old site a building. *State v. Kearney*, 25 Neb. 262.

In *Nevada*, as to the duties of the fire wardens, see *Nevada Gen. Stat.* (1885), § 2156.

In *New Hampshire*, fire wardens may pull down a building to stop a conflagration. *New Hampshire Pub. Stat.* (1891), p. 327. This statute is constitutional. *Dartmouth College v. Woodward*, 1 N. H. 130. The enlargement of a house within the fire limits, contrary to the ordinance, will not be enjoined, if the risk from fire is not thereby increased. *Manchester v. Smyth*, 64 N. H. 380.

As to the power of town fire-wards to pull down buildings, etc., see *Portsmouth v. Snell*, 8 N. H. 338.

In *New Jersey*, as to the duties of the fire inspector concerning the erection of external fire escapes, etc., see *New Jersey Rev. Supp.*, p. 685, § 865.

As to the duties of township committees in extinguishing forest fires, see *New Jersey Sess. Acts* (1892), p. 205. As to the restrictions upon municipal power to remove buildings, see *State v. Hightstown*, 45 N. J. L. 127.

In *New Mexico*, it is the duty of town trustees to prevent a deposit of ashes in unsafe places, and to cause all buildings in a dangerous state to be put in a safe condition. *New Mexico Comp. L.* (1884), § 1622, pl. 33.

The *New Netherlands* ordinance of 1658 made it the duty of the burgo-masters to determine what lots should first be built on. *New Netherlands L.*, p. 220.

In *New York*, it is a duty of the village board of trustees, by resolution, to establish fire limits, "describing the same by metes and boundaries, which resolution shall be filed in the office of the village clerk, and be posted in three public places within the corporate bounds, to prevent fires, and provide for their extinguishment." Bird. *New York Stat.* (1890), p. 3265, § 45, pl. 13. As to the right under municipal char-

ters, to destroy a building to stop a conflagration, the duty to indemnify owners, etc., see *New York v. Lord*, 17 Wend. (N. Y.) 285; 18 Wend. (N. Y.) 126; *Stone v. New York*, 25 Wend. (N. Y.) 157; *Russell v. New York*, 2 Den. (N. Y.) 461; *People v. Buffalo*, 76 N. Y. 558; 32 Am. Rep. 337.

The fire wardens cannot authorize the erection of a prohibited structure. *Fire Dept. v. Buffum*, 2 E. D. Smith (N. Y.) 511. Charter authorization to establish regulations for the prevention of fires, was held not to import power to prohibit the erection of wooden buildings of over certain prescribed dimensions. *Hudson v. Thorne*, 7 Paige (N. Y.) 261. But this was an *obiter dictum*. *Troy v. Winters*, 2 Hun (N. Y.) 63. Recovery of the penalty by the fire department does not preclude the proceeding to remove the structure. *New York Fire Dept. v. Kotlowsky* (Sup. Ct. 1885), Real Est. R. & G. 953.

A permit to erect a wooden building within the fire limits, and the proceeding in the work, was held to confer an irrevocable vested right. *Buffalo v. Chadeayne*, 134 N. Y. 163.

In *North Carolina*, enforcement of an alleged unlawful municipal ordinance will not be enjoined. *St. Peter's Episcopal Church v. Washington*, 109 N. Car. 21.

In *Ohio*, a first-class city of first grade may establish or extend fire limits; this applies also to "squares blocked for fire protection." *Ohio Rev. Stat.* (1890), § 8223, pl. 77. See also, as to fire escapes, *Ohio Sess. L.* (1892), p. 415. An ordinance prohibiting the placing of a wooden structure over ten feet high within certain limits, was held not to prevent the removal thereof from one point to another within them; and the city was held liable for interfering, rendering it an obstruction and inducing its being torn down; the owner's agreement to raze it, being void for want of mutuality. *Cleveland v. Lenze*, 27 Ohio St. 383.

In *Oklahoma*, town trustees may establish such "measures of prudence for the prevention or extinguishment of fires as they shall deem necessary." *Oklahoma Stat.* (1890), § 686, pl. 3.

In *Oregon*, it is a penal offense for one to negligently permit fire to pass from his own premises to the injury of another. *Oregon Annot. L.* (1892), § 1787.

In *Pennsylvania*, an ordinance for-

4. Town-Site Laws.—The provisions of the federal statutes and the decisions of the federal courts as to entry of town sites, have

bidding one to "erect and build" any shop within certain limits, was held to apply to enlarging and changing a blacksmith shop into a cabinet shop. *Douglass v. Com.*, 2 Rawle (Pa.) 262. Such an ordinance is constitutional. *Respublica v. Duquet*, 2 Yeates (Pa.) 493.

In the absence of charter authorization, a borough cannot prohibit the erection of a wooden building. *Kneeder v. Norristown*, 100 Pa. St. 368; 45 Am. Rep. 384. After due notice, a borough may demolish a wooden building that is being constructed contrary to the ordinance. *Klingler v. Bickel*, 117 Pa. St. 326. One who builds unlawfully, cannot invoke an injunction against demolition. *Aronheimer v. Stokley*, 11 Phila. (Pa.) 283. Compare the case of wooden barroom booths, *Fields v. Stokley*, 99 Pa. St. 306. Also the planing-mill case, *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221.

In *Rhode Island*, one obliged to pay enhanced insurance rates by reason of an adjoining proprietor's violation of such ordinance, may have an action on the case against him therefor. *Alldrich v. Howard*, 7 R. I. 199.

In *South Carolina*, as to the right of fire masters to pull down buildings, see *White v. Charleston*, 2 Hill (S. Car.) 571.

In *Tennessee*, as to the duty of fire inspectors, see *Tennessee Code* (1884), § 2299. An ordinance prohibiting the erection of a wooden building within certain limits, does not, in the constitutional sense, impair the obligation of a prior contract therefor. *Knoxville v. Bird*, 12 Lea (Tenn.) 121; 47 Am. Rep. 326.

In *Texas*, a council may establish fire limits, and may prohibit not only the erection of wooden buildings therein, but also their removal from one point to another therein. *Texas Civ. Stat.* (1889), art. 453. In the absence of express authorization, a municipality cannot establish and declare a wooden building therein to be a nuisance. *Pye v. Peterson*, 45 Tex. 312. As to the remedy for property destroyed to stop a conflagration, see *Keller v. Corpus Christi*, 50 Tex. 614; 32 Am. Rep. 613.

In *Utah*, disorderly obstruction of the extinguishment of a fire is a penal

offense. *Utah Comp. L.* (1888), § 4577.

In *Vermont*, fire departmental districts not over two miles square, may be established on the petition of twenty freeholders to the selectmen, and the filing of a certificate in the town clerk's office. The voters therein become a body corporate. *Vermont Rev. L.* (1880), § 2795. As to a right of appropriation to prevent fires under the statutory expression, "in defense of their common rights and interests," see *Van Sicklen v. Burlington*, 27 Vt. 70.

In *Virginia*, as to the duties of the fire marshal, etc., see *Virginia Code* (1887), §§ 1065-6.

In *Washington*, a city of the second class may establish fire limits, and regulate and prevent the erection of combustible structures therein. *Washington Stat.* (1891), § 558.

In *West Virginia*, a town or village council may, for preventing fires, "regulate how buildings shall be constructed." *West Virginia Code* (1891), p. 435, § 9. Charter authorization "to make regulations for guarding against damage from fires," imports power to ordain fire limits, and prohibit the erection of wooden buildings. A building with wooden studding, and with sides covered with sheet iron, is a "wooden" building, within the ordinance. *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336.

In *Wisconsin*, a village board may establish limits within which combustible buildings shall not be erected. *Wisconsin Annot. Stat.* (1889), § 892. Equity will not enjoin a threatened violation of such ordinance; and this, though it prescribe the board's duty to get injunction thereof. *Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446.

In *Wyoming*, as to the duties of fire wardens, see *Wyoming Rev. Stat.* (1887), § 1922.

The *Ontario* statute (ch. 174, § 467, pl. 6), authorizing a municipal by-law prohibiting erection, within defined areas, of buildings other than with main walls of brick, etc., and roofing of incombustible material, did not empower Hamilton to enact that, "No roof of any building already erected in the said fire limits shall be relaid or recovered, except with materials before enumerated." *Reg. v. Howard*, 4 Ont. 377.

already been considered in discussing the public land system.¹ It remains to collate certain state legislation and adjudication thereon, not only as bearing upon town enlargement, but also upon the rights and liabilities of towns, town officers and occupants.

In *England*, as to the power of the fire brigade, see *Joyce v. Metropolitan Board of Works*, 44 L. T. 811.

1 PUBLIC LANDS, vol. 19, p. 362. See U. S. Stat. (1878), § 2380 *et seq.* See also *Davis v. Webbald*, 139 U. S. 507.

In *Utah*, the provisions of the town-site law "shall not apply to military or other reservations heretofore made by the *United States*, nor to reservations for lighthouses, custom-houses, mints, or such other public purposes as the interests of the *United States* may require, whether held under reservations through the land office by the title derived from the crown of *Spain*, or otherwise." *Utah Comp. L.* (1888), § 305. See *Dooly Block v. Salt Lake Rapid Transit Co.* (Utah, 1893), 33 Pac. Rep. 229; *Rogers v. Thompson* (Utah, 1893), 33 Pac. Rep. 234.

In *Alabama*, any person can divide his land into town lots, by survey, recording, etc. *Alabama Acts* (1887), p. 93.

In *Arizona*, the authorities of an incorporated town, or if unincorporated, the probate or the county judge may, on petition, cause entry of a town site, survey, etc. *Arizona Rev. Stat.* (1887), § 167. The trustee of a town site may, on petition and with the advice of the school-trustees, establish sites for schools. If the town be a county seat, the trustees may on petition, with the consent of the supervisors, establish a site for a courthouse, etc., § 180.

It was held that a deed by the mayor of Tombstone, conveying 2,100 out of 2,300 lots of a town site to a company, was evidently for speculation, a breach of the trust, and invalid. *Clark v. Titus* (Arizona, 1886), 11 Pac. Rep. 312.

In the Town-Site Act of Congress of 1867, the "occupant," for whom the probate judge holds in trust, is the one in actual possession. *Singer Mfg. Co. v. Tillman* (Arizona, 1889), 21 Pac. Rep. 818.

In *Arkansas*, where, under U. S. Rev. Stat., § 2387, the patent for a town site has issued to the mayor, he holds the legal title of town lots in trust for the occupants thereof. *Jones v. Eureka Imp. Co.*, 53 Ark. 191.

In *California*, under the town-site

acts of Congress, the interest of an occupant who is an unmarried woman, remains her separate property on her marriage; the fact that the husband advanced the funds necessary to get a conveyance from the town authorities, does not render it community property. *Morgan v. Lones*, 80 Cal. 317. But compare *Morgan v. Lones*, 78 Cal. 58. Under that of 1867 to quiet titles in Petaluma, the town had the right to the use of the public squares and streets, as against individuals' adverse possession acquired after March 1st, 1867. *Jones v. Petaluma*, 36 Cal. 230. But under those of 1864 and 1865, pre-emption rights therein could be acquired by *bona fide* settlers. *Jones v. Petaluma*, 38 Cal. 397. Compare *Neil v. McNear*, 57 Cal. 424. Under that of 1866 to quiet title in Benicia, a deed by a *bona fide* occupant conveying all subsequently acquired title, will prevent enforcement of title from the town. *Carroll v. Benicia*, 40 Cal. 386. Under that of 1867 for the relief, etc., the town authorities were mere trustees for the occupants; the trust to be exercised as the legislature might prescribe. In a petition to them for a deed, a reference to a map showing a street laid out, would not effect a dedication to public use. *Cerf v. Pflieger*, 94 Cal. 131. Compare *Eversdon v. Mayhew*, 85 Cal. 1; *San Leandro v. LeBreton*, 72 Cal. 170. The exception as to mining property, U. S. Rev. Stat., § 2392, applies only to a mine that one had reason to believe existed at the time of the town-site grant. *Smith v. Hill*, 89 Cal. 122; *Richards v. Dower*, 81 Cal. 44. Compare *Dower v. Richards*, 73 Cal. 477; *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482. In a conveyance under the act of 1867, description by reference to a street does not have the effect of dedication. *Cerf v. Pflieger*, 94 Cal. 131. A patent to a town site conveys a perfect title in fee, except as to such land as was known to contain valuable mines before issuance of the patent. *McCormick v. Sutton*, 97 Cal. 373, citing *Deffebach v. Hawke*, 115 U. S. 392; *Davis v. Webbald*, 139 U. S. 507.

In *Colorado*, as to the disposal of lots under the town-site acts of Con-

gress, to whom, etc., practice, etc., see *Colorado* Annot. Stat. (1891), § 4335; *Cofield v. McClellan*, 1 Colo. 371; 16 Wall. (U. S.) 334; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 450; *Denver v. Kent*, 1 Colo. 342; *Cook v. Rice*, 2 Colo. 137; *Eyster v. Gaff*, 2 Colo. 228; *Logan v. Clough*, 2 Colo. 137; *Clayton v. Spencer*, 2 Colo. 378; *Smith v. Pipe*, 3 Colo. 187; *Georgetown v. Glaze*, 3 Colo. 230; *Tucker v. McCoy*, 3 Colo. 286; *Downing v. Brown*, 3 Colo. 571; *Mills v. Buttrick*, 4 Colo. 123; *Adams v. Binkley*, 4 Colo. 247; *Poire v. Wells*, 6 Colo. 406; *Anderson v. Bartels*, 7 Colo. 256; *Schwenke v. Union Depot, etc., Co.*, 7 Colo. 512; *Murray v. Hobson*, 10 Colo. 66; *Mills v. Hobson*, 10 Colo. 81; *Aspen v. Rucker*, 10 Colo. 184; *Aspen v. Aspen Town, etc., Co.*, 10 Colo. 191; *Chever v. Horner*, 11 Colo. 69; 142 U. S. 122; *Denver v. Pearce*, 13 Colo. 383; *Wheeler v. Wade*, 1 Colo. App. 66; *Webber v. Petty*, 2 Colo. App. 63; *Rice v. Goodwin*, 2 Colo. App. 267.

In *Idaho*, as to the duty of corporate authorities or of the probate judge to enter town sites at the *United States* land office, and establish claims of inhabitants under acts of Congress and regulations of the secretary of the interior, see *Idaho* Rev. Stat. (1887), § 2200 *et seq.*

An action under the town-site act to settle adverse claims, is in the nature of a suit in equity to quiet title. *Foraythe v. Richardson*, 1 Idaho 459.

Occupancy of one legal subdivision does not draw to it another legal subdivision, though immediately adjoining. *Thompson v. Holbrook*, 1 Idaho 609.

In *Illinois*, as to the proper certification of a town plat, see *Auburn v. Goodwin*, 128 Ill. 57; *Eckhart v. Irons*, 128 Ill. 568. As to the proper acknowledgment, see *Gould v. Howe*, 131 Ill. 490.

In *Indiana*, as to the platting of towns, see *Indiana* Rev. Stat. (1888), § 3374.

In *Iowa*, a town plat showing in the center a tract marked "Public Square," is held to import a dedication. *Young v. Oskaloosa* (Iowa, 1893), 56 N. W. Rep. 177.

In *Kansas*, the provision for entry of town sites is like that of *Idaho*, already mentioned. *Kansas* Gen. Stat. (1889), § 7038. As to the copartnership rights and liabilities of owners of town lots, see § 7051 *et seq.*

As to the rights of occupants and claimants, and the duties of the pro-

bate judge and corporate authorities thereupon, see *Riggs v. Anderson*, 47 Kan. 66; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Independence Town Co. v. DeLong*, 11 Kan. 152; *Sherry v. Sampson*, 11 Kan. 611; *McTaggart v. Harrison*, 12 Kan. 62; *Emmert v. DeLong*, 12 Kan. 67; *Setter v. Alvey*, 15 Kan. 157; *Fessler v. Haas*, 19 Kan. 216; *Yoxall v. Osborne County*, 20 Kan. 581; *Allen v. Houston*, 21 Kan. 194; *Mathews v. Buckingham*, 22 Kan. 166; *Jackson v. Winfield Town Co.*, 23 Kan. 542; *Rathbone v. Sterling*, 25 Kan. 444; *Guffin v. Linney*, 26 Kan. 717; *Doster v. Sterling*, 33 Kan. 381; *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *Atchison, etc., R. Co. v. Manley*, 42 Kan. 577; *Sherman Center Town Co. v. Russell*, 46 Kan. 382; *Greiner v. Fulton*, 46 Kan. 405.

A street dedicated by filing the plat of a congressional town site, on vacation reverts to the abutting owners in proportion to frontage, according to *Kansas* Act of 1872, and not according to the second proviso of § 811 of *Gen. Stat.* (1889). *Showalter v. Southern Kan. R. Co.*, 49 Kan. 421.

In *Kentucky*, as to the duties of the trustees in the platting of towns and the conveyance of lots, see *infra*, this title, *Powers and Privileges*.

In *Michigan*, as to the platting of town sites, see *Michigan* Gen. Stat. (1890), § 1473 *et seq.*

The fact that village police regulations were enforceable within the area of a proposed township common, was held to raise no presumption against the township proprietary rights therein. *Atty. Gen'l v. Burrell*, 31 Mich. 25.

In *Minnesota*, as to the survey and dedication of town plats, see *Minnesota* Gen. Stat. (1891), § 2166 *et seq.* As to the entry of town sites under the Act of Congress of 1854, see § 4091.

Under the Act of Congress of 1844, the *United States* land officers' allowance or disallowance of a town-site entry is conclusive. *Mankato v. Meagher*, 17 Minn. 265. But the state courts may determine who were the occupants thereunder. *Leech v. Rauch*, 3 Minn. 448. That the county judge properly performed his duty as trustee, will be presumed beyond any questioning by a stranger to the title. He may convey to beneficiaries before issuance of the patent by the *United States*. *Taylor v. Winona, etc., R. Co.*, 45 Minn. 66. A deed of the fee from the trustee will be subject to the

dedication, though at the time thereof there was no grantee capable of taking. *Winona v. Huff*, 11 Minn. 119, citing *Cincinnati v. White*, 6 Pet. (U. S.) 440. The trustee's deed estops him and his representatives from denying that the grantee was an occupant. *Morris v. Watson*, 15 Minn. 212. The right of a *bona fide* purchaser from an occupant, was held to be superior to that of the holder of a prior unrecorded conveyance. *Davis v. Murphy*, 3 Minn. 119. A right of entry may, even after the plat is made and recorded, be lost by abandonment. *Weisberger v. Tenn*, 8 Minn. 456. Agreements as to entry of town sites on unsurveyed lands are not necessarily illegal. *Wood v. Cullen*, 13 Minn. 394. The fact that a penalty is imposed upon an owner selling before due record of the plat, etc., does not import avoidance of the sale. *De Mers v. Daniels*, 39 Minn. 158.

The occupant takes subject to the public easement in the adjoining street. *Harrington v. St. Paul, etc.*, R. Co., 17 Minn. 215. The abutter has an easement in the street, the full width, for light and air. *Adams v. Chicago, etc.*, R. Co., 39 Minn. 286; *Lamm v. Chicago, etc.*, R. Co., 45 Minn. 71.

Joint owners platting a town, have no easement or right of way distinct from that granted the town. *Patterson v. Duluth*, 21 Minn. 493. A corporation may take town-site land. *Mankato v. Meagher*, 17 Minn. 265. A county may be a beneficiary therein, and acquire absolute title, in fee. *Blue Earth County v. St. Paul, etc.*, R. Co., 28 Minn. 503. In order to title, occupancy must be actual and not merely constructive. *Carson v. Smith*, 12 Minn. 546. Upon the decease of an occupant, his minor heirs are not prejudiced by failure to file claims in due time. *Coy v. Coy*, 15 Minn. 119. As to when the title vests, see *Castner v. Gunther*, 6 Minn. 119. As to requisites of an occupant's procedure to compel conveyance by the town authorities, see *Cathcart v. Peck*, 11 Minn. 45. As to the reservation of a right to conduct water across streets, see *Wilder v. De Cou*, 26 Minn. 10.

The court may direct an incorrectly numbered plat to be amended. *Rice v. Kelsel*, 42 Minn. 511. In a conveyance, reference to lot and block, according to the recorded plat, was held to prevail over bounds, course, and dis-

tance. *Coles v. Yorks*, 36 Minn. 388. But compare *Turnbull v. Schroeder*, 29 Minn. 49; *Rochat v. Emmett*, 35 Minn. 420.

Where, after the owner had conveyed an inland block with reference to his plat, the water of Duluth Bay encroached thereon, it was held that the grantee could not reclaim and use the intervening submerged block and street. *Gilbert v. Eldridge*, 47 Minn. 210. Compare *Duluth v. St. Paul, etc.*, R. Co., 49 Minn. 201 (diagram) 202.

On a town plat, a notation, "County Block," was held not to be sufficient evidence of a donation or grant to the county. *Hennepin County v. Dayton*, 17 Minn. 260. So, also, a notation, "Reserved for right of way, Line of S. M. R. R." was held to establish no donation to a railroad corporation of a strip that was left undivided into lots. *Watson v. Chicago, etc.*, R. Co., 46 Minn. 321.

Parole evidence was held admissible to supplement a plat that failed to comply with the town-site law. *Borer v. Lange*, 44 Minn. 281; *Reed v. Lammell*, 28 Minn. 306; *Ames v. Lowry*, 30 Minn. 283; *Sanborn v. Mueller*, 38 Minn. 27. So, also, to determine whether a blank space upon the plat was intended to be dedicated for a public wharf. *Hurley v. Rum River Boom Co.*, 34 Minn. 143 (diagram at p. 145), citing *Eastland v. Fogo*, 58 Wis. 274. Compare *Downer v. St. Paul, etc.*, R. Co., 23 Minn. 271; also the "Eagle Park" case, *Middleton v. Wharton*, 41 Minn. 266.

The trustee has no power to dedicate land for streets. *Buffalo v. Harling*, 50 Minn. 551. As to the sufficiency of a deed executed by the members of the council, see *Remillard v. Blackmar*, 49 Minn. 490.

In *Missouri*, as to the restrictions imposed by the amendatory act of 1887 concerning plats and additions, see *State v. Chase*, 42 Mo. App. 343.

In *Montana*, on petition of a majority of the resident property owners to the corporate authorities of the town, or if it be unincorporated, to the probate judge, a town site may be entered in the public land office, in trust, etc., within the Act of Congress of 1867. A survey and plat shall be made, and no lot shall exceed 4200 square feet. Claimants of lots must file a statement within two months after the date of the first publication of notice. Each may preempt two lots, "and such additional lot or

IV. GOVERNMENT—1. Governing Bodies; Ordinances.—In England, from time immemorial, there have been towns governed by boards

lots upon which such claimant may have substantial improvements of the value of not less than \$250. If aggrieved, he may appeal from the award of the authorities or judge, upon the evidence, and receive deed after the final determination by the district court. Plats must be acknowledged, and must designate the surveyor's monuments. A copy must be filed with the county clerk, the paper whereof must not exceed 30 by 36 inches. *Montana Comp. Stat.* (1887), p. 1218 *et seq.*

The trust position of the probate judge under the town-site law is quasi-judicial. In any collateral proceeding, his deed is conclusive. *Ming v. Foote*, 9 Mont. 201. As to requisites of entry for dedication, see *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102.

The judge of probate cannot lawfully establish by plat a street over lands actually occupied as a residence when the entry was made. *Helena v. Albertose*, 8 Mont. 499.

In *Nevada*, upon receipt by the clerk of the district court of the papers to be filed with him in the cases mentioned in the town-site acts of Congress of 1844 and 1866, he must notify the claimant or his agent that the claim is contested, and either party may appeal within twenty days. *Nevada Gen. Stat.* (1885), § 402. As to the duties of the corporate authorities to convey title under the Act of Congress of 1867, see § 411 *et seq.*

The town-site act of Congress is paramount to the state law. The intent therein was to protect actual citizens against mere speculators. Only actual occupancy entitles one to a deed. *Lechler v. Chapin*, 12 Nev. 65. The deed may be collaterally attacked for the grantee's non-occupancy. *Treadway v. Wilder*, 8 Nev. 91; 9 Nev. 67. Subdivision and platting are requisite to appropriation. *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 44. Compare *Stark v. Starr*, 1 Sawyer (U. S.) 15.

In *New Jersey*, the county superintendent of schools fixes the boundaries of school districts. *New Jersey Revision* (1877), p. 1074, § 24.

In *New Mexico*, as to the procedure concerning town sites, see *New Mexico Comp. L.* (1884), § 1706.

In *Ohio*, any proprietor can have a hamlet or village laid out, or subdivi-

sion or addition to a municipal corporation made, by survey, platting, erection of corner-stones, etc. *Ohio Rev. Stat.* (1890), § 2597. For procedure on revision of plats, and renumbering of lots, see § 2619. As to when a conveyance operates as a revocation of the dedication of a street on a plat, see *Lockland v. Smiley*, 26 Ohio St. 94.

In *Oklahoma*, as to town-site procedure, see *Oklahoma Stat.* (1890), § 775 *et seq.* As to appeal from an award of the trustees, see *McDaid v. Ter.* (Okl. 1892), 30 Pac. Rep. 438.

The Federal Act of 1890 to provide for town-site entries of lands in *Oklahoma*, empowered the secretary of the interior to provide for an appeal to the commissioners of the general land office in case of contest. Pending an appeal from the trustees, they must decline to issue a deed to the appellee. *McDaid v. Ter.*, 1 Okl. 92, citing *Moore v. Robbins*, 96 U. S. 530, and *distinguishing Snyder v. Sickles*, 98 U. S. 210.

In *Oregon*, as to the requisites of procedure in town platting, see *Oregon Annot. L.* (1892), § 4178 *et seq.*

As to the rights of parties claiming under the *Oregon Territorial Act* of Congress of 1848, and the town-site acts, see *Stark v. Starr*, 6 Wall. (U. S.) 402 (decided in 1867), and *Stark v. Starr*, 1 Sawyer (U. S.) 15 (decided in 1870).

In *Utah*, as to the procedure under the act of 1869, in furtherance of the privileges conferred by the Act of Congress of 1867, see *Utah Comp. L.* (1888), ch. 5, p. 144. As to platting and dedication by the owner, see *Sess. L.* (1890), ch. 50.

In *Washington*, see *Newhouse v. Simino*, 3 Wash. 648; *Rund v. Jensen*, 3 Wash. 785; *Kellogg v. Sessions*, 4 Wash. 814.

The *Wisconsin* statutory requirement as to the plat must be complied with as essentially as in case of conveyance between individuals. *Emmons v. Milwaukee*, 32 Wis. 434.

On the formation of a new county, the successor of the county judge may execute the trust deed. *Whittlesey v. Hoppenyan*, 72 Wis. 140; *Tucker v. Whittlesey*, 74 Wis. 74.

In *Wyoming*, as to the procedure in disposal of town-site lands, see *Wyo-*

which have many of the powers and duties of town boards in some of the *United States*.¹

In those states in which the county is the chief political unit, many of the sanitary and police powers that in other states are vested in the town authorities, are vested in the county board. In such states, however, these powers are sometimes relegated² to certain towns by special municipal charter.³ In many states, the town elects a board of trustees to execute its principal corporate powers, their function as a local board resembling that of the county board of supervisors or commissioners in the former class of states. In *New England*, *Nebraska*, and some other

ming Rev. Stat. (1887), § 1388 *et seq.*, and amendment, Sess. L. (1888), ch. 46. Requisites of the plat, § 1401.

1. That of Romney affords an interesting example of our English prototype. In the library of St. Catherine's Hall, Cambridge, is preserved a copy of the "Customal" of the town of Romney, in the time of Edward III. It is embodied in the town clerk's register for 1353. It is in Norman, and the following is a literal translation of pertinent portions:

"*Imprimis*.—It is used from year to year to elect twelve jurats to guard and govern the said town, according to the points of their commission. . . . They shall render to us a reasonable account of all their receipts and expenses. . . . 2. *Item*.—If any baron, after election by the said commonality, will not be obedient to serve the said office of jurat, the bailiff, or all the commonality, shall go to his house, and the said disobedient person, his wife and his children and the rest of his family, they shall oust from the house, and shall close the windows, and his goods shall they seal up and sequester, and so they shall remain, until he is willing to do the said office of jurat. . . . 4. *Item*.—It is used that the jurats may, by virtue of their office, take distress and make sequestration, without bailiff, for debts due to the commonality. . . . 5. *Item*.—The said jurats may make attachment, without bailiff, upon all those whom they find rebels touching the service of our lord the king. . . . 12. *Item*.—It is used that, in case a man and his wife, dwellers and free in the said town, have children between them free born, and the father and mother die, or the father die and the widow take another husband, or she die a widow, then the goods and chattels in the hands of the executors or ad-

ministrators found within the franchise, shall be seized by the jurats, . . . and when they ascertain the quantity, they shall deliver them to him who is the nearest of blood, to whom no inheritance can descend, who of right shall have the ward if he will sue for it, finding sufficient pledges. . . . 16. *Item*.—It is used that if a strange man dwell in the town, in a suspicious place, the jurats and the bailiff shall demand of his host if he will engage that this suspicious person shall bear himself as a lawful man. . . . If he says he is a man of good fame, let him have a reasonable day to get from his country a letter of good conversation under an authentic seal. . . . 37. *Item*.—If any be found cutting a purse within the franchise, at the suit of the party, let him be put in the pillory, and afterwards, at the said suit, let one ear of his head be cut off, and let him be led to one end of the town, and he shall abjure the town without any return. . . . 40. *Item*.—It is used that no shipway shall be holden unless the warden be there in his proper person, sitting, and with him the mayors and bailiffs of the cinque-ports, first to make inquest by twelve barons there sworn, if any man has spoken treason against our lord the king or his kingdom. Or if any man has counterfeited the seal of our lord the king, and of false moneyers, and treason found and concealed." See 7 L. Mag. & Rev. (1859) 300.

2. *Maryland* Pub. Gen. Laws (1888), p. 406 *et seq.* See also COUNTIES, vol. 4, p. 345; MUNICIPAL CORPORATIONS, vol. 15, p. 1028. As to boards of equalization, see *supra*, this title, *Enlargement; Severance*.

3. See the amended charter of Hagerstown, *Maryland* Sess. L. (1892), p. 34 *et seq.*; and the charter of Luray, *South Carolina* Acts (1891), p. 1380.

states, the statutes commit to the electors at large, assembled in an annual meeting, the main direction of the town business.¹

It would be difficult, without inconveniently cumbersome exceptions, to formulate any useful general statement of legislative and executive powers of "meetings," "selectmen," "chosen freeholders," "corporate authorities," "supervisors" and "trustees," in police and sanitary and cognate matters. An assertion that, even in so small a state as *Rhode Island* or *Delaware*, the general statutes leave little scope for local ordinances, would be inaccurate. It is indispensable to resort to specification and collation of the pertinent statutory provisions of the states respectively.²

1. See *infra*, this title, *Meetings*.

2. See *supra*, this title, *Fire Limits*; *infra*, this title, *Powers and Privileges*, also *Officers—Powers and Duties*. See also MUNICIPAL CORPORATIONS, vol. 15, pp. 1039, 1057, 1080, 1122, 1167; ORDINANCES, vol. 17, p. 235.

In *Alabama*, "the corporate authorities" of the town may pass necessary by-laws and ordinances; license amusements and liquor-selling; prohibit gaming, houses of ill-fame and breaches of the peace; establish watches and patrols; repair streets and drains; license carriages running for hire; appoint, and fix compensation of, necessary officers; impose fines and sentence men (but not women) to labor on streets; supply vacancies in their own body; purchase, hold, and dispose of real and of necessary personal property; and levy town taxes. *Alabama Code* (1886), §§ 1500, 1504.

Otherwise, as to an ordinance prohibiting the importation of second-hand clothing. *Greensboro v. Ehrenreich* (Ala. 1887), 2 So. Rep. 725.

A charter authorizing the prohibition of "retailing," etc., was held not to authorize an ordinance prohibiting a sale in less quantities than twenty gallons. *Harris v. Livingston*, 28 Ala. 577.

An ordinance was held valid which made it the duty of the marshal to impound hogs running at large within the corporate limits, and sell them upon forty-eight hours' notice, if not redeemed by the owner paying the expense; and it could apply to animals of non-residents so running. *Folmar v. Curtis*, 86 Ala. 354.

Courts will not set aside a by-law, unless its unreasonableness be clearly shown. *Marion v. Chandler*, 6 Ala. 899. Further, as to ordinances, see *Birmingham v. Alabama, etc., R. Co.* (Ala. 1893), 13 So. Rep. 141.

In *Arizona*, the board of town trustees appoint the executive officers; levy taxes; and make ordinances to regulate the registration of voters, to provide for the preservation of the peace, to establish a board of health, to maintain pest-houses, to procure legal advice, to restrain cattle and dogs, to prohibit immoral shows, to fix licenses for carrying on business, games, or amusements, to regulate hours for liquor-selling and gambling, to prohibit sales to minors or habitual drunkards, to designate places of imprisonment, and to apply the fund from licenses and fines. *Arizona Rev. Stat.* (1887), § 161 *et seq.*

In *Arkansas*, the town council may fill vacancies in their board, provide by ordinance for the election of a treasurer, marshal, and necessary subordinate officers, and prescribe their duties and compensation. *Arkansas Dig. Stat.* (1884), § 795.

The mayor, as president, cannot order a member to be forcibly excluded from a council meeting for any disorderly behavior that does not threaten personal injury, or arrest the progress of business. *Thompson v. Whipple*, 54 Ark. 203.

The council cannot appropriate money to aid in building a courthouse for the county, to be located in the town. *Russell v. Tate*, 52 Ark. 541.

A town ordinance which unqualifiedly makes the keeping of bees a nuisance, is invalid. *Arkadelphia v. Clark*, 52 Ark. 23. So, also, is an ordinance imposing convict labor on streets. *Ward v. Little Rock*, 41 Ark. 526; 48 Am. Rep. 46.

A municipal ordinance may be void in part and valid *pro tanto*. *Eureka Springs v. O'Neal*, 56 Ark. 350.

A license fee of \$25 for a ferry privilege, was held to be a reasonable

regulation and not a tax, in *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370.

Under *Arkansas* Act, 1891, p. 97, a conviction in a mayor's court for violation of a town ordinance, will bar a prosecution before a justice of the peace for the same offense, although the state penalty be not for the same. *Richardson v. State*, 56 Ark. 367.

Under *Arkansas* Dig. L., §§ 5860-5863, an incorporated town is entitled to fines collected in the mayor's court, for violations of town ordinances imposing penalties for acts which were also offenses against the state. *Hackett City v. State*, 56 Ark. 133.

Under *Arkansas* Stat. (1884), § 764, municipal power to punish "lascivious behavior in public places" was held not to authorize a town ordinance punishing "any person whose known character is that of a prostitute." *Buell v. State*, 45 Ark. 336.

In *California*, as to governing bodies of the six classes of the municipal corporations respectively, see *California* Act of 1883; *California* Pol. Code (1885), p. 737 *et seq.*

The town board of trustees may establish by ordinance a board of health of five persons, one to be a practicing physician, graduate of some reputable school of medicine, and one, if practicable, a civil engineer. *California* Pol. Code (1885), § 3061.

Under the *California* constitution, the words, "system of town governments," refer to town organizations, in their general features like those of other states. When the system is established, local legislatures make local rules; until then the state legislature cannot delegate the power to the people of a certain territory. *Ex p. Wall*, 48 Cal. 279. A charter provision that a majority of the board of town trustees shall be a quorum, imports that a majority may organize at the first meeting time. *Oakland v. Carpenter*, 13 Cal. 540.

An ordinance prohibiting the sale of opium, was held valid. *Ex p. Hong Shen*, 98 Cal. 681. An ordinance that no hospital or asylum for the insane shall be constructed of brick or iron or stone, or within 400 yards of any dwelling or school, and that a separate house be required for each of certain diseases named, was held unreasonable and void. *Ex p. Whitwell*, 98 Cal. 73. An ordinance forbidding the maintenance of a private asylum, was held to pro-

hibit a lawful business, and to be invalid. *Ex p. Whitwell*, 98 Cal. 73. An ordinance forbidding liquor in any dance cellar or place where females wait or attend on any person, was held not to contravene *California* Const., art. 20, § 18, namely, that no person shall, on account of sex, be disqualified from pursuing any lawful vocation. *Ex p. Hayes*, 98 Cal. 555. See the requisites of attestation and the publication of ordinances of a municipal board, in *San Diego County v. Seifert*, 97 Cal. 594. A town ordinance prohibiting any public laundry, except in certain specified blocks, without a written permit from the town trustees, is unconstitutional, being an unreasonable interference with a lawful occupation. *Ex p. Sing Lee*, 96 Cal. 354, citing *Yick Wo v. Hopkins*, 118 U. S. 356. Further, as to municipal ordinances, see *Weber v. Gill*, 98 Cal. 462; *Partridge v. Lucas*, 99 Cal. 519; *Jacobs v. San Francisco County* (Cal. 1893), 34 Pac. Rep. 630; *Williams v. Bisagno* (Cal. 1893), 34 Pac. Rep. 640. An ordinance imposing a license fee of \$50 per month for selling intoxicating liquors, was held not to be presumed, as a matter of law, to be oppressive, unreasonable, or prohibitory of trade. *In re Guerrero*, 69 Cal. 88.

Under the *Colorado* Act of 1889, the corporate authority of towns organized for general purposes, is vested in a board consisting of one mayor and six trustees. *Colorado* Annot. Stat. (1891), § 4508.

A town board or city council will not be enjoined from legislating on a matter within the scope of its charter authority. *Lewis v. Denver City Water Works Co.* (Colo. 1893), 34 Pac. Rep. 993.

The rule (1 Dill. on Mun. Corp., §§ 89, 316, 329) that an ordinance must not be repugnant to the policy of the state, was applied to a prohibition of selling goods on Sunday, in *Durango v. Reinsberg*, 16 Colo. 327.

Colorado Gen. Stat., § 3312, allowing a municipal council to declare what is a nuisance, and abate it by penalty, does not authorize an ordinance discriminating between individuals, by prohibiting the storing of green or dry hides or pelts within the corporate limits. *May v. People*, 1 Colo. App. 157.

An ordinance more comprehensive than the common law cannot be tested by common-law rules. Under the ordinance of the town of Lamar that

"no person shall engage in quarreling, nor shall invite or defy," etc., the proprietor of a store cannot use force to expel from the room one who refuses to depart when ordered out. *Metcalf v. People*, 2 Colo. App. 262.

A recital in an ordinance that "public welfare and safety require" an act to be done, is not conclusive upon the judiciary; and it is so held as to an ordinance ordering the confining of the channel of a ditch to a certain width by fluming, to prevent washing away property. *Platt, etc., Canal, etc., Co. v. Lee*, 2 Colo. App. 184, *citing* *Mugler v. Kansas*, 123 U. S. 661.

Where the town trustees have assumed control of liquor-selling, a saloon-keeper holding a license under their ordinance therefor, is not liable, in the absence of a Sunday ordinance, to be indicted under the state Sunday Law, *Colorado Gen. Stat.*, § 839. *Cunningham v. People*, 1 Colo. App. 155, *citing* *Heinssen v. State*, 14 Colo. 228. But compare *McInerney v. Denver*, 17 Colo. 302. As to an ordinance regulating livery stables, see *Phillips v. Denver* (Colo. 1893), 34 Pac. Rep. 902.

In *Connecticut*, the selectmen "shall superintend the concerns of the town, adjust and settle all claims against it, and draw orders on the town treasurer for their payment," and "require of the treasurer a sufficient bond," etc. They shall make annual returns to the governor, of the number of deaf, dumb and blind persons; shall contract with the officers of the Retreat at Hartford for the support of the insane poor; shall appoint examiners of the land records; and may appoint special constables and truancy officers. *Connecticut Gen. Stat.* (1888), § 64 *et seq.* They shall warn town meetings, § 33. They may cause indigent imbecile children to be sent to the school at Lakeville, § 489; may have unsafe buildings repaired or removed, § 2629; may license the passing of wild animals through the town, § 2630; may license the manufacture and sale of compounds more explosive than gunpowder, § 2631; and may compel the removal of gunpowder, § 2638. They shall inspect facilities for escape from fire, § 2645; shall, upon request, apportion division fences, § 2279; shall, upon application, review the fence-viewers' appraisalment of repairing the fence around a common field, § 2299. So, also, as to repair of drains upon inspection by the lowland

scavengers, §§ 2041, 2050. They shall, on application, cause dams and reservoirs to be inspected by the board of civil engineers, § 3698; shall cause owners of unregistered dogs to be prosecuted, § 3747; may lay out ways or discontinue them, §§ 2699, 2708; shall remove encroachments on highways, §§ 2674, 3252; shall maintain guideposts, § 2697; shall compel needed repair of turnpikes, § 2732; shall regulate as to railroad crossings and bridge guards, §§ 3486, 3502; and may license auctioneers, exhibitions, junk-shops, pawn-brokers, and itinerant physicians, § 2993 *et seq.* They supervise the enrollment of the militia, § 3140. They may forbid the sale of spirituous liquors to persons receiving town aid, § 3089; shall provide standard weights and measures, § 3976; shall provide for impounding animals, § 3320; shall apprehend rioters and disperse loiterers, §§ 1502-5. They may prevent the withdrawal of a bastardy complaint, § 1209; and may control the erection and maintenance of electrical fixtures, § 3946. The selectmen of certain towns may designate shellfish grounds, §§ 2313, 2326, 2352, 2378.

As to the liability of selectmen for their acts in *Connecticut*, see *infra*, this title, *Officers—Liabilities*.

The selectmen cannot deputize a performance of their duties; their authority is a personal trust. *Pinney v. Brown*, 60 Conn. 164.

A vote authorizing the selectmen to pay bounties, has been held not to empower them to give a note therefor. *Ladd v. Franklin*, 37 Conn. 53.

The selectmen, under their general powers of superintendence, may employ counsel and spend money in opposing a petition to the legislature to divide the town, apportion the property and liabilities, etc. *Farrel v. Derby*, 58 Conn. 234.

The selectmen may enter into a contract with a person to operate a ferry. *Rocky Hill v. Hollister*, 59 Conn. 434.

The selectmen of one town have power *ex officio* to settle an account presented by another town for supplies to a pauper of the former. *Sharon v. Salisbury*, 29 Conn. 113.

Further, as to the powers of selectmen, see *Porter v. Blakely*, 1 Root (Conn.) 440; *Leavenworth v. Kingsbury*, 2 Day (Conn.) 323; *Knapp v. Lockwood*, 3 Day (Conn.) 131; *Burlington v. New Haven, etc., R. Co.*,

26 Conn. 51; *Whitlock v. West*, 26 Conn. 406.

A by-law giving half the penalty to the informer, was held enforceable by a *qui tam* action in the name of the informer and the town treasurer. *Bradley v. Baldwin*, 5 Conn. 288.

The statutory requirement of the publication of an impounding by-law in a newspaper, "as the town shall direct," was held not to be complied with by a publication upon the mere order of the town clerk; and the by-law to be void. *Higley v. Bunce*, 10 Conn. 436.

A penal ordinance is not invalidated by the fact that one's conviction under it still leaves him subject to prosecution under statute. So held as to a prohibition of policy playing. *State v. Flint* (Conn. 1893), 28 Atl. Rep. 28.

In the *Dakotas*, the town trustees are to purchase, insure, and hold necessary property for the use of the corporation; organize fire companies, and procure the apparatus for extinguishment; regulate the storage of gunpowder and the deposit of ashes; appoint fire wardens; prevent outfires and discharge of fire-works; declare and abate nuisances; restrain animals; prevent gambling and prostitution; license liquor-selling, auctions, peddling, and exhibitions; establish markets and local slaughter houses; lay out and keep repaired and unincumbered streets and sewers; provide for the preservation of the peace; purchase, lay out, and regulate cemeteries; plant trees along the streets, and preserve the public squares; levy taxes; make necessary by-laws and ordinances; enact fines and penalties; and grant franchises for street railways, water and gas pipes. *Dakota Comp. Laws* (1887), § 1043.

Either publication or posting is a prerequisite to a binding enactment of the by-laws. *O'Hara v. Park River*, 1 N. Dak. 279.

In *Delaware*, each town elects annually a board of three commissioners to regulate the streets, "prohibit any dangerous sport or practice," prevent "turbulent assemblages of negroes or boys within the town after night or on the Sabbath day," and therefor make ordinances and penalties. *Delaware Laws* (1874), p. 249, § 7.

In *Florida*, many of the powers and duties of the town council are like those of the *Dakotas* already mentioned. Moreover, it may, with the approval of

a majority of the registered voters, borrow money and pledge the credit of the town. *Florida Rev. Stat.* (1892), § 675.

As to the municipal power to establish markets, see *Jacksonville v. Ledwith*, 26 Fla. 163.

In *Georgia*, the governing body is a council consisting of a mayor, recorder, and five councilmen. *Georgia Code* (1882), § 779. The powers of the council are similar to those of the council in *Florida*, already mentioned. Moreover, it may organize work-gangs of persons convicted of violating the ordinances and not paying the fines. § 786.

A town has only such powers as are expressly granted by statute, or are incident to such grant. *Turner v. Forsyth*, 78 Ga. 683.

A town council made a court, can inflict a fine for contempt, and enforce execution therefor. *Swafford v. Berrong*, 84 Ga. 65.

Breaking a pound and liberating a cow (after the marshal had completed the impounding), was held not to be a violation of an ordinance prohibiting one from "opposing or interrupting any officer in the execution," etc. *Rome v. Omburg*, 22 Ga. 67.

Under charter authority to grant or withhold liquor licenses, and to establish police regulations generally, a town cannot, after granting a license, enact and enforce an ordinance prohibiting sales of liquor whenever "any denomination of Christian people" are holding divine service anywhere in the town. *Gilham v. Wells*, 64 Ga. 192.

The portion of a Sunday ordinance prohibiting an offense punishable by the state law, was held void. *Rothschild v. Darien*, 69 Ga. 503.

As to when the reasonableness of an ordinance regulating speed of trains in the streets, may be left to a jury, see *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500.

An ordinance prohibiting sales of meats elsewhere than in a public market, was held not unreasonable in *Henry v. Macon* (Ga. 1893), 18 S. E. Rep. 143. Further, as to municipal ordinances, see *Collins v. Hall* (Ga. 1893), 17 S. E. Rep. 622; *Brunswick v. King* (Ga. 1893), 17 S. E. Rep. 940.

In *Idaho*, the powers and duties of the board of town trustees are similar to those of such body in the *Dakotas*. They are set forth in the thirty-six sub-sections of *Idaho Rev. Stat.* (1887),

§ 2230, and in § 2242 *et seq.* As to its power of annexing, see *supra*, this title, *Boundaries—Enlargement*.

The *Illinois* Act of 1883 authorizes town trustees to protect from inundation by levees, dykes, etc. *Illinois* Rev. Stat. (1891), p. 287c. That of 1874 prohibits town boards from licensing houses of ill-fame. *Illinois* Rev. Stat. (1891), p. 271, § 227.

The *Illinois* Act of 1831, conferring upon the president and town trustees the power to license shows, etc., was held to suspend the requirement of the act of 1829, of a license from the county treasurer. *Woodward v. Turnbull*, 4 Ill. 1.

Although town trustees have no powers not expressed by statute, the power to sue and be sued imports authority to bind the town by a *bona fide* settlement of a controversy. *Petersburg v. Mappin*, 14 Ill. 193; 56 Am. Dec. 501.

A town ordinance providing that, "If any person shall drive any horse furiously in any street . . . he shall forfeit," etc., was held to import only a voluntary driving; and an instruction ignoring the intent of the accused, was held erroneous. *Morton v. Princeton*, 18 Ill. 383. Where, under the state law, the minimum penalty for a breach of the peace was three dollars, a town ordinance fixing it at five dollars, was held unauthorized by a charter prescribing punishment as provided by law for like offenses against the laws of the state. *Petersburg v. Metzker*, 21 Ill. 205.

For requisites of enactment and publication of town ordinances, see *Elizabethtown v. Lefler*, 23 Ill. 90; *Barnett v. Newark*, 28 Ill. 62. An ordinance punishing as a nuisance the allowing of swine to run at large, was held valid, *Roberts v. Ogle*, 30 Ill. 459; 83 Am. Dec. 201; otherwise, one forbidding the establishment of a cemetery in a property locality. *Lake View v. Letz*, 44 Ill. 81.

Under the authority to control and license water-craft, a village may require owners of boats to obtain a license before letting them for hire. Exacting a license fee therefor of \$5 per annum is not unreasonable. *Poyer v. Desplaines*, 22 Ill. App. 576.

A prosecution for violating an ordinance prohibiting the letting of grounds for picnics, without compensation, is not maintainable on evidence of the reservation of a right to sell refreshments, without also proving that

the right was exercised. *Poyer v. Desplaines*, 22 Ill. App. 584.

A village ordinance declaring "all public picnics and open-air dances" within its limits, to be nuisances, was held void. *Poyer v. Desplaines*, 18 Ill. App. 225.

A village empowered to pass "all necessary police ordinances," may ordain the closing of places of business on Sunday; and this, though the general law forbids only such labor on Sunday as disturbs the peace and good order of society. *McPherson v. Chebanse*, 114 Ill. 46; 55 Am. Rep. 857.

All municipal ordinances must bear equally on all inhabitants. Slaughtering, distilling, or soap-making cannot be interdicted in one locality, and permitted in another, or by a particular firm. *Tugman v. Chicago*, 78 Ill. 405, citing *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *Hudson v. Thorne*, 7 Paige (N. Y.) 261.

As to the admissibility of a pamphlet in proof of a village ordinance, see *Raker v. Maquon*, 9 Ill. App. 155; *Bethalto v. Conley*, 9 Ill. App. 339.

Where a town charter limited to \$50 fine for violation of ordinances, an ordinance fixing a penalty at from \$20 to \$100, it was held void as to excess above \$50. *Greenfield v. Mook*, 12 Ill. App. 281.

Without express charter authority, a municipality cannot impose a penalty for the violation of an ordinance regulating intelligence offices. *Keim v. Chicago*, 46 Ill. App. 445.

An ordinance against book-making and pool-selling within the municipality, but not applying to the actual inclosure of a fair or race-track association during the meeting, etc., was held not to discriminate against persons. *Chicago v. Brownell*, 146 Ill. 64, citing *State v. Burgdoerfer*, 107 Mo. 1.

Further, as to the requisites, validity, and construction of municipal ordinances, see *Parker v. Catholic Bishop*, 146 Ill. 158; *Wagner v. Rock Island*, 146 Ill. 139.

In *Indiana*, the powers and duties of the board of town trustees, under the act of 1885, are similar to those of such body in the *Dakotas* already mentioned. They are principally set forth in the nineteen sub-sections of *Indiana* Rev. Stat. (1888), § 3333. Compare the fifty-one sub-sections of section 3106, as to the powers of city councils. Moreover, they may authorize lot owners to inclose a portion of the street for orna-

mental purposes, but not for permanent structures; nor to reduce the street and sidewalks below the width of sixty feet, § 3334. They shall "have power to provide, by ordinance, reasonable regulations for the safe supply, distribution, and consumption of natural gas within the respective limits of such towns," and require the users to pay a reasonable license therefor, § 3106 f. As to highways, town trustees have the same powers and duties as township trustees, § 5090 j. Of the six duties of the township trustees, under the act of 1859 (besides those under the acts concerning schools, the poor, and as fence-viewers), the principal one is: "Fourth, to see to a proper application of all moneys belonging to the township for road, school, or other purposes, and perform all the duties heretofore required of the township trustee, clerk, and treasurer under the school acts," § 5993. The authorization in the act of 1852 for town trustees to purchase fire apparatus, imports power to pledge credit therein. *Second Nat. Bank v. Danville*, 60 Ind. 504.

An ordinance requiring the town marshal to kill unmuzzled dogs, was held a valid exercise of the police power. *Haller v. Sheridan*, 27 Ind. 494.

Town trustees cannot pass a valid ordinance, until the statutory filing of the certificate of their election. *Dinwiddie v. Rushville*, 37 Ind. 66.

A town ordinance imposing a fine for driving faster than an ordinary trot, was held valid. *Nealis v. Hayward*, 48 Ind. 19.

The *Indiana* Act of 1867, p. 220, having contravened the constitutional requirement as to the amendments, town trustees cannot pass a valid ordinance prohibiting sale of intoxicating liquors without a license. *Martinsville v. Frieze*, 33 Ind. 507; *Steinmetz v. Versailles*, 40 Ind. 249. Accordingly, money paid for such license under threats of fine and imprisonment, can be recovered back. *Princeton v. Vierling*, 40 Ind. 340.

Towns incorporated under the general law cannot, by ordinance, impound and sell animals found running at large. *Slessman v. Crozier*, 80 Ind. 487. A penalty for violating a town ordinance is not a "debt" within the constitutional inhibition of imprisonment for debt. *Hardenbrook v. Ligonier*, 95 Ind. 70.

An action to recover an ordinance penalty is controlled by the rules of the

civil practice. *Ridge v. Crawfordsville*, 4 Ind. App. 513.

The penalty for an engineer's violation of an ordinance regulating the speed of locomotives, may be recovered against the railway company. *Hammond v. New York, etc., R. Co.*, 5 Ind. App. 526.

An ordinance forbidding liquor-saloon keepers to obstruct by screens or colored glass, a view of the interior of the saloon, was held unreasonable and void. *Champer v. Greencastle* (Ind. 1893), 35 N. E. Rep. 14.

An ordinance leaving it to the uncontrolled discretion of the board of health and the common council to decide whether a permit be granted for the erection of any tannery, was held invalid. *Plymouth v. Schultheis* (Ind. 1893), 35 N. E. Rep. 12.

Further, as to ordinances, see *Lewisville Natural Gas Co. v. State* (Ind. 1893), 34 N. E. Rep. 702, *overruling* *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; *Woodruff v. Bowen* (Ind. 1893), 34 N. E. Rep. 1113.

In *Iowa*, as to the effect of state legislation upon a saloon ordinance, see *New Hampton v. Conroy*, 56 Iowa 499; *Clinton v. Grusendorf*, 80 Iowa 117.

As to the presumption that an ordinance establishing a street was for a public purpose, see *Strahan v. Malvern*, 77 Iowa 454; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722. As to requisites for the enactment of an ordinance, see *Bayard v. Baker*, 76 Iowa 220.

Irregularity in the town's organization cannot be pleaded in a prosecution under an ordinance, *e. g.*, for keeping an unlicensed ball-alley. *Decoran v. Gillis*, 10 Iowa 234.

Without a previous vote of the electors, district township electors cannot purchase school apparatus. *Taylor v. Otter Creek Dist. Tp.*, 26 Iowa 281.

Under a power to "prevent riots, noise, disturbance," etc., and to "preserve peace and order," a town may enact an ordinance to arrest and punish persons found intoxicated. *Bloomfield v. Trimble*, 54 Iowa 399; 37 Am. Rep. 212.

In *Iowa*, an ordinance authorizing a lot owner to make a grass plot along a sidewalk, is held not to import that the council may not destroy it by a crossing at a street intersection. *Brown v. Barstow* (Iowa, 1893), 54 N. W. Rep. 241.

An ordinance interdicting the marching of processions or noise of instru-

ments in the streets, so as to frighten horses or obstruct travel, and declaring it to be a misdemeanor not to desist upon the order of the marshal, was held not to be unreasonable. *Chariton v. Fitzsimmons* (Iowa, 1893), 54 N. W. Rep. 146.

As to when an ordinance is within the authorization of *Iowa Code*, § 489, for the erection of electric light plants, see *Hanson v. Hunter* (Iowa, 1892), 53 N. W. Rep. 84.

A town council, after authorizing a property owner to erect a scale in a street, is estopped to revoke the license until the public interests require its removal. *Spencer v. Andrew*, 82 Iowa 14.

As to the validity of ordinances regulating the hours of closing liquor saloons, see *Clinton v. Grusendorf*, 80 Iowa 117, citing *New Hampton v. Conroy*, 56 Iowa 499.

In *Kansas*, the township trustee contracts for the building of bridges; divides the township into road districts; fills vacancies in the office of road overseer; removes highway obstructions; prosecutes violations of the road laws; constructs drains; applies the township's moneys; has the care of its property; acts with the county board in levying an annual tax; as township assessor, enrolls soldiers employed in the late war, their widows and children; is judge of elections; is overseer of the poor; and constitutes, with the clerk and treasurer, an auditing board, with power also to issue licenses for billiards, etc.

Parol evidence is admissible to supplement the record of the acts and proceedings of a township board. *Rock Creek Tp. v. Coddling*, 42 Kan. 649.

As to when notice to, or presence of all, the members is essential to a valid special meeting of the town council, compare *Atchison v. De Kay*, 148 U. S. 591; *Paola, etc., R. Co. v. Anderson County*, 16 Kan. 302; *Aikman v. School Dist. No. 16*, 27 Kan. 129.

As to municipal ordinances, see *Re McCort* (Kan. 1893), 34 Pac. Rep. 456.

In *Kentucky*, the trustees make necessary regulations for the government of the town; cause the streets to be kept in order; levy taxes under certain restrictions; are a body corporate, suing and being sued, and appointing a necessary attorney; may purchase and hold land, not exceeding forty acres, for a cemetery; may tax any show or bowling alley within a quarter of a mile of the town limits; license the

keeping of stallions; and must annually post up a statement of the doings of the board, the receipts, disbursements, etc. *Kentucky Gen. Stat.* (1887), p. 1239 *et seq.* As to towns licensing billiard tables, see p. 1051 *et seq.* As to discharging firearms, see p. 459. As to counties licensing liquor-selling, nine-pin alleys, pawnbrokers and circuses, see p. 1047 *et seq.*

The general revenue law has not repealed the special statutes authorizing towns to license liquor-selling. *Adams v. Stephens*, 88 Ky. 443. A city or town may require a license of plumbers, but cannot delegate to a water company the power of determining who shall make the connections, etc. *Franke v. Paducah Water Supply Co.*, 88 Ky. 467. Compare, as to delegating to an engineer, etc., *Nevin v. Roach*, 86 Ky. 492.

A by-law subjecting to sale hogs found running at large, the owner to have only the balance of the proceeds, after deducting costs and charges, was held constitutional. *McKee v. McKee*, 8 B. Mon. (Ky.) 461.

In *Louisiana*, notwithstanding a general statute thereon, the legislature may delegate to a municipality power to adopt and enforce ordinances of special local importance; *e. g.*, as to the adulteration of milk. *State v. Fourcade* (La. 1893), 13 So. Rep. 187.

As to the power of a municipal council to reject bids, see *Gunning Gravel Co. v. New Orleans* (La. 1893), 13 So. Rep. 182.

An order to maintain the cleanliness of market places, was held not unreasonable. *State v. Dubarry* (La. 1893), 14 So. Rep. 298.

A charter provision for punishing the violation of municipal ordinances was held to apply to an ordinance prohibiting the obstruction of streets and alleys. *State v. Lochte* (La. 1893), 14 So. Rep. 215.

An ordinance prohibiting sales of lottery tickets, was held constitutional. *State v. Dobard* (La. 1893), 14 So. Rep. 253.

An ordinance requiring a labor agent to give bond, and answer in damages to anyone injured by his failure to discharge a duty, was held unconstitutional. *State v. Sachs* (La. 1893), 14 So. Rep. 249.

A statute prohibiting the contracting of any debt, without providing in the ordinance creating it the means of paying it, was held not contravened

by an ordinance directing work not necessitating the giving out of obligations beyond what the current revenues of the town may meet. *Reynolds v. Shreveport*, 13 La. Ann. 426.

An ordinance without express charter authorization for appointing inspectors of steam boilers and prescribing penalties, was held void. *State v. Robertson* (La. 1893), 13 So. Rep. 164.

In *Maine*, the selectmen have *pro tempore* power as moderators of town meetings. *Maine Rev. Stat.* (1883), pp. 79 and 97. They act as fence-viewers when others are not chosen, p. 81; cause town lines to be perambulated quinquennially, p. 88; inspect naturalization papers, and prepare vote lists, p. 95; act as assessors if none are chosen, p. 147; cause guide-posts to be erected, p. 259; appoint weighers, measurers, and sealers, pp. 353, 356, 394; and appoint overseers of houses of correction, p. 976.

The statutory provision for making quarantine regulations does not empower a town board of health to appropriate a vessel to hospital purposes. *Mitchell v. Rockland*, 41 Me. 363; 45 Me. 496; 52 Me. 118; 66 Am. Dec. 252.

The selectmen cannot pay over money in obedience to an illegal vote of the town. *Hooper v. Emery*, 14 Me. 375.

The selectmen can defend pauper suits without a special vote of authorization. *Industry v. Starks*, 65 Me. 167.

Selectmen may draw a negotiable order on the town treasurer in payment of a town debt. *Willey v. Greenfield*, 30 Me. 452.

Further, as to powers of selectmen, see *Bethum v. Turner*, 1 Me. 111; 10 Am. Dec. 36; *Mussey v. White*, 3 Me. 290; *Pease v. Cornish*, 19 Me. 191; *Harlow v. Young*, 37 Me. 88; *Frankfort v. Waldo County*, 40 Me. 389; *Kidder v. Knox*, 48 Me. 551.

As to the liabilities of the selectmen for their acts in *Maine*, see *infra*, this title, *Officers—Liabilities*.

In *Maryland*, the county being the chief political unit, the county commissioners are made the principal executive board for police and sanitary purposes, in the absence of special charter provisions otherwise. *Maryland Gen. Pub. Laws* (1888), p. 404 *et seq.*

Even after a street railway company has laid a track, the ordinance granting the right may be repealed, and the grant revoked; and this, without compensation, if on notice prior to the lay-

ing. *Lake Roland El. R. Co. v. Baltimore* (Md. 1893), 26 Atl. Rep. 510.

In *Massachusetts*, "the board of health of a town shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth, and causes of sickness within the town, or on board of vessels within the harbor of such town, and respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness. . . . Whoever violates any such regulation shall forfeit a sum not exceeding \$100." The board may examine into such nuisances, causes, etc., and destroy them; order the owner or occupant to remove them, under penalty of \$20 for each day of willful neglect; make compulsory examination of premises; on hearing, etc., abate nuisance of wet, rotten, or spongy lands, where an infected person cannot be removed, cause the neighbors to be removed; and obtain a justice's warrant to secure infected articles or break open a house, etc. *Massachusetts Pub. Stat.* (1882), p. 436 *et seq.*

The board cannot take possession of a dwelling-house and appropriate it as a small-pox hospital. *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334. As to requisites of the notice to remove a nuisance, see *Com. v. Alden*, 143 Mass. 113. As to the powers of the board, see *Conway v. Russell*, 151 Mass. 581; *Quincy v. Kennard*, 151 Mass. 563.

The selectmen act as assessors, overseers of the poor, and a board of health, in the absence of election thereof. *Massachusetts Pub. Stat.* (1882), p. 237. They prepare the lists for the drawing of jurors, p. 994; remove a disabled tax collector, p. 127, and take charge of uncollected tax lists, p. 128; appoint, upon vacancy, a collector, highway surveyor, fence-viewer and field driver, p. 236; appoint fire-wards and fire-enginemen, p. 265; audit expenses of fire inquests, p. 1209; make annual returns to the insurance commissioner, p. 265; establish a fire department, p. 267; call town meetings for establishing fire districts, p. 269; appoint harbor masters, p. 411; appoint fish wardens and enforce fish laws, p. 505; measure ponds in regulation of inland fisheries, p. 500; enforce lobster laws, p. 507; also oyster laws, p. 508; also game laws, p. 511; execute a call of the militia, p. 150; appoint lock-up keepers, p. 230; appoint commissioners to try complaints against girls, p.

488; advise as to the sentence of boys to the reform school, p. 490; restrain peddling by minors, p. 405; apply to the probate court to appoint a guardian of a minor, p. 783; cause the probate court to appoint a guardian of an insane person or spendthrift, p. 784; appoint complainants as to neglected children, p. 320; provide for binding out apprentices, p. 827; regulate educational exhibitions of children, p. 318; appoint probation officers, p. 1193; appoint police officers, p. 236; compel attendance of witnesses, p. 986; provide for armories, p. 162; disburse state aid, p. 248; establish watch districts, p. 262; hear, etc., as to railroad routes, p. 607; offer rewards for apprehension of offenders, p. 1186; direct carriers' sales of unclaimed articles, p. 515; appoint inspectors, weighers and measurers, p. 377 *et seq.*; regulate trotting parks, p. 1178; arrange for water supply, p. 229; provide for laying aqueducts, p. 592; lay sewers, p. 340; petition for lowland roads and drains, p. 1085; enforce vaccination, p. 443; establish drinking troughs, p. 232; regulate as to slaughter houses and other offensive trades, p. 447; regulate the laying of gas pipes, p. 583; erect guide posts, p. 352; authorize the erection of telegraphs and make regulations therefor, p. 231; remove highway incumbrances, p. 356; regulate passage of vehicles and sleds, p. 353; abate unsafe structures, p. 360; abate gaming booths, p. 538; license the moving of buildings in highways, p. 353; also veteran parades, p. 167; also fireworks and other explosives, p. 546; also theatricals, p. 555; also billiards and bowling alleys, p. 554; also liquor-selling, p. 524; also inn-holders and victualers, p. 540; also lying-in hospitals, p. 443; also pawn-brokers, p. 543; also intelligence offices, p. 532; also auctioneers, p. 404; cause unlicensed dogs to be killed, p. 551; and provide against contagious diseases among animals, p. 494.

A proceeding before the county commissioners on a petition to lay out a highway, was held to be a "suit" within a by-law authorizing the selectmen to defend suits against the town. *Hyde Park v. Norfolk County*, 157 Mass. 94.

As to the liability of selectmen for their acts in *Massachusetts*, see *infra*, this title, *Officers—Liability*.

A majority of the selectmen may lay out a town way. *Dartmouth v. Bristol County*, 153 Mass. 12.

As to the authority of the selectmen to represent the town at a hearing on petition to the county board for laying out a highway, see *Hyde Park v. Wiggin*, 157 Mass. 94.

The wrongful laying out of a sewer through private land does not invalidate the whole lay-out. *Com. v. Abbott* (Mass. 1894), 35 N. E. Rep. 782.

Upon a town vote to sell land, the next year's board of selectmen cannot execute a deed. *Littlefield v. Boston, etc.*, R. Co., 146 Mass. 268.

A town's vote to appropriate a certain sum for highways does not empower the selectmen to contract for the construction of a way ordered by the county commissioners, nor to pledge the town's credit therefor. *Bean v. Hyde Park*, 143 Mass. 245.

A town vote authorizing selectmen to settle a claim "at their discretion," was held to empower them to submit it to arbitration. *Campbell v. Upton*, 113 Mass. 67.

A town's election of fire-wards, was held not to affect the selectmen's general statutory duty to establish a fire-department. *Long v. Sargent*, 101 Mass. 117.

The *Massachusetts* statute authorizing selectmen to offer a reward for securing a person "charged with crime," means only a charge by complaint or indictment. *Day v. Otis*, 8 Allen (Mass.) 477.

Selectmen have no authority *ex officio* to hire a building for the town meetings. *Goff v. Rehoboth*, 12 Met. (Mass.) 26.

Further, as to the powers of selectmen, see *Clark v. Cushman*, 5 Mass. 505; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Anthony v. Adams*, 1 Met. (Mass.) 384; *Blanchard v. Stearns*, 5 Met. (Mass.) 298; *Mears v. Boston, etc.*, R. Co., 5 Gray (Mass.) 371; *Smith v. Cheshire*, 13 Gray (Mass.) 318; *Lombard v. Oliver*, 3 Allen (Mass.) 1; *Rowe v. Edmands*, 3 Allen (Mass.) 334; *Belcher v. Farrar*, 8 Allen (Mass.) 325; *Washington v. Eames*, 8 Allen (Mass.) 432; *Palmer v. Haverhill*, 98 Mass. 487.

An ordinance prohibiting blasting without the consent of the municipal board, was held valid. *Com. v. Parks*, 155 Mass. 531.

The reasonableness of a municipal by-law or sanitary ordinance, *e. g.*, forbidding an abutter to allow filth to remain in a passageway, but not specifying the time, is not to be tested by its application to extreme cases. *Com. v. Cutter*, 156 Mass. 52.

An ordinance may forbid selling in the streets without a permit, although the party complained of has a license as peddler, from the commonwealth. *Com. v. Ellis*, 158 Mass. 555.

In *Michigan*, "The supervisor, the two justices of the peace whose term of office will soonest expire, and the township clerk, shall constitute the township board." *Michigan Gen. Stat.* (1882), § 744. It audits all claims against the township, § 746; settles with the other officers, protects the records, and determines as to the clerk's bond, § 747; raises money for town purposes when the town meeting has neglected to do so, § 750; appoints a board of review of assessments, pp. 1270, 1293; directs in the planting of shade trees, § 1408; acts as board of health, § 1633; purchases and holds in trust burial grounds, §§ 1637-8; appoints commissioners to protect fruit trees, § 2226; approves liquor bonds, § 2278, and druggists' bonds, § 2282; levies the tax to pay railroad aid bonds, §§ 3452-3; and may for cause, on five days' notice, remove a district officer or school inspector, § 5170. As to the restricted power of the board to vote money for township expenses, see *Harding v. Bader*, 75 Mich. 316. In case of a vacancy on the board, the members may call a justice of the peace to act temporarily. *Grondin v. Logan*, 88 Mich. 247. As to requisites of valid action of the board, see *Newaygo County Mfg. Co. v. Echinaw*, 81 Mich. 416; Auditor Gen'l v. McArthur, 87 Mich. 457. As to organization of town agricultural or horticultural boards, see *Michigan Gen. Stat.* (1882), § 2303. No meeting of a township board is legal, unless duly called or notified, or else attended by all its members. *Beaver Creek Tp. Board v. Hastings*, 52 Mich. 528. Where a village charter provides for selling animals, partly as a penalty for their running at large, and partly for expenses of impounding, the penalty is severable and can be omitted. *Grover v. Huckins*, 26 Mich. 476. In licensing liquor-selling, accepting the dealer's bond, etc., a village has no discretion beyond the power conferred by the statute; *e. g.*, it cannot reject the bond merely because the principal is a married woman. *Amperse v. Kalamazoo*, 59 Mich. 78. A resolution of council assuming to empower an electric light company to use the poles of another company without regulating

the manner of stringing the wires, was held unreasonable and void. *Citizens' Electric Light, etc., Co. v. Sands*, 95 Mich. 551. An ordinance making indecent exposure an offense, without reference to the intent, was held to be a valid exercise of the police power. *Grand Rapids v. Bateman*, 93 Mich. 135. An ordinance or resolution fixing a salary, was held to be, within a charter requirement of a majority vote, an appropriation of money. *Fournier v. West Bay City*, 94 Mich. 463.

In *Minnesota*, the town supervisors may issue coupon bonds of the town. *Minnesota Gen. Stat.* (1891), § 1137. A village charter authorizing the council by ordinance "to prevent riots, noise," etc., "and generally to promote and preserve good order," etc., was held to import power to ordain against assault and battery only when committed publicly. *State v. Bruckhauser*, 26 Minn. 301. An ordinance requiring saloons to be kept closed on Sunday, was held not unreasonable. *State v. Harris*, 50 Minn. 128. Charter authority to contract for a water supply, was held not to empower to grant an exclusive franchise disabling the municipality for thirty years from establishing its own water-works. *Long v. Duluth*, 49 Minn. 280. An ordinance provision that a building inspector shall be a practical architect and sanitary engineer, was held to be mandatory. *State v. Starky*, 49 Minn. 503. A stock clock was held to be within a municipal charter authorizing the prohibition of any "gambling device." *State v. Grimes*, 49 Minn. 443. As to the power of a park board under *Minnesota Special Laws* (1883), ch. 281, to exclude vehicles from the parks, see *State v. Waddell*, 49 Minn. 500. A store was held not to be a "junk shop," within the meaning of a license ordinance, merely because it deals in second-hand furniture. *Duluth v. Bloom* (Minn. 1893), 56 N. W. Rep. 580.

In *Mississippi*, "The mayor and board of aldermen of every city, town and village shall have the care, management, and control of the city, town, or village, and its property and finances, and shall have power to enact ordinances, . . . ;" levy and collect taxes for general revenue purposes not to exceed six mills on the dollar in any one year, and for general improvements within the same limit; levy taxes to pay municipal bonds and coupons; make regulations as to nuisances and cognate

matters; compel owners of property adjacent to walks and ways to erect safeguards, except when made dangerous by municipal authority; grant the right to erect telegraph, electric light or telephone poles and wires, but not exclusively; grant the right to lay gas, water, sewer, or steam pipes, or conduits for electric light; prescribe rules for weighing and measuring commodities, and for inspecting and condemning inflammable fluids not of standard quality; change water courses, under certain restrictions as to cost, etc.; approve maps of subdivision; compel certain males to work streets; exercise the right of eminent domain as to streets, etc.; erect and operate water-works and prescribe water rates; make quarantine laws and enforce them within five miles of the corporate limits; to suppress dram shops and club rooms; restrain and prohibit slaughter houses, disreputable houses, gambling rooms, "desecration of the Sabbath-day, and all kinds of indecency and other disorderly practices, disturbance of the peace, and to provide for the punishment of the persons engaged therein;" provide necessary municipal buildings; construct needful harbor improvements, guide river currents, regulate public wharves, and collect levee rates; erect a municipal prison, and regulate the keeping of the prisoners; "aid and encourage the establishment of manufactories, gas works, water-works, and other enterprises of public utility, other than railroads, within the corporate limits, by exempting all property used for such purposes from municipal taxation for a period not longer than ten years;" pass all ordinances, and enforce the same by fine not exceeding \$100, or imprisonment not exceeding thirty days, or both. *Mississippi Code* (1892), § 2925 *et seq.* Moreover, cities and towns in that state have certain powers that are not conferred on villages; *e. g.*, to license ferries; fix carriage rates; adopt measures to protect strangers; erect and govern hospitals, work-houses and houses of correction; maintain police; provide for lighting streets and public grounds; maintain public libraries; regulate public halls as to ingress and egress; provide for the prevention and extinguishment of fires; prohibit the erection of wooden buildings within certain limits; regulate and prevent dangerous or noxious manufactories and the storing of green hides; regulate the storage of powder, cotton, and

all other combustible and inflammable materials; regulate construction of chimneys, boilers, ash-deposits, with right to enter buildings therefor; and, on vote of the qualified electors, keep in repair the highways within three miles from the corporate limits. § 2958. Cities and towns having more than 1,000 inhabitants may impose a license-tax on all callings, etc., pursued within their limits, "the same not to exceed fifty per centum of the state license-tax levied upon the same callings, trades, and professions;" may regulate street railways and crossings; prevent the running at large of animals; destroy dogs running at large; and, on vote of the qualified electors, establish landings and free wharves on navigable streams within five miles of the corporate limits, § 2971 *et seq.*

An ordinance prohibiting the retailing of fresh meats from four o'clock p. m. to nine a. m., was held valid. *Porter v. Water Valley*, 70 Miss. 560.

The courts will not take judicial notice of the existence of a town ordinance. *Naul v. McComb*, 70 Miss. 699.

An ordinance prohibiting the placing of rubbish on sidewalks, not mentioning barrels, although specifying iron hoops and nails, is not violated by allowing barrels containing rubbish to remain on the sidewalk. *Giardina v. Greenville*, 70 Miss. 896.

An ordinance of a town, declaring it unlawful to bring therein or offer for sale second-hand clothing, without first having produced satisfactory proof to the mayor that such clothing did not come from a locality where contagion prevailed, was held to be void; it being an unjust and unreasonable restraint of trade. *Kosciusko v. Slomberg*, 68 Miss. 469. But compare *Soon Hing v. Crowley*, 113 U. S. 703.

In *Missouri*, as to the duties of the township board of directors, see *Missouri Rev. Stat.* (1889), § 8473.

An ordinance providing for advertisement for bids on a paving contract, by posting the notices at ten public places for five days, was held not unreasonable. *Warren v. Barber Asphalt Paving Co.*, 115 Mo. 572.

Charter authority to impose a fine for letting live stock run at large, was held not to sustain an ordinance authorizing sale upon non-payment of certain charges. *Johnson v. Daw*, 53 Mo. App. 372.

An ordinance fixing the maximum load of a two-horse team and wagon,

and affixing a penalty for excess, was held not void for partiality. *Kansas City v. Sutton*, 52 Mo. App. 398.

An ordinance passed by legislative officers *de facto* under color of right, is not assailable collaterally by private parties. *Perkins v. Fielding* (Mo. 1893), 24 S. W. Rep. 444.

In actions for violating a town's ordinances, its corporate capacity cannot be questioned; this can be done only by the state, by *quo warranto*, or other direct proceeding. *Fredericktown v. Fox*, 84 Mo. 59.

An ordinance may prescribe the manner in which a common-law obligation shall be discharged; *e. g.*, that one excavating in a street, shall erect a fence three feet high as a safeguard. *Jelly v. Pleper*, 44 Mo. App. 380. A municipality has no authority to ordain that a street car "shall be stopped in the shortest time and space possible," *Fath v. Tower Grove, etc., R. Co.*, 39 Mo. App. 447; nor that a railway train be run not faster than four miles an hour. *White v. St. Louis, etc., R. Co.*, 44 Mo. App. 540, *citing* against municipal favoritism or prejudice, the slaughter-house case, *Tugman v. Chicago*, 78 Ill. 405; the case of an invalid ordinance inhibiting auction sales after sundown, *Hayes v. Appleton*, 24 Wis. 542; and the gas-pipe case, *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318. An ordinance granting a right to a gas company and its successors was held not to be void for extending the term thereof beyond the company's own term of existence. *State v. Laclede Gaslight Co.*, 102 Mo. 472.

An ordinance imposing the cost of a street grading both on abutting and other property, was held to be invalid. *Halpin v. Campbell*, 71 Mo. 493. An ordinance authorizing the construction of a sidewalk in an isolated portion of a municipality, was held to be unreasonable and invalid. *Corrigan v. Gage*, 68 Mo. 541, *citing* the meat-shop case, *St. Louis v. Weber*, 44 Mo. 547.

The courts will not consider the question of the unreasonableness or oppressiveness of an ordinance passed in pursuance of an express legislative grant. *Kansas City v. Richards*, 34 Mo. App. 521.

An ordinance allowing a railroad company to run a track over streets in prosecuting its private business, was held to be unlawful. *Glaessner v.*

Anheuser-Busch Brewing Assoc., 100 Mo. 508.

An ordinance prohibiting the sale of skimmed milk was sustained. *Kansas City v. Cook*, 38 Mo. App. 660.

In *Nebraska*, an ordinance was held not to be unreasonable for interdicting seats in drinking saloons. *Brown v. Lutz*, 36 Neb. 527.

Where seventeen members of the county board were present, and eight voted in favor of changing the boundaries of a township, seven against it, and two did not vote, it was held sufficient to authorize the change; *Nebraska Const. Stat.*, § 912, requiring "the votes of a majority of the supervisors present." *Inavale Tp. v. Bailey*, 35 Neb. 453.

In *Nevada*, towns and cities are chiefly governed by the board of county commissioners; *e. g.*, as to boundaries, tax-levies, streets, fire department, nuisances, licenses, ordinances, prevention and punishment of disorderly conduct, establishing a board of health, auditing claims, managing municipal property, condemning and appropriating, etc. *Nevada Gen. Stat.* (1885), § 2024. As to work on streets upon contract under sealed bids, duty of the county commissioners, etc., see § 441.

Charter authority to make necessary contracts, and to make all necessary provision for the maintenance of the indigent and for medical attendance upon them, was held not to import power to furnish medical attendance to municipal officers who are not indigent. *Tucker v. Virginia City*, 4 Nev. 20.

In *New Hampshire*, a municipal board cannot delegate authority conferred by statute; *e. g.*, the laying out of a turn-out in a horse railroad. *Concord v. Concord Horse R. Co.*, 65 N. H. 30. A town holds the volumes of the state statutes and reports for the information of its inhabitants; and it may reclaim them from a lawyer who has contracted with the selectmen for their use. *Litchfield v. Parker*, 64 N. H. 443.

As to the liability of selectmen for their acts in *New Hampshire*, see *infra*, this title, *Officers—Liabilities*. As to their powers and duties, see *New Hampshire Pub. Stat.* (1891), p. 151.

Selectmen cannot, *ex officio*, act as town liquor agents. *Richards v. Columbia*, 55 N. H. 96.

The selectmen can, without special authorization, institute suits to recover back illegal interest paid by the town. *Albany v. Abbott*, 61 N. H. 157.

The selectmen cannot inquire into the legality of a school district's vote to raise money; *mandamus* lies to compel them to assess the tax voted. *School District No. 6 v. Carr*, 63 N. H. 201.

The selectmen are themselves the health officers, until they have appointed others. *Bedford v. Rice*, 58 N. H. 446.

They have not general authority to bind the town by contract. *Andover v. Grafton*, 7 N. H. 298.

In the absence of specific instructions, they have discretionary power to pay a town debt. *Sanborn v. Deerfield*, 2 N. H. 251.

Selectmen cannot, *ex officio*, release without consideration, a cause of action against the town, nor release a witness liable over to the town in case of a judgment against the town. Such authority must be given by town votes. *Carlton v. Bath*, 22 N. H. 559.

A selectman cannot act for the town in making a loan of its money to himself. *Holderness v. Baker*, 44 N. H. 414.

Selectmen may omit to tax a resident, to prevent his gaining a settlement. *Thompson v. Newtown*, 21 N. H. 595.

Further, as to powers of selectmen, see *Wason v. Severance*, 2 N. H. 501; *Hanover v. Eaton*, 3 N. H. 38; *Tolman v. Marlborough*, 3 N. H. 57; *Mason v. Bristol*, 10 N. H. 36; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Backman v. Charlestown*, 42 N. H. 125.

In *New Jersey*, as to the duty of "the board of chosen freeholders," see *infra*, this title, *Election or Appointment*. These township boards constitute for the county "a body politic and corporate in law," capable to hold real and personal estate in trust for the county, sue and be sued, etc., and raise money for county purposes. *New Jersey Revision* (1877), § 1 *et seq.*

The township committee is the legislative or governing body in the Taxation Act of 1884. *Reid v. Wiley*, 46 N. J. L. 473. Where a legislative act confers on a township committee the supervision of persons authorized to interfere with a public road, the committee, and not the town, may bring suit on a bond exacted from such persons to perform the duty. *Woodbridge Tp. v. Hall*, 47 N. J. L. 388. A township committee cannot direct the collector not to collect a tax which, though illegal, has never been set

aside; and the committee would not be stopped to sue on his bond for his dereliction. *Painter v. Blairstown*, 43 N. J. Eq. 317. To support a water tax under the act of 1881, every part of the township need not be supplied with water. *State v. Bloomfield*, 47 N. J. L. 442. Where a statute authorized a township committee to drain certain lands, if they deemed it of public advantage, it was held that their resolution therefor, stating that they so deemed it, could not be contradicted by parol, after public money had been expended for the same. *State v. Clinton*, 39 N. J. L. 656. The duty of the township authorities as to highways, gives them such special interest beyond the public at large, as entitles them to maintain a bill in their own name to restrain the shutting up thereof. *Greenwich v. Easton, etc.*, R. Co., 24 N. J. Eq. 217; 25 N. J. Eq. 565.

An ordinance requiring horse railway companies to have an agent, besides the driver, to help control the car and passengers, was held not unreasonable. *State v. Trenton*, 53 N. J. L. 132.

An ordinance prohibiting the digging up of the surface of a street, except by permission of the municipal board, was held unreasonable, as applied to a railway company's exercise of its franchise. *Allen v. Jersey City*, 53 N. J. L. 522.

As to the power of a municipal board to contract for lighting streets, see *State v. Board of Street, etc., Com'rs* (N. J. 1893), 26 Atl. Rep. 92. Street boundaries cannot be determined without allowing the abutting owners to be heard. *Voorhees v. Bound Brook* (N. J. 1893), 26 Atl. Rep. 710. Further, as to ordinances, see *State v. Bayonne* (N. J. 1893), 26 Atl. Rep. 81; *State v. Elizabeth* (N. J. 1893), 26 Atl. Rep. 939; *State v. Rutherford* (N. J. 1893), 26 Atl. Rep. 933; *State v. National Docks R. Co.* (N. J. 1893), 26 Atl. Rep. 145; *State v. Vineland* (N. J. 1893), 26 Atl. Rep. 149; *State v. Egg Harbor City* (N. J. 1893), 26 Atl. Rep. 89; *Rutgers College Athletic Assoc. v. New Brunswick* (N. J. 1893), 26 Atl. Rep. 87; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; *Paterson R. Co. v. Grundy* (N. J. 1893), 26 Atl. Rep. 788; *State v. Orange*, 50 N. J. L. 389; *State v. Ocean Grove Camp Assoc.* (N. J. 1893), 26 Atl. Rep. 798.

Statutory authorization of an ordinance, providing for trial of certain

offenses by the mayor or "justices of the peace" of the town of Lambertville, was held not to authorize an ordinance providing for trial thereof before "either of the justices" of said town. *State v. Zeigler*, 32 N. J. L. 262.

In *New Mexico*, "the corporate authority of the incorporated towns, organized for general purposes, shall be vested in a board of trustees (*fidei comisarios*), consisting of one mayor, one recorder, and four other trustees, who shall be qualified electors residing within the limits," etc. *New Mexico Comp. L.* (1884), § 1686. For eighty-one specifications of the trustees' duties, see § 1622.

In *New York*, the town board may appoint fire companies. *New York Sess. L.* (1891), p. 477. As to the right of the board to appeal, regardless of the meeting's direction, see *Chase v. Defendorf*, 128 N. Y. 652; *Hulburt v. Defendorf*, 58 Hun (N. Y.) 585. As to the requisites of valid action of the board in auditing claims, see *Jackson v. Collins*, 16 N. Y. Supp. 651; 62 Hun (N. Y.) 618.

An ordinance of a board of health prohibiting all persons from passing from within a quarantine inclosure, contravening the authority of the state quarantine officer, was held invalid. *People v. Roff*, 3 Park Cr. Cas. (N. Y.) 216.

Charter authority to license "peddlers," was held to import power to compel milk dealers to take out a license. *People v. Mulholland*, 19 Hun (N. Y.) 548.

A municipal council's grant of a franchise for a street railway, without consideration, was set aside at the suit of a taxpayer, a third party's offer to pay a large sum having been refused. *Adamson v. Union R. Co.* (Supreme Ct.), 26 N. Y. Supp. 136.

A village ordinance was held invalid for not publishing when it was to take effect. *Watkins v. Hillerman* (Supreme Ct.), 26 N. Y. Supp. 252.

A village ordinance prohibiting the igniting of combustibles in streets, between the rising and the setting of the sun, was held valid. *New Rochelle v. Clark*, 65 Hun (N. Y.) 140.

Upon a tie, the presiding officer's vote was held to make a "majority vote" of a municipal council. *New York, etc., R. Co. v. Dunkirk*, 65 Hun (N. Y.) 494.

In *North Carolina*, every incorporated town may annually elect not

more than seven, nor less than three, commissioners to "be a body corporate, with succession during the corporate existence of the town." *North Carolina Code* (1883), § 3787. Also a mayor to preside at the meetings of the board, § 3794. They may levy taxes on polls, on liquor-retailing, on animals running at large, and on produce wagons; establish markets; appoint a weigher, a constable, patrol, and other necessary agents; pass laws for abating nuisances and preserving health; regulate as to bakers' bread; keep streets and bridges in repair; purchase land for cemeteries; and enforce their laws by penalties, § 3800 *et seq.* The route of a railroad cannot be altered after the grading is begun, unless the change be sanctioned by a vote of two-thirds of the corporate authorities of the town, etc., § 1953.

The act of 1877, ch. 141, deprived the board of township trustees of its existence as a municipal corporation, and it cannot be a party to a suit. *Wallace v. Sharon Tp.*, 84 N. Car. 164.

An ordinance punishing owners of beasts not penned, was held not to apply to non-residents of the town. *Plymouth v. Pettijohn*, 4 Dev. (N. Car.) 591. But compare *Whitfield v. Longest*, 6 Ired. (N. Car.) 268.

A town ordinance declaring certain riparian strips to be the property of the front lot owners respectively, was held not to give color of title; being not under seal nor expressing any consideration. *Beaufort Tp. v. Duncan*, 1 Jones (N. Car.) 239.

An ordinance forbidding anyone coming from an infected place to enter the town, was held to apply only to those persons who left the infected place after its passage, and came immediately to the town. *Salisbury v. Powe*, 6 Jones (N. Car.) 134.

A penalty for disorderly conduct, ranging from one dollar to twenty, was held to render a town ordinance void for uncertainty. *Louisburg v. Harris*, 7 Jones (N. Car.) 281.

A town ordinance for impounding and selling for the expenses, all hogs found running at large, whether of residents or non-residents, was held valid. *Rose v. Hardie*, 98 N. Car. 44.

A town ordinance prescribing as limits of penalty that one "shall be fined a sum not exceeding five dollars, and one dollar for each and every day he shall neglect to make such repairs," was held void for uncertainty. *State v. Rice*, 97

N. Car. 421. So, also, was held void one prescribing, as a penalty for assaulting or insulting an officer, that such person "shall forfeit and pay not more than fifty dollars or suffer imprisonment not to exceed one month." *State v. Crenshaw*, 94 N. Car. 877.

A town ordinance prohibiting liquor selling, was held void under the general state license law. *State v. Brittain*, 89 N. Car. 574.

A town ordinance punishing the selling of liquor on Sunday, must give way to the statute thereon. The town charter is subordinate to the general public law. *State v. Langston*, 88 N. Car. 692, *citing* 1 Dill. on Mun. Corp., § 302, and the market-house case, *Washington v. Hammond*, 76 N. Car. 33.

Further, as to regulating liquor selling, see *State v. Davis*, 111 N. Car. 729.

In *Ohio*, the board of civil township trustees divides the township into road districts; settles the accounts of the treasurer and supervisors; appropriates the road moneys; makes and enforces all necessary health regulations; procures lands for cemeteries, and makes and enforces regulations therefor; appoints trustees of the public library; and relieves the poor. *Ohio Rev. Stat.* (1890), § 1457 *et seq.* The board also notifies as to the election of justices, § 566, and of pike superintendents, § 4878, supervises militia drafts, § 3092; regulates as to partition fences, § 4242; establishes public ditches, § 4511; provides for county roads, § 4660; for extermination of Canada thistles, § 4732; for guide-boards, § 4734; for watering on highways, § 4736; and for extinguishment of dangerous prairie and forest fires, § 4750. The power of the trustees, under a devise, with trust "to manage as they think best for said poor," was held not to be limited by the act of 1865 to loans upon real estate security. *Scott v. Marion Tp.*, 39 *Ohio St.* 153. As to the discretion of the trustees under the Act of 1866, in the erection of a town hall, see *New London Tp. v. Miner*, 26 *Ohio St.* 452.

An ordinance requiring a license fee of \$25, to sell at auction goods imported therefor, was held unreasonable. *Sipe v. Murphy*, 49 *Ohio St.* 536, *citing* the case of the "Sample-seller's Ordinance," *Ex p. Frank*, 52 *Cal.* 606; *Brown v. Maryland*, 12 *Wheat.* (U. S.) 448.

As to the validity of an ordinance imposing a fine for a specific offense, greater than that prescribed by the gen-

eral statute—*e. g.*, liquor-selling, *Ohio Rev. Stat.* 1862—see *Alliance v. Joyce*, 49 *Ohio St.* 7.

An imprisonment sentence by the mayor of a village, under an ordinance after the *Ohio* law of 1856, not providing for trial by jury, was held illegal. *Thomas v. Ashland*, 12 *Ohio St.* 124.

A town cannot subject to ordinance stray animals of non-residents. *Marietta v. Fearing*, 4 *Ohio* 429.

In *Oklahoma*, the principal police and sanitary powers are in the town board of trustees. See the twenty-one specifications in *Oklahoma Stat.* (1890), § 686. As to ordinances, see *Stillwater v. Moor* (Okla. 1893), 33 *Pac. Rep.* 1024.

In *Pennsylvania*, the corporate powers of a township are exercised by the supervisors thereof. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 364.

In a business requiring deliberation, the township can be bound only by the action of a majority of the board in a regular meeting. Repairing a road is a mere ministerial matter, manageable by one of the two supervisors; otherwise, as to the contraction of a debt therefor. *Union Tp. v. Gibboney*, 94 *Pa. St.* 534. Or as to a contract with an attorney for a year, at a fixed sum. *Bohan v. Pittston Tp.*, 4 *Kulp* (Pa.) 234. One supervisor may open a road authorized by the quarter sessions. *Brodhead v. Township*, 2 *Lehigh Val. L. R.* (Pa.) 381. One may also, the others not dissenting, in a district divided and assigned, purchase stone, and bind the township thereby. *Shepard v. Township*, 4 *Del. Co. Rep.* (Pa.) 385. But one cannot bind the township to pay an enlistment bounty. *Bearce v. Township*, 27 *W. N. C.* (Pa.) 212. The supervisors, on finding that the town has no defense, may confess judgment against it. *Maneval v. Jackson Tp.*, 141 *Pa. St.* 426.

A municipal council may adopt an unauthorized act done for the public good, by one of the municipal officers, and may assume the debt thereby contracted. So held as to a direction to the chief engineer to purchase flues necessary for a fire-engine. *Silsby Mfg. Co. v. Allentown*, 153 *Pa. St.* 319.

An ordinance prohibiting peddling without a license, but exempting residents of the borough from its operation, was held invalid; it contravening the constitution of the *United States* and the interstate commerce act, *Sayre v. Phillips*, 148 *Pa. St.* 482; *distinguishing* *Warren v. Geer*, 117

Pa. St. 207; and *Titusville v. Brennan*, 143 Pa. St. 642.

An ordinance providing that a fire committee or engineer should not incur, for repairs between council meetings, a liability exceeding a certain sum, was held not to preclude the council from adopting the act of such agent in excess of the sum named. *Silsby Mfg. Co. v. Allentown*, 153 Pa. St. 319.

A resolution offering a reward for the conviction of incendiaries, is binding only during a reasonable time. Seventeen years after the date of the resolution (and ten years after the last proclamation thereunder) was held to be an unreasonable time. *Shaub v. Lancaster*, 156 Pa. St. 362.

As to the power of municipal councils to permit the operation of a street railway by electricity, see *Reeves v. Philadelphia Traction Co.*, 152 Pa. St. 153.

The discretion of municipal councils in putting a sewer into a street, was held conclusive. *Philadelphia v. Thomas*, 152 Pa. St. 494.

As to the construction of an ordinance prohibiting the placing of goods on sale on footways, see *Philadelphia v. Sheppard*, 158 Pa. St. 347. As to one on repair of street railway tracks and paving, see *McKeesport v. McKeesport Pass. R. Co.*, 158 Pa. St. 447. Compare *Trenton v. Trenton Pass. R. Co.* (N. J. 1893), 27 Atl. Rep. 483.

As to the construction of a municipal grant to a railway to occupy so much of a street "as may be necessary," see *Pennsylvania, etc., R. Co. v. Philadelphia, etc., R. Co.* (Pa. 1893), 27 Atl. Rep. 683.

In *Rhode Island*, "the town councils shall be courts of probate within their respective towns." *Rhode Island Pub. Stat.* (1882), p. 459. They may ordain all regulations "not repugnant to law, which they may deem necessary for the safety of their inhabitants, from fire, firearms, fireworks, explosion of gunpowder from the quantity of, or mode or place of storing the same; to prevent persons standing on any footwalk, doorstep or in any doorway, or riding," etc., thereon to the annoyance of persons in the vicinity; to regulate telegraph wires and their appurtenances; to prevent indecent exposure of bathers; "against breakers of the Sabbath; against habitual drunkenness; to regulate the speed of driving horses and cattle over bridges; respecting the purchase and sale of merchandise or com-

modities within their respective towns and cities; to protect burying grounds from trespassers;" and, generally, all other regulations for the well-ordering of the prudential affairs and police of their respective towns, not repugnant to the constitution, etc.; also to impose penalties for the violation thereof; also to regulate the construction of doors and entrances, etc., and the use of lecture halls, etc., for the public safety; also "the time of closing shops, saloons, and other places of resort in the evening;" also requiring provision of fire-escapes; also to appoint special constables and other officers, to enforce ordinances. They also hold lands and funds for burial purposes; and may grant the right to lay water-pipes in highways, p. 151 *et seq.* A town council may also remove a tax collector, p. 131; fill a vacancy in a school committee, p. 139; make truancy ordinances, p. 154; lay out highways, p. 160; assign to the surveyors divisions for repair of highways and bridges, p. 170; alter water-courses, p. 173; establish sidewalks and gradings, p. 75; maintain guide-posts, p. 179; authorize one landowner to construct a drain across another's land, p. 181; bind out poor children, p. 185; direct the sergeant to remove paupers to their proper town, p. 190; order away persons of bad fame, p. 191; send insane paupers to the state asylum, p. 204; abate nuisances and regulate places for slaughtering, for burials, for manufacture of deleterious articles, for keeping swine, and for vaults and cesspools, p. 210; appoint a health officer, and establish quarantine rules, p. 219; ordain against contagion among cattle, p. 222; appoint registers of births, marriages and deaths, also undertakers, p. 225; license victuallers, p. 228; and pawn-brokers, p. 247; appoint fire marshals, p. 251; regulate as to dogs and damages therefrom, p. 256; appoint bird constables, p. 260; in towns on the sea appoint wreckage commissioners, p. 275; remove illegally located windmills, p. 283; appoint oil inspectors, p. 314; and milk inspectors, p. 317; apply to the railroad commissioners to alter crossings, p. 410; require flagmen, p. 411; examine any suspected possessor of unclaimed estate, p. 493; elect trial justices, p. 519; make juror lists, p. 539; appoint tramp officers, p. 689; elect coroners, p. 707; supervise militia enrollments, p. 744; and provide armories, p. 753. They may prohibit burials in compact parts of the town. *Rhode*

Island Sess. Acts (1884), p. 169. They may appoint liquor commissioners. Sess. Acts (1889), p. 135. They may grant franchises for distributing water or electric lights. Sess. Acts (1891), p. 1.

A town council's contract for a lease cannot, after the lessee has complied with its terms, be ignored by a subsequent council. *Marden v. Champlin*, 17 R. I. 423.

In *South Carolina*, the intendant and wardens may tax plays and shows. *South Carolina* Gen. Stat. (1882), § 1756. The municipal authorities of all incorporated towns and villages are empowered to grant licenses to retail spirituous liquors, § 1736. As to the power of the county commissioners to issue township bonds in aid of railroads, see *South Carolina* Acts (1888), p. 12.

One's remedy against a town council assuming to try him for an alleged violation of an ordinance, is by a writ of prohibition; he cannot recover a fine paid, though the council had no jurisdiction. *McKee v. Anderson*, Rice (S. Car.) 24.

In *Tennessee*, under the act of 1879, inhibiting any municipality from suspending any general statute for running railroads, an ordinance forbidding the necessary blowing of a steam engine is a nullity. *Katzenberger v. Lawo*, 90 Tenn. 235, *distinguishing* *Indiana* Code (1881), § 2178; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188.

Charter authorization to pass ordinances necessary and proper to preserve the health and "comfort" of the town, was held not to import power to impose penalties for breaches of the peace. *Raleigh v. Dougherty*, 3 Humph. (Tenn.) 11; 39 Am. Dec. 149.

A by-law prohibiting the sale of intoxicating liquors without a town license, was held void, as contravening the statute allowing sales under a state license. *Robinson v. Franklin*, 1 Humph. (Tenn.) 156.

As to the power of municipal officers in advertising proposals, see *Public Ledger Co. v. Memphis* (Tenn. 1893), 23 S. W. Rep. 51.

In *Texas*, the board of aldermen of a town controls the streets and other public places, prevents or abates nuisances, establishes markets, "and may do whatever else may be necessary to give effect to the provisions of this chapter," as to taxes, ordinances, pre-

scribing fines, etc. *Texas* Rev. Civ. Stat. (1889), art. 521. The town authorities coöperate with the county commissioners' court in sanitary regulations, art. 4098 a.

An ordinance prohibiting the renting of private property to lewd women, was held unreasonable and void. *Milliken v. Weatherford Council*, 54 Tex. 388.

An ordinance imposing an annual occupation tax upon butchers' establishing private stalls for vending meats within the municipality, was held to contravene to constitutional inhibition against unequal taxation. *Hoefling v. San Antonio*, 85 Tex. 228.

In *Utah*, the governing board is a president and four trustees, elected biennially. *Utah* Comp. L. (1888), § 1820. As to its powers and duties, see the nineteen specifications in section 1824, and amendments thereof. Sess. L. (1890), ch. 54.

In *Vermont*, the powers and duties of the board of selectmen are nearly as multifarious as those of this board in *Massachusetts*, already mentioned. "The selectmen shall have the general supervision of the concerns of the town, and shall cause duties required by law of towns, and not committed to the care of any particular officer, to be duly performed and executed." *Vermont* Rev. L. (1880), § 2692.

Under such statute, it was held by a majority of the court, that the board could not bind the town by a promise to repay to its tax collector the amount of taxes advanced by him, but illegally assessed. *Miles v. Albany*, 59 Vt. 79.

The selectmen cannot bind the town by an order to pay their own claims. *Davenport v. Johnson*, 49 Vt. 403.

Selectmen may, after their term has expired, acknowledge their previous lease of public lands. In their lease of a ministerial lot, the words, "as long as wood grows and water runs or as we the selectmen have a right to lease the same," were held to refer to the statutory limitations of the time. *Lemington v. Stevens*, 48 Vt. 38.

As to the power of the selectmen to appoint highway surveyors, see *Scott v. Mount Tabor*, 48 Vt. 391.

Under the statute requiring the selectmen to "take the most prudent measures," etc., they may procure inoculation, and the town may vote to defray the expense. *Hazen v. Strong*, 2 Vt. 427. Selectmen have no author-

ity *ex officio* to receive moneys of the town and give discharges therefor. *Middlebury v. Rood*, 7 Vt. 125; *Angel v. Pownal*, 3 Vt. 462.

The selectmen may submit to arbitration such claims as they have statutory power to audit and adjust; and the town will be bound by the award. *Dix v. Dommerston*, 19 Vt. 262.

The selectmen may employ counsel in a road case in which the town agent has employed none. *Burton v. Norwich*, 34 Vt. 345. They may settle a suit, though the town has appointed an agent to manage suits as he thinks best. *Cabot v. Britt*, 36 Vt. 349.

Further, as to powers of selectmen, see *Cummings v. Clark*, 15 Vt. 653; *Taft v. Pittsford*, 28 Vt. 286; *Tarbell v. Plymouth*, 39 Vt. 429; *Hartwell v. Newark*, 41 Vt. 337.

As to the liability of selectmen for their acts in *Vermont*, see *infra*, this title, *Officers—Liability*.

Charter authorization of a village to "regulate" victualling houses, was held impliedly to repeal the general law for the town selectmen to license such houses, and to empower the village to license with penalty, etc. *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731.

A municipality cannot impair its license to an electric light company that has expended money on the faith thereof. This imports a vested right not to be interfered with by another company. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377.

In *Virginia*, the mayor and councilmen constitute the council. *Virginia Code* (1887), § 1021. "The word 'council' shall include any body or bodies authorized to make ordinances for the government of a city or town." Ordinances "must not be inconsistent with the constitution and laws of the *United States*, or of this state," § 5, pl. 15 and 16. Among the sanitary and police powers of the council, is that "to prevent the pollution of the water and injuries to the water-works, for which purpose their jurisdiction shall extend to a mile above the same; to provide for the regular building of houses in the town; to make regulations for the purpose of guarding against dangers from accidents from fire; and, on the petition of the owners of not less than two-thirds of the ground included in any square, to prohibit the erection in such square of any

building or of an addition to any building, more than ten feet high, unless the outer walls thereof be made of brick and mortar, or stone and mortar, and provide for the removal of any building or addition erected contrary to such prohibition," § 1038. In an ordinance as to fire limits and building materials, the inhibition, "no person shall erect any building," may apply to the adding of a story to a house. *Carroll v. Lynchburg*, 84 Va. 803.

An ordinance that no person shall open a street without a deposit of such a sum as the committee on streets shall deem sufficient, was held to be *ultra vires*. *Wheat v. Alexandria*, 88 Va. 742.

A municipal council cannot delegate to a committee the power to sell public property. *Beal v. Roanoke* (Va. 1893), 17 S. E. Rep. 738.

In *Washington*, the governing board consists of the mayor and a council of five members elected biennially. *Washington Gen. Stat.* (1891), §§ 662-3. As to the powers of the town council, see the sixteen specifications in § 673.

Where the complaint, under an ordinance punishing vagrancy, states facts that constitute the crime under the general statute defining vagrancy, the conviction will be sustained, although the municipality is not authorized to define the crime. *Spokane v. Williams*, 6 Wash. 376.

As to the validity of an ordinance for impounding cattle running at large, see *Wilson v. Beyers*, 5 Wash. 303.

As to the sufficiency of an ordinance for the purchasing of water-works, see *Seymour v. Tacoma*, 6 Wash. 138.

Further, as to ordinances, see *McBryde v. Montesano*, 7 Wash. 69; *Spokane v. Williams*, 6 Wash. 376; *Spokane v. Robison*, 6 Wash. 547; *Arnott v. Spokane*, 6 Wash. 442; *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521; *Lewis v. Port Angeles*, 7 Wash. 190.

In *West Virginia*, the governing authority is a common council composed of the mayor, recorder, and at least five councilmen. *West Virginia Code* (1891), p. 424, § 13. As to the powers thereof, see the enumeration, p. 426, § 28; p. 435, § 9. See also *Moundsville v. Fountain*, 27 W. Va. 182; *Richards v. Clarkesburg*, 30 W. Va. 491.

In *Wisconsin*, if the county has but one town, the town board of supervisors shall constitute the county board. This does not violate the constitutional requirement of uniformity of government.

Where a municipal charter commits the decision of a matter to the council, and is silent as to the mode of decision, it may be by resolution, and need not be by ordinance.

2. Meetings—Votes.—The requisites of notification and of the conduct of town meetings in the respective *New England* states are much alike.¹

Cathcart v. Comstock, 56 Wis. 590. As to the principal duties of the town board, see § 819. As a board of audit, see § 821. As a drainage board, see § 1364. As a board of health, see § 1411. As to liquor licenses, see § 1548.

A town board cannot discharge a judgment on the treasurer's bond, by allowing additional credits. *Butternut v. O'Malley*, 50 Wis. 329.

Publication of the penalty of violating a village ordinance is not required when imposed by a general statute. *Oak Grove v. Juneau*, 66 Wis. 534.

Charter authorization of a village to submit to a vote the raising of money "for an extraordinary or special purpose," was held to mean only a municipal purpose; not to aid in the construction of a railroad. *Perrin v. New London*, 67 Wis. 416.

As to the validity of an ordinance regulating street parades, see *State v. Dering*, 84 Wis. 585.

An ordinance granting rights to lay pipes in streets, was held properly revoked before the acceptance of the grant; and the village was enjoined from laying them. *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475.

A charter requirement that the municipality shall build and keep in repair the sidewalks, and the lot owners pay the cost, either in material or labor under supervision of the street commissioner, imports no authority to ordain that abutters shall keep in repair the respective portions. *Woodard v. Boscobel*, 84 Wis. 226.

In *Wyoming*, the town council consists of a mayor and four councilmen, elected annually. Vacancies are filled by the council. *Wyoming Rev. Stat.* (1887), § 458; Amendment, Sess. L. (1888), ch. 43, § 1. As to the powers thereof, see the seven specifications in § 7; also the twenty-nine specifications in *Wyoming Rev. Stat.* (1887), § 468; *Atchison v. DeKay*, 148 U. S. 591, citing *State v. Jersey City*, 27 N. J. L. 493; *State v. Passaic*, 44 N. J. L. 171; *Merchants' Union Barb Wire Co. v. Chicago*, etc., R. Co., 70 Iowa 105;

Sower v. Philadelphia, 35 Pa. St. 231; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *First Municipality v. Cutting*, 4 La. Ann. 335; *Green Bay v. Brauns*, 50 Wis. 204.

But if the charter requires a thing to be done by ordinance, it cannot be done by a resolution. *Newman v. Emporia*, 32 Kan. 458.

1. Compare with the *Massachusetts* provisions immediately succeeding *Connecticut Gen. Stat.* (1888), § 31 *et seq.*; *Maine Rev. Stat.* (1883), p. 78; *New Hampshire Pub. Stat.* (1891), p. 146 *et seq.*; *Rhode Island Pub. Stat.* (1882), p. 106, § 12; *Vermont Rev. Laws* (1880), § 2684 *et seq.*

In *Massachusetts*, every male citizen twenty-one years old (except paupers, wards, and persons unable to read), residents within the commonwealth one year, and within the town six months next preceding the meeting, and having paid taxes within two years, may vote thereat on all town affairs; also "women duly qualified and assessed, may vote for members of school committees." "Every town meeting shall be held in pursuance of a warrant under the hands of the selectmen, directed to the constables, or to some other persons appointed by the selectmen for that purpose, who shall forthwith notify," etc. "The warrant shall express the time and place of the meeting and the subjects to be there acted upon; the selectmen shall insert therein all subjects which may, in writing, be requested of them by ten or more voters of the town, and nothing acted upon shall have a legal operation, unless the subject-matter thereof is contained in the warrant." *Massachusetts Pub. Stat.* (1882), p. 232.

In *Reed v. Acton*, 117 Mass. 390, the court, by Morton, J., said: "Articles in warrants must often be, from the nature of the case, general in their description of the subject-matter." And it was held therein that the warrant for a prior adjourned meeting may be referred to in authorization of action. Compare *Belfast*, etc., R. Co. v. *Brooks*, 60 Me. 568. An article, "to hear the report

of any committee heretofore chosen, and to pass any vote in relation to the same," was held sufficient to enable the meeting to vote sums recommended by a committee appointed at a former meeting, the warrant for which fully set forth the business to be brought before it. *Fuller v. Groton*, 11 Gray (Mass.) 340. *Compare Rand v. Wilder*, 11 Cush. (Mass.) 294. But an article, "to choose a committee, or to hear and act upon the report of any committee the town may think proper when assembled," was held not to authorize the choice of a committee to discontinue a portion of a town way, and set off the land to a private individual. *Wood v. Quincy*, 11 Cush. (Mass.) 487. An article "to see if the town will build a new schoolhouse in District Number Six," followed by a vote "that the selectmen be authorized to build a schoolhouse in District Number Six, if they think it necessary," was held to effect no legal location of the house. *Crosby v. Dracut*, 109 Mass. 206. An article "to see if the town will build a town-house, and raise and appropriate money for the same," was held to authorize a vote to build one from the materials of an old meeting-house given by resolution of its proprietors, and to appoint a committee to take it down, procure a site, and superintend the erection, and a vote to indemnify the committee against any claim of any proprietor of the meeting-house. *Hadsell v. Hancock*, 3 Gray (Mass.) 526. An article, "to take any necessary measures for the support of the families of those who," etc., was held to authorize a vote to pay a certain sum monthly to each citizen of the town who shall enlist in the military service. *Grover v. Pembroke*, 11 Allen (Mass.) 88. An article, "to see what action the town will take relative to collecting the tax on" certain land, "and pass any votes on the same subject that may be deemed proper," followed by a vote to refer the matter to the selectmen with full powers, was held not to authorize them to grant to the owner, in consideration of the tax being paid, permission to use the land for burial purposes. *Woodlawn Cemetery v. Everett*, 118 Mass. 354. The warrant need not name each item of town charges for which money is to be raised. *Westhampton v. Searle*, 127 Mass. 502. An article, "to elect all necessary town officers," and "to raise and appropriate such sums of money as may

be necessary to defray town charges," etc., was held to authorize a vote to invest the tax collector with all the powers which a town treasurer has when appointed collector of taxes. *Sherman v. Torrey*, 99 Mass. 472.

The moderator must cause smokers and liquor-holders to withdraw. *Massachusetts Pub. Stat.* (1882), p. 81, § 64.

A vote appropriating a certain sum "for highways," does not empower the selectmen to contract for the construction of a way ordered by the county commissioners, or to pledge the credit of the town therefor. *Bean v. Hyde Park*, 143 Mass. 245. As to the power of the town under an article "to see if the town will discontinue any part of the road recently located from," etc., "or act anything thereon," see *Spaulding v. Nourse*, 143 Mass. 490; as to the effect of different articles for choice of town officers, and a clause, "all of said votes to be on one ballot," see *Com. v. Wentworth*, 145 Mass. 50.

A town may, before any rights of third parties have intervened, rescind a vote. *Withington v. Harvard*, 8 Cush. (Mass.) 68. *Compare Brown v. Winterport*, 79 Me. 305.

Omission to comply with the statute as to the use of the check-list, was held to invalidate an election of the selectmen, beyond remedy by adjourned meeting. *Atty. Gen'l v. Simonds*, 111 Mass. 256.

A town clerk's record of a town meeting, as amended by himself, cannot be controlled by parol evidence. *Halleck v. Boylston*, 117 Mass. 469.

At whose cost a town way was made, is irrelevant to the question of its convenience or necessity; hence a vote of approval was held not to be invalidated by the town's knowledge of individual contribution thereto. *Copeland v. Packard*, 16 Pick. (Mass.) 217.

In order to bind a town, by purchase made by a part of a committee, the authorization must be in explicit language. A vote to raise a sum "for the purpose of erecting a high-school building," was held not to import power to contract for land for the site. *Marsh v. Dedham*, 137 Mass. 235.

As to requisites for the amendment of an invalid town vote, see *Judd v. Thompson*, 125 Mass. 553.

A town vote of "liberty to erect a grist mill on," etc., "with the use of said stream," accepted by the grantee, he to keep the bridge and highway in repair, was construed not to be a grant

of land; the town's ownership not being proven. *Hadley v. Hadley Mfg. Co.*, 4 Gray (Mass.) 140.

The fact that after the votes for the town officers of Montague had been cast, but before the result was announced, the moderator and clerk resigned, was held not to terminate the authority of the tellers, and one appointed clerk by the selectmen to be a clerk *de facto*. *Atty. Gen'l v. Crocker*, 138 Mass. 214.

In *Maine*, the requirement as to the warrant, is similar to that of the *Massachusetts* statute. See *Maine Rev. Stat.* (1883), p. 78. The notice of the meeting need not mention a public station authorizing the proposed vote; *e. g.*, in aid of a railroad. *Canton v. Smith*, 65 Me. 203. As to what is or is not an "unreasonable refusal" of the selectmen to call the meeting, see *Southard v. Bradford*, 53 Me. 389. A town by-law requiring three months' notice of the meeting, was held unreasonable and void. *Jones v. Sanford*, 66 Me. 585. The meeting must be at the place named in the warrant. *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517. A valid vote may be taken in the open air near the building at which the warrant called the meeting, upon a unanimous consent thereto, if the room be too crowded to take an accurate division vote within. *Brown v. Winterport*, 79 Me. 305. A call for a meeting "at" a schoolhouse, means within its walls. An action after a hasty out-door meeting adjourned to a store a mile distant, without notification left behind, was held invalid. *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517. For divers cases illustrating the rule that the warrant need notify of the subject-matter only with reasonable certainty, see *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568; *Ford v. Clough*, 8 Me. 334; 23 Am. Dec. 513; *Davenport v. Hallowell*, 10 Me. 317; *State v. Beeman*, 35 Me. 242; *Canton v. Smith*, 65 Me. 203; *Brown v. Winterport*, 79 Me. 305. Action of a meeting was held void for want of a specific article in the warrant. *Cornish v. Pease*, 19 Me. 184; *Barker v. Dixmont*, 53 Me. 575. An article to raise money for certain purposes is not exhausted by a single vote raising a certain sum. *Farrar v. Perley*, 7 Me. 404. An article "to see if the town will pay D. a certain sum which was actually reimbursed to the town for his enlisting," was held not to

authorize a vote "to pay a compensation to D. of \$400 in satisfaction of services he claims to have rendered the town for enlisting," it appearing that the town had not received any reimbursement on that account. *Drisko v. Columbia*, 75 Me. 73. The return must show that the warrant was posted at proper places. *Brown v. Witham*, 51 Me. 29; *Clark v. Wardwell*, 55 Me. 61; *Hamilton v. Phippsburg*, 55 Me. 193; *Allen v. Archer*, 49 Me. 346; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Tuttle v. Cary*, 7 Me. 426. It must show posting, not merely in a public, but in a "public and conspicuous" place. *Bearce v. Fossett*, 34 Me. 575. The return must show the sign manual of the constable—not a dictated signature. *Chapman v. Limerick*, 56 Me. 390. That the return bore date on the day of the meeting, was held not fatal. *Bucksport v. Spofford*, 12 Me. 487. As to the requisites of the statutory "two-thirds vote," see *Portland, etc., R. Co. v. Hartford*, 58 Me. 23; *Belfast, etc., R. Co. v. Unity*, 62 Me. 148; *Portland, etc., R. Co. v. Standish*, 65 Me. 63. A railroad-aid meeting under the statute requiring a two-thirds vote, may adjourn by a majority vote and the adjourned meeting be a continuance. *Canton v. Smith*, 65 Me. 203. A town vote ratifying a loan to the selectmen, cannot be rescinded at a subsequent meeting. *Brown v. Winterport*, 79 Me. 305. A vote to ratify the proceedings of a prior illegal meeting extends only to the adoption therein precisely indicated. *Hamilton v. Phippsburg*, 55 Me. 193. Proceedings of town meetings must be construed liberally. *Keller v. Savage*, 17 Me. 444. A town vote authorizing a sale, was held to import power to execute a deed. *Nobleboro v. Clark*, 68 Me. 87; 28 Am. Rep. 22.

In *New Hampshire*, the requirements as to the "warrant" are very similar to those of the *Maine* statute. See *New Hampshire Pub. Stat.* (1891), p. 146. Further, as to the requisites of definiteness therein, see *Pillsbury v. Danforth*, 56 N. H. 272.

A warning for a vote on passage of a by-law to restrain the speed of driving over bridges, was held substantially to comply with the statute thereon; any phraseology is sufficient that clearly indicates the object. *Lisbon v. Clark*, 18 N. H. 234.

Under an article, "to see if the town

will alter the boundaries of any of the school districts," two districts may be united. *Converse v. Porter*, 45 N. H. 395. But an article pertaining only to redistricting would not authorize a vote to abolish a school-district system. *Child v. Colburn*, 54 N. H. 71. Under an article to raise money for the annual expenditures, each sum and object need not be specified in the voting. *Tucker v. Aiken*, 7 N. H. 113. A vote to pay a bounty for future enlistments was held valid; but not valid, a vote "to pay those who have enlisted since the date of the warrant." *Shackford v. Newington*, 46 N. H. 415.

In the conduct, voting, etc., towns may adopt the general election laws for town meetings. *New Hampshire Pub. Stat.* (1891), p. 116. One's pecuniary interest in the subject-matter—*e. g.*, election of a town agent to manage a suit brought by the town against him—does not disqualify him from voting thereon. *Dorchester v. Youngman*, 60 N. H. 385.

A court may allow the record of a town meeting to be amended by the officer who made it, even after he has ceased to hold the office. *Gibson v. Bailey*, 9 N. H. 168; *Pierce v. Richardson*, 37 N. H. 306. Where only a few years have elapsed since the meeting was held, and it does not appear that the record thereof might not be amended if the truth would warrant it, the sufficiency of the posting and proceedings will not be presumed. *Davis v. Robertson*, 9 N. H. 524.

In *Rhode Island*, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Rhode Island Pub. Stat.* (1882), p. 106. But notice by the clerk was held to be legal, in the absence of proof of a by-law, under *Rhode Island Pub. Stat.* (1882), ch. 35, § 9, prescribing other methods. *Marden v. Champlin*, 17 R. I. 423.

In *Connecticut*, also, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Connecticut Gen. Stat.* (1888), § 31 *et seq.*

In the "warning" no technical nicety is required, *e. g.*, as between the synonyms, "citizen," "inhabitant," "domiciled resident," etc. *Bull v. Warren*, 36 Conn. 83. The clerk's record is *prima facie* evidence of due special warning. *Isbell v. New York*, etc., R. Co., 25 Conn. 556. Specific mention in the warning is required for passing a by-law for a special purpose; *e. g.*, to regulate shell fishery.

Hayden v. Noyes, 5 Conn. 391. As to the burden of proof of due warning, see *Treat v. Middletown*, 8 Conn. 243. As to inadequate time of posting, and the validation of a note thereupon taken from military bounties by the *Connecticut* Act of 1864, see *Stuart v. Warren*, 37 Conn. 228.

The legislature can confirm an unauthorized vote of a town for military enlistment bounties. *Booth v. Woodbury*, 32 Conn. 118. An injunction collusively obtained was held not to preclude a town from ratifying a bounty vote. *Waldo v. Portland*, 33 Conn. 363.

An oral promise in a town meeting by the father and surety of a tax collector that had lost his rate-bill, to pay the expense of any litigation necessary in collecting a new one, if the town would make one out, is held void, being a promise to answer for another's default. *Pratt's Appeal*, 41 Conn. 191.

In *Vermont*, also, the provisions are somewhat similar to those of the *Massachusetts* statute. See *Vermont Rev. Laws* (1880), § 2684 *et seq.*

For divers cases illustrating the rule that the warning need indicate the subject-matter only with such reasonable certainty that no person interested be misled as to the proposition to be submitted, see *Moore v. Beattie*, 33 Vt. 219; *Ovitt v. Chase*, 37 Vt. 196; *Weeks v. Batchelder*, 41 Vt. 317.

As to requirements of the checklist and of posting it, see *Willard v. Pike*, 59 Vt. 202; *Wilson v. Wheeler*, 55 Vt. 446.

A vote may be rescinded before anything is done thereunder or rights of third parties have attached. *Estey v. Starr*, 56 Vt. 690.

After the due announcement and recording of a tie vote on the question of adopting the town school system, a majority vote was held void. *State v. Adams*, 58 Vt. 694.

A vote to pay a soldier a bounty in consideration of past enlistment and application on the town's quota, is binding, and its legal effects cannot be defeated by a rescission at a subsequent meeting. *Seymour v. Marlboro*, 40 Vt. 171; *Cox v. Mount Tabor*, 41 Vt. 28; *Haven v. Ludlow*, 41 Vt. 418; *Pottle v. Maidstone*, 39 Vt. 70; *Stiles v. Danville*, 42 Vt. 282.

A vote offering a bounty to such as should "enlist" before a certain date, was held to apply to one who had already enlisted under expectation there-

In *New York*, *New Jersey*, *Minnesota*, and *Nebraska*, some of the statutory provisions as to the conduct of annual meetings, their functions, etc., are analogous to those of the *New England* states.¹

of, and was afterwards mustered in and credited to the town's quota. *Johnson v. Newfane*, 40 Vt. 9.

Further, as to votes offering soldiers' bounty, see *Livingston v. Albany*, 40 Vt. 666; *Davis v. Windsor*, 46 Vt. 210; *Hartwell v. Newark*, 41 Vt. 337; *Rogers v. Shelburne*, 42 Vt. 550; *Woods v. Springfield*, 43 Vt. 617; *Hatch v. Fairfield*, 43 Vt. 321; *Chase v. Middlesex*, 43 Vt. 679; *Jones v. Waterbury*, 44 Vt. 113.

A town may rescind a vote of a previous meeting, *e. g.*, to subscribe in aid of a railroad, if, meanwhile, nothing has been done thereunder, and no rights of third persons have attached. *Esty v. Starr*, 56 Vt. 690. Where a town cast a tie vote as to the adoption of the town school system, and this was announced by the moderator and recorded by the clerk, it was held on *quo warranto* that the town's authority upon the question was thereby exhausted, and a second vote at the same meeting resulting in a majority for the system, was void. *State v. Adams*, 58 Vt. 694.

1. In *New York*, eight days' notification must be given by the clerk. *Bird. New York Rev. Stat.* (1851), p. 3080, § 31. As to the place, etc., see *Sess. L.* (1892), p. 89. At each annual meeting, the electors determine the number of assessors, constables, and pound-masters to be chosen; elect town officers; raise a lawful sum for support of schools; direct as to the town's suits or controversies, and provide for the expense thereof; direct as to the exercise of the town's corporate powers; provide for the destruction of noxious weeds; maintain pounds; establish compensation of fence-viewers and collectors; regulate as to improvements of the town's lands, the maintenance of fences, and the seasons for animals to go at large; impose penalties on violations of regulations, not exceeding \$12.50 for each offense, and apply the recoveries as most conducive to the interests of the town; provide for support of the poor; provide for erection of lock-ups and a town house; and choose trustees of burying grounds, pp. 3077-9. See also p. 1215, § 24.

The requisites for the calling of a

town meeting are exemplified in *People v. Board of Audit*, 4 Hun (N. Y.) 95.

As to the requisites of notice of a special meeting, purposes, etc., see *Birge v. Berlin Bridge Co.*, 62 Hun (N. Y.) 618.

A town election was held not to be invalidated by the casting of marked ballots. *People v. Bidelman*, 69 Hun (N. Y.) 596.

As to the procedure for holding the annual town meeting, see *New York L.* (1892), ch. 569, § 10 (*Am. G. L. ch.* 20), p. 2229. As to the powers of town meetings, see § 24, p. 2234. As to meetings of the town boards, see § 160, p. 2258.

In the *New York Laws* of 1875, ch. 482, prescribing procedure for town meetings, "town elections" is not synonymous with "town meetings." In each election district, the whole town business is transacted in one town meeting. *People v. Orleans County*, 65 Hun (N. Y.) 481.

A town may by a majority vote establish and maintain a free public library. *New York Sess. L.* (1892), p. 783. Also purchase and order the use of Myers' automatic ballot-cabinets, p. 197. As to procedure for the election of town officers, see *People v. Shaw*, 133 N. Y. 493.

In *New Jersey*, one behaving disorderly in a town meeting is liable to removal, confinement, and fine. *New Jersey Revision* (1877), p. 1193, § 7.

A statute of 1860 provides that the next annual town meeting be held by ballot, etc., p. 1200, § 41.

In case of a tie vote between candidates for a township office, and of failure of the township committee to choose between them (as prescribed by *New Jersey Revision*, p. 1201, § 45), *mandamus* lies to compel them to proceed, and not to rescind their order to post the notices for such meeting. *State v. Boden*, 51 N. J. L., § 114. A township vote to raise a sum for fees not otherwise provided for by law, was held to be obscure and illegal. So also was held illegal, in the absence of express statutory authority, a vote to raise money to repair a certain wharf. *State v. Smith*, 47 N. J. L. 473.

A regular town meeting may order

New England towns in meeting, are equal; as to rights and

payment of a township officer's reasonable expenses in *bona fide* discharge of his duty; *e. g.*, in litigation as to the opening of a highway. *State v. Woolwich Tp.* (N. J. 1893), 27 Atl. Rep. 906.

For requisites of a resolution or vote to indemnify town officers for expenses incurred by them, see *State v. Hammon-ton*, 38 N. J. L. 430.

In *Minnesota*, as to the powers of the town meeting, see the nine specifications in *Minnesota Gen. Stat.* (1891), § 1093.

In *Nebraska*, "In case any town in any county wherein township organization has been or may be adopted, shall refuse or neglect to organize and elect town officers at the time fixed by law, it shall be the duty of the board of supervisors of the county, upon the affidavit of any freeholder, resident of said town, filed in the office of the county clerk, setting forth the facts, to proceed at any regular or special meeting of the board and appoint the necessary town officers for such town." *Nebraska Consol. Stat.* (1891), § 958.

"Special town meetings shall be held when the supervisor, town clerk, and justice of the peace, or any two of them, together with at least twelve freeholders of the town, shall in writing file in the office of the town clerk a statement that a special meeting is necessary to the interests of the town, setting forth the objects of the meeting; and the town clerk, or, in his absence, the supervisor, shall post up notices in five of the most public places." § 963.

The engrafting of the western system of town government upon the eastern, is a very notable feature of section 957, which prescribes the powers of action of a *Nebraska* town meeting, viz.: "The electors present at the annual town meeting shall have power: First—To make all orders for the sale, conveyance, regulation or use of the corporate property of the town that may be deemed to be conducive to the interests of its inhabitants. Second—To take all necessary measures, and give directions for the exercise of their corporate power. Third—To provide for the institution, defense, or disposition of suits at law or in equity, in which the town is interested. Fourth—To take such action as shall induce the planting and cultivation of trees along the highways in such towns, and to protect and preserve trees

standing along or on highways. Fifth—To construct and keep in repair public wells, and to regulate the use thereof. Sixth—to prevent the exposure or deposit of offensive or injurious substances within the limits of the town. Seventh—to make such by-laws, rules, and regulations as may be deemed necessary to carry into effect the powers herein granted, and to impose such fines and penalties, not exceeding \$20 for one offense, as shall be deemed proper, except when a fine or penalty is already allowed by law, such fine or penalty to be imposed by any justice of the peace of the town where the offense is committed. Eighth—To direct the raising of money by taxation for the following purposes: 1st. For constructing or repairing roads and bridges within the town to the extent allowed by law. 2d. For the prosecution or defense of suits by or against the town, or in which it is interested. 3d. For any other purpose required by law. 4th. For the purpose of building or repairing bridges over streams dividing said town from any other town. 5th. For the support of the poor within the town; provided that when the county board of any county shall have established a poor-house under any statute law of the state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings, except sufficient to provide temporary relief. 6th. For the compensation of town officers at the rate allowed by law, and when no rate is fixed, for such amount as the electors may direct. Ninth—To guard against the destruction of property in said town by prairie fire. Tenth—To restrain, regulate, or prohibit the running at large of cattle, horses, mules, asses, swine, sheep, and goats, and determine when such animals may go at large, if at all; provided that all votes thereupon shall be by ballot. Eleventh—To authorize the distraining, impounding, and sale of cattle, horses, mules, asses, sheep, goats, and swine for penalties incurred, and costs proceedings; provided that the owner of such animals shall have the right to redeem the same from the purchaser thereof at any time within one month from the day of sale, by paying the amount of the purchaser's bid, with reasonable cost for their keeping, and

powers of action, those whose charters antedate the constitution have no reserved sovereignty.¹

In the other states, especially those in which the county is the principal unit, the town meeting is little else than an election.²

interest at the rate of seven per cent. per annum," § 957.

1. In *Bennington v. Park*, 50 Vt. 178—in holding the town to be estopped to deny the validity of its bonds issued (without meeting) upon a certificate of assent to railroad aid, under the *Vermont Act of 1867* therefor—the court, by Powers, J., said: "The suggestion that towns in *Vermont*, especially *Bennington* and her sister towns, whose charters antedate the formation of the constitution, have certain chartered or natural rights which were never surrendered in the delegation of sovereignty to the state government, and which exist as a sort of civil birthright in *New England* society, among which is the inalienable and invaluable right of deliberating upon and discussing in town meeting all questions affecting town interests—advances a new theory of political rights never before evolved in the study of constitutional law. . . . They hold town meetings 'to discuss and deliberate upon questions affecting town interests,' not in virtue of any inherent right, but because the statute has provided that they shall hold such meetings. . . . Those old towns held town meetings, it is true; but those meetings were quite different in their character and purposes from meetings held by towns for municipal ends. They were meetings generally held for consultation upon measures of policy, not affecting towns in their local interests, but concerning the public welfare. They partook largely of the character of 'provisional parliaments,' convened for the purpose of devising means for the public safety while the settlers were preparing the way for some form of organized government. The men of those towns were the framers of the constitution; in it they . . . delegated to the legislative department the power 'to constitute towns,' and, if such new towns were to enjoy less privileges, or stand in any different subordination to the state government than the existing towns, it is remarkable that no mention of such difference is made in the constitution itself."

2. See ELECTIONS, vol. 6, p. 255;

MUNICIPAL CORPORATIONS, vol. 15, p. 1098. See also *infra*, this title, *Officers — Elections*; *Alabama Code* (1886), § 352 *et seq.*; *Arizona Rev. Stat.* (1887), § 160; *Arkansas Dig. Stat.* (1884), §§ 791, 2652 *et seq.*, 4109; *California Pol. Code* (1885), § 4109; *Colorado Stat.* (1891), § 4475; *Dakota Comp. Laws* (1887), § 1032 *et seq.*; *Delaware Laws* (1874), pp. 3, 60, 119; *Florida Rev. Stat.* (1892), § 661; *Georgia Code* (1882), § 778 *et seq.*; *Idaho Rev. Stat.* (1887), §§ 2232, 2246; *Illinois Rev. Stat.* (1891), p. 1497; *Cottonwood Tp. Board of Auditors v. People*, 38 Ill. App. 239; *Indiana Stat.* (1888), § 3305 *et seq.*; *McClain's Iowa Code* (1888), § 573 *et seq.*; *Kansas Gen. Stat.* (1889), § 7064 *et seq.*; *Kentucky Gen. Stat.* (1887), p. 506 *et seq.*; *Louisiana Rev. Stat.* (1876), p. 358 *et seq.*; *Maryland Pub. Gen. Laws* (1888), p. 618 *et seq.*; *Michigan Gen. Stat.* (1882), § 677; *Smith v. Chittenden*, 16 Mich. 152; *Mississippi Code* (1892), § 3028 *et seq.*; *Missouri Rev. Stat.* (1889), § 8440; *Montana Comp. Stat.* (1887), p. 678, § 316; *Nevada Gen. Stat.* (1885), § 1524 *et seq.*; *North Carolina Code* (1883), 3787; *Ohio Rev. Stat.* (1890), § 1448; *B. P. Pennsylvania Dig. L.*, p. 674; *Tennessee Code* (1884), § 1630 *et seq.*; *Texas Rev. Civ. Stat.* (1889), art. 515, *et seq.*; *Utah Comp. L.* (1888), § 1822; *Virginia Code* (1887), § 1023 *et seq.*; *Washington Gen. Stat.* (1891), § 663; *West Virginia Code* (1891), p. 425; *Wisconsin Annot. Stat.* (1889), § 782 *et seq.*; *State v. Waterbury*, 79 Wis. 207; *Wisconsin Cent. R. Co. v. Ashland County*, 81 Wis. 1; *McVichie v. Knight*, 82 Wis. 157; *Wyoming Sess. L.* (1890), p. 119.

In the *Dakotas*, the authorization (*Dakota Comp. L.*, § 716) of the town electors to vote to raise money to repair roads and bridges, was held not to import power to ratify an appropriation by the supervisors of ordinary town funds therefor. *Aldrich v. Collins* (S. Dak. 1892), 52 N. W. Rep. 854.

Under the *Illinois Act of 1867*, authorizing a town to subscribe to stock of a railroad company, "a majority of the legal voters of any township," is held to mean a majority of those voting, although those voting on both

V. POWERS AND PRIVILEGES.—The authority of a town, or civil township, as distinguished from a specially chartered municipal corporation, is only such as is prescribed by usage and general statute.¹

sides are a minority of all the legal voters of the township. *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644. Compare *Reiger v. Beaufort*, 70 N. Car. 319.

Upon loss of the record book, a town's vote—*e. g.*, to borrow money and issue bonds—may be proved by two witnesses. *Lemont v. Singer, etc.*, *Stone Co.*, 98 Ill. 94.

In *Iowa*, a member of a town committee appointed to work up the voting in another township for subscription to a railroad, was afterwards employed by the railroad company to do the same thing in its behalf, and offered to pay voters fifty per cent. for the certificates of taxes paid by them. It was held that the tax so voted was void. *Chicago, etc., R. Co. v. Shea*, 67 *Iowa* 728.

In *Kansas*, a township vote appropriating more than enough to pay certain railroad bonds, was held to be void only as to the excess. *Turner v. Woodson County*, 27 *Kan.* 314.

The voters of a town, city or justice's precinct, may repeal the operation of a local option law within its limits, although adopted by the county. *Whisenhunt v. State*, 18 *Tex. App.* 491; *Woodlief v. State*, 21 *Tex. App.* 412.

In *Hubbard v. Williamstown*, 66 *Wis.* 551, at an annual town meeting a resolution was passed authorizing the supervisors "to use their own judgment" in repairing the abutments of a bridge, or removing it to another place. Afterwards, at a special town meeting, an offer of the owners of the abutments to sell to the town was accepted, and a written contract for the sale was afterwards made between the owners and the supervisors, wherein it was recited that it was made pursuant to the action of such special meeting. The proceedings of this special meeting were invalid because of insufficient notice of the same. The supervisors procured a bridge to be built upon the abutments, and town orders were issued to pay the builders. These facts were reported to, and approved at, the next annual town meeting. In an action against the town on the contract for the sale of the abutments, it was held, that the resolution adopted at the first annual meeting did not authorize the purchase; that the contract, being

based solely on the invalid action of the special meeting, was itself invalid; and that there was no ratification by the town of the contract.

The requirement in *Wisconsin Rev. Stat.*, § 789, that the clerk record the request for a special town meeting, is merely discretionary; his omission to do so does not invalidate the proceedings. *State v. Decatur*, 58 *Wis.* 291.

Under *Wisconsin Rev. Stat.*, § 776, a sum may, with notice, be voted to settle a claim for the support of a pauper. *Tuttle v. Weston*, 59 *Wis.* 151.

An accepted town vote in aid of a railroad, was held irrevocable, and not affected by an amendment of the state constitution in *Bound v. Wisconsin Cent. R. Co.*, 45 *Wis.* 543.

In the absence of statutory direction for the procedure of a town meeting, the general rules of parliamentary law, so far as applicable, govern. So held, as to the ordering of a meeting for the election of a town treasurer. *State v. Davidson*, 32 *Wis.* 114. Further, as to town meetings, see *State v. Doyle*, 84 *Wis.* 678.

1. *Seele v. Deering*, 79 *Me.* 346; *Rumford School Dist. v. Wood*, 13 *Mass.* 193; *Shronk v. Penn Tp.*, 3 *Rawle (Pa.)* 347; *Hopple v. Brown Tp.*, 13 *Ohio St.* 311; *Booth v. Woodbury*, 32 *Conn.* 118; *Baldwin v. North Braintree*, 32 *Conn.* 47; *Webster v. Harwinton*, 32 *Conn.* 131; *Christie v. Malden*, 23 *W. Va.* 667; *Ravenswood v. Flemings*, 22 *W. Va.* 52; *Hooper v. Emery*, 14 *Me.* 375.

In *Anthony v. Adams*, 1 *Met. (Mass.)* 284, the court, by Shaw, C. J., said: "A town, in its corporate capacity, is not bound, even by the express vote of a majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which they are incorporated."

As to the taxing power, assessments for local improvements, etc., see *TAXATION*, vol. 25, p. 5.

As to the power to take land, etc., see *EMINENT DOMAIN*, vol. 6, p. 517.

As to representative powers, agents, ordinances, etc., see *supra*, this title, *Governing Bodies*; *infra*, *Officers—Powers and Duties*.

The authority so conferred or acquired is to be exercised solely for the purpose for which the town is created.¹

Under authority to make appropriations for the necessary charges arising against the town, money may be expended for purposes which will look to the safety and convenience of the citizens;² under such a provision, a town may make appropria-

As to town bonds, see *infra*, this title, *Duties and Liabilities—Upon Contracts—Town Bonds*.

A judgment against a town decided by the supreme court not to be constitutionally incorporated, is a nullity. *Colton v. Rossi*, 9 Cal. 595.

A town cannot do indirectly what it has no power to do directly. It cannot abate a tax, nor excuse a collector from collecting it, nor compensate a delinquent town officer for loss from his neglect of duty. *Thorndike v. Camden*, 82 Me. 39.

Charter Rights in Conflict with Previous Statute.—A provision in a town charter will prevail over an inconsistent one in an earlier general law. *Bracket v. People*, 72 Ill. 573. In *Re Snell*, 58 Vt. 207, a charter authorizing the suppression of gaming was held to repeal by implication a statute authorizing the selectmen to permit or forbid the use of billiard tables.

But the powers of the state and county courts are not divested by the act incorporating a town, unless expressly so declared. *Baldwin v. Green*, 10 Mo. 410.

1. *Stetson v. Kempton*, 13 Mass. 272. In *Parsons v. Goshen*, 11 Pick. (Mass.) 396, *Wilde, J.*, said: "A town, in its corporate capacity, will not be bound even by the expressed vote of the majority, to the performance of contracts or other legal duties, not within the scope of the objects and purposes to which they are incorporated."

A civil township cannot make a contract for the benefit of school property. *Jackson Tp. v. Barnes*, 55 Ind. 136.

A town cannot raise a fund towards keeping a private cemetery in repair and decorating graves of certain individuals, even though it may avail itself of a conditional bequest. *Luques v. Dresden*, 77 Me. 186.

A town has no power to seize a vessel in quarantine, and convert it into a hospital. *Mitchell v. Rockland*, 45 Me. 496.

2. *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

Under such a general power it has been held that a town may compensate a committee appointed to execute its statutory powers in procuring water supply, *Arlington v. Pierce*, 122 Mass. 270; may employ and pay agents and counsel to suppress illegal sales of liquor, *Dunn v. Framingham*, 132 Mass. 436; may indemnify an officer for liability incurred while acting in excess of his duty; *e. g.*, a highway surveyor's encroachment in draining a roadway, *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; 29 Am. Dec. 23; may subscribe for the track of a railroad corporation, and become an associate in its formation, *Kittredge v. North Brookfield*, 138 Mass. 286; but cannot appropriate money to pay expenses incurred before incorporation in procuring its charter, *Frost v. Belmont*, 6 Allen (Mass.) 152; or pay the expenses of a committee directed by vote thereof to petition the legislature for annexation to another town, *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; or expenses incurred in opposing such annexation, *Coolidge v. Brookline*, 114 Mass. 592; *Westbrook v. Deering*, 63 Me. 231. But see *Mass. St. 1889, ch. 380*; *Connolly v. Beverly*, 151 Mass. 437; or expenses of a committee to procure the passage of an unconstitutional act, *Mead v. Acton*, 139 Mass. 341.

One town cannot raise money to build or to repair a bridge in another. *Concord v. Boscawen*, 17 N. H. 465.

A town may appoint a special collector of taxes necessary to pay a judgment against the town. *Webb v. Beaufort*, 88 N. Car. 496.

A town may appropriate a reasonable amount to employ a counsel to defend its officers sued for their official *bona fide* acts. *Roper v. Laurinberg*, 90 N. Car. 427; *Cullen v. Carthage*, 103 Ind. 196.

A town, in accepting testamentary provision for a public library, cannot bind itself to expend therein more than is allowed by the statute therefor. *Drury v. Natick*, 10 Allen (Mass.) 169.

A town's contract to allow a dramatic company the use of its town-

tions for, and erect buildings for, governmental purposes and purposes consistent with its creation, such as school buildings, when created for school purposes.¹ The power to issue commercial paper is not to be conceded unless by virtue of express legislation or necessary implication.² Unless expressly authorized by statute to do so,³ a town cannot vote bounties for military enlistments.⁴

Among the powers usually conferred upon towns and townships, is the general power of internal regulation,⁵ the power

house for six years, when not wanted for town purposes, in consideration of money to be expended in enlarging and repairs, was held not *ultra vires*. *Jones v. Sanford*, 66 Me. 585.

The contract of an incorporated town for the construction of a levee is *ultra vires* and void. The town is not stopped by having permitted and accepted the work. *Newport v. Batesville, etc.*, R. Co. (Ark. 1893), 24 S. W. Rep. 427.

A state statute forbidding a town to borrow money save on petition, etc., does not apply to the purchase of articles of necessity; *e. g.*, a reversible road-scraper. *Fowler v. F. C. Austin Mfg. Co.*, 5 Ind. App. 489.

Private Enterprise.—The legislature cannot constitutionally authorize towns to loan their credit to such persons as, in consideration thereof, will engage therein in manufacturing for their private emolument. *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185.

Bridges.—A town's contract to build a bridge is not, in the statutory sense, "necessary to the exercise of its corporate or administrative powers," and can only be authorized by express legislation. *Donnelly v. Ossining*, 18 Hun (N. Y.) 352; *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477.

A town has no power to accept the *Connecticut* portion of a bridge lying partly in another state and built by private subscription. *Abendroth v. Greenwich*, 29 Conn. 356.

1. *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Bates v. Bassett*, 60 Vt. 530.

The erection of a town-house is one of the "necessary charges therein," and imports, as incidental to the power, discretionary right to make additional compensation to a subcontractor. *Friend v. Gilbert*, 108 Mass. 408.

Under special authority "to prevent and extinguish fires" and, in general, to provide a suitable place for town business, a town may erect a fire-engine

house and provide for a public hall over the engine-room. *Clarke v. Brookfield*, 81 Mo. 503; 51 Am. Rep. 243.

A town may, within reasonable limits, judge for itself of the architecture. It cannot, without special statute, erect a building for rental. *White v. Stamford*, 37 Conn. 578.

A town erecting a town-house may provide therein for prospective wants, let rooms therein, and have a lock-up thereunder. *French v. Quincy*, 3 Allen (Mass.) 9.

A town may provide for the support of a public clock. *Willard v. Newburyport*, 12 Pick. (Mass.) 227.

But unless expressly authorized to do so towns cannot appropriate money for defense against an invading enemy; nor for a building for purposes of mere amusement, nor for a monument not designed for ornamentation in a populace place. *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145.

2. See MUNICIPAL SECURITIES, vol. 15, p. 1204.

The power to issue commercial paper is foreign to the objects of the creation of the political divisions of counties. Statutory power in a county to erect necessary county buildings, does not authorize the issuance of commercial paper as evidence of, or security for, a debt contracted for constructing them. *Claiborne County v. Brooks*, 111 U. S. 400.

3. *Davis v. Putney*, 43 Vt. 582.

4. *Farr v. Warren*, 98 Mass. 229; *Butler v. Putney*, 43 Vt. 481; *Lough-ton v. Putney*, 43 Vt. 485; *Swift v. Elmer*, 44 Vt. 87; *Cover v. Baytown*, 12 Minn. 124.

5. **Police Regulations.**—(See POLICE POWER, vol. 18, p. 739.)

A statute authorizing towns to make "all by-laws that may be necessary to preserve the peace, good order, and internal police" therein, and to annex penalties, etc., is held not to import power to prohibit selling "strong

to sue and be sued,¹ and to acquire and hold real estate for

beer, ale, or any other intoxicating liquor in a less quantity than twenty gallons." *Com. v. Turner*, 1 Cush. (Mass.) 493.

A statute empowering towns to make such ordinances, not inconsistent with state laws, as are necessary to promote the prosperity and improve the morals of the inhabitants, does not authorize a town council to proscribe a particular class of persons against whom no overt act is charged; *e. g.*, to make it a misdemeanor for a prostitute to be found within the town limits. *Buell v. State*, 45 Ark. 336, citing *Milliken v. Weatherford*, 54 Tex. 388, and *doubting* the *Hagerstown* case, *Shafer v. Mumma*, 17 Md. 331; 79 Am. Dec. 656.

Power to "establish and keep up" a market, does not authorize an ordinance excluding persons from selling elsewhere in market hours. *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789.

A village whose charter authorizes it to prohibit running and soliciting for hotels, may prohibit soliciting even on the solicitor's property. *Niagara Falls v. Salt*, 45 Hun (N. Y.) 41.

Although a statute permits towns to regulate fisheries, a by-law prohibiting other than the town's inhabitants from taking shell-fish, contravenes a common-law right, and is invalid. *Hayden v. Noyes*, 5 Conn. 391. But compare *Rogers v. Jones*, 1 Wend. (N. Y.) 237; 19 Am. Dec. 493. So, also, is invalid a by-law allowing the inhabitants to pasture their cows in the public highways. *Woodruff v. Neal*, 28 Conn. 165.

A town may impound and summarily sell cattle found running at large. *Brophy v. Hyatt*, 10 Colo. 223.

A town may discontinue a town way, but not a landing place, abatement of nuisances whereon is distinctly provided for by statute. *Com. v. Tucker*, 2 Pick. (Mass.) 44.

In *Arkansas*, both the state, as against general statute, and the town, as against ordinance, may punish the offense of carrying concealed weapons. *Van Buren v. Wells*, 53 Ark. 368. So, also, that of selling liquor on Sunday. *Cassidy v. Texarkana*, 53 Ark. 368. A statute authorizing a town to suppress dram-shops, does not import power to prohibit liquor-selling without a license. *Tuck v. Waldron*, 31 Ark. 462.

Within the statute allowing towns to restrain dogs, a dog is "going at

large," if following loose the accompanying person so far as to be beyond his control in preventing mischief. *Com. v. Dow*, 10 Met. (Mass.) 382.

Fire Regulations.—Power to "make regulations for guarding against damage from fires," imports power to ordain fire limits, and to prohibit the erection of wooden buildings therein. *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336.

A town council may remove a wooden building erected contrary to the ordinance inhibiting the same, to prevent fire in a locality. *McKibbin v. Fort Smith*, 35 Ark. 352.

Streets.—A town's omission to pass a general ordinance respecting sidewalks, does not impair its control over the streets; it may still intrust to the road commissioner the responsibility of the details; *e. g.*, laying out a sidewalk across an abutter's lawn. *Bowers v. Barrett*, 85 Me. 382.

Nuisances.—The power given to cities and towns by *Iowa* Code, § 456, to abate nuisances, imports no authority for an ordinance to punish by fine. *Nevada v. Hutchins*, 59 Iowa 506; *Knoxville v. Chicago*, etc., R. Co., 83 Iowa 636.

Inhibition of Power.—An inhibition in a village charter against exercising police power against a certain company for two years, was held not to be a grant, but only a regulation enforceable after two years. *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634.

1. Under the general power to sue and be sued it has been held that a township may sue on a bond given to its road commissioners by name. *Anderson v. Hamilton Tp.*, 25 Pa. St. 75. So, also, on a bond given to its auditors, *Dyer v. Covington Tp.*, 28 Pa. St. 186; *Young v. Machamer*, 1 Pears. (Pa.) 303; and as indorsee; and this, without vote, *Augusta v. Leadbetter*, 16 Me. 45.

A town has no right of action against a fraudulent claimant, to recover money spent to prove the claim groundless. Thus in this suit ("case"), Judge Carpenter remarked that if the town relied on false representations that a horse was injured by a highway defect, it did not investigate them; if it did not investigate them, it did not rely upon them. *Enfield v. Colburn*, 63 N. H. 218.

A town cannot recover over of a wrongdoer whose act has caused a personal injury, without allegation and

corporate purposes.¹ The powers and privileges of towns and townships depend, for the most part, on statutes, and because of these various statutory provisions touching such powers and privileges, special reference must be made to the adjudications in the different states of the Union; for which see note 2.

proof of its primary liability. *Fahey v. Harvard*, 62 Ill. 28.

Any inhabitant of a town is a party to a suit against it, and may appear and defend therein. *Union v. Crawford*, 19 Conn. 331.

Rights of action accruing to a town in its municipal capacity may be joined with those in its parochial capacity. *Alna v. Plumer*, 3 Me. 88.

The Statute of Limitations does not begin to run against the inhabitants of a town until it is incorporated. But the claim of an occupant of a lot therein is ground of compromise with them. *Reiley v. Chouquette*, 18 Mo. 220.

Under the *Massachusetts Act of 1869*, authorizing the Middlesex county commissioners, on approval by the towns, to lay out certain drains, assess benefits, and award damages, they and not the town are the proper party to a suit to enjoin obstruction. *Melrose v. Cutter* (Mass. 1893), 34 N. E. Rep. 695.

Action for Injury to Highway.—A town can recover for the destruction or obstruction of a highway, or for conversion of the material. *Troy v. Cheshire R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Laconia v. Gilman*, 55 N. H. 127.

A town bound to repair a highway, though not strictly the owner, may enforce a covenant originally made with it to keep a portion—*e. g.*, bridge approaches—in repair. *Middlefield v. Church Mills Knitting Co.* (Mass. 1894), 35 N. E. Rep. 780. But see *Fishkill v. Fishkill*, etc., R. Co., 22 Barb. (N. Y.) 634.

But it is held that a town cannot recover of an individual for his injuring a highway, until put to expense in consequence thereof. *Freedom v. Weed*, 40 Me. 383.

A town cannot maintain trespass, *quare clausum fregit*, where the *locus in quo* is a national road, the fee whereof is in the state; the town having only a qualified possession for repairing it. *St. Louis, etc., R. Co. v. Summit*, 3 Ill. App. 155.

Action Against Rioters.—The fact

that a town has, in pursuance of an award, voluntarily paid a citizen for destruction of property in a riot, does not preclude its maintaining an action against the rioters. *Hanover v. Dewey*, 58 N. H. 485.

1. See *Conner v. New Albany*, 1 Blackf. (Ind.) 43; *Booth v. Coventry*, 4 Vt. 297; *Beach v. Haynes*, 12 Vt. 15; *Windham v. Portland*, 4 Mass. 384.

Incorporation vests in a town no title to lands not before granted. *South Hampton v. Fowler*, 52 N. H. 225.

Under the power to acquire and hold real estate, a town may purchase at sheriff's sale, and maintain its title to real estate which has been taken upon execution in its favor. *Corinth v. Locke*, 62 Vt. 411.

The right to purchase land outside the municipality, is held to import the right to extend a sewer outside. *Callon v. Jacksonville* (Ill. 1893), 35 N. E. Rep. 223.

In *Rhode Island*, a town may acquire realty by possession for other than municipal purposes; *e. g.*, for sale or lease for alleviation of town burdens. Otherwise, as to purchasing therefor, as this requires expenditure. *New Shoreham v. Ball*, 14 R. I. 566.

Towns as Riparian Owners.—The rule that an upper riparian owner may reasonably use the water, though to the injury of the lower, was applied, where two villages were the parties in interest. *Barry Water Co. v. Carnes*, 65 Vt. 626, following *Spence v. McDonough*, 77 Iowa 46; *Evans v. Merriweather*, 4 Ill. 492; 38 Am. Dec. 106.

2. In *Connecticut*, a town may establish a public square, maintain a fire department, make by-laws as to sidewalks, the taking of birds, and fisheries, offer a bounty for killing certain wild animals, provide for the observance of Decoration Day, erect a soldiers' monument, issue and reissue bonds to pay indebtedness, maintain a free public library, erect sign-posts, and provide a fire-proof structure for records. *Connecticut Gen. Stat.* (1888), § 132 *et seq.*

In the *Dakotas*, for the general provisions as to towns, see *Dakota Comp.*

L. (1887), § 1022 *et seq.* See also § 716, upon powers of the electors in meeting, as construed in *Aldrich v. Collins* (S. Dak. 1892), 52 N. W. Rep. 854.

In *South Dakota*, mere general language granting the power to condemn, does not include power to appropriate land already subjected to a public use, where the proposed use will interfere with the former. *Winona, etc., R. Co. v. Watertown* (S. Dak. 1893), 56 N. W. Rep. 1077.

In *Iowa*, the powers of towns are very similar to those of the *Dakotas*. McClain's *Iowa Code* (1888), § 615 *et seq.*

The power of a municipality to dispose of a site or other property, does not import authority to discharge a debtor, *Washington Dist. Tp. v. Thomas*, 59 Iowa 50; nor to convey real estate in consideration of the location of the county seat. *Brockman v. Creston*, 79 Iowa 587.

A township cannot sue. On demurrer the clerk may be substituted. *Wells v. Stomback*, 59 Iowa 376.

A township was held entitled to recover upon a note given for a loan of its funds, that had been lawfully made by its directors. *Pleasant Valley v. Calvin*, 59 Iowa 189.

In *Kansas*, each organized township is a body politic and corporate; it may contract, may sue and be sued, etc. *Kansas Gen. Stat.* (1889), § 7061.

A township may contract for the building of a bridge conjointly with the county. *Uhl v. Douglass Tp.*, 27 Kan. 80.

In *Illinois*, a town has power "to sue and be sued, to acquire by purchase, gift, or devise, and to hold property, both real and personal, for the use of its inhabitants, and again to sell and convey the same; to make all such contracts as may be necessary in the exercise of the powers of the town." *Illinois Rev. Stat.* (1891), p. 1493b, § 39.

The trustees of schools are a *quasi* corporation wholly as to schools of the township; it cannot, through them, become a stockholder in a railway corporation, with a power to issue bonds, etc. *People v. Dupuyt*, 71 Ill. 651.

A town may order its attorney to assist the state's attorney in conducting prosecutions in which, through its right to receive the fine, or otherwise, it has a special interest; and it may pay him therefor. *People v. Warren*, 14 Ill. App. 296.

In *Massachusetts*, *Maine*, and *New Hampshire*, the powers and privileges

of towns and townships are very similar.

A town may grant to a private individual the right to regulate the flow of a stream, by dams and sluices. *Berry v. Raddin*, 11 Allen (Mass.) 577.

A town grant of land for a meeting-house, is held to include sufficient area for tying the parishoners' horses. *First Parish v. Middlesex County*, 7 Gray (Mass.) 106.

A town grant, to a private person, of outlet waters of a certain "great pond" for mill purposes for the town's needs, will be construed most liberally in favor of the grantee. *Berry v. Raddin*, 11 Allen (Mass.) 577. Towns may, by reasonable by-laws, regulate the use of great ponds; *e. g.*, as to ice-cutting. *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158.

The legislature cannot authorize towns and cities to buy fuel to sell to inhabitants, *Justices' Opinion*, 155 Mass. 598; nor can a town under any existing *Massachusetts* statute, erect and maintain works for lighting streets by electricity or thereby distributing light to the inhabitants, *Spaulding v. Peabody*, 153 Mass. 129. But see *Justice's Opinion*, 150 Mass. 592.

It was early held that a town might remove its house of worship from one place to another, though the pews be the property of individuals. *Fisher v. Glover*, 4 N. H. 180.

A statute authorizing highway surveyors to "remove" whatever obstructs a highway, imports no power to maintain a bill in equity where no special damage is sustained; the town's proper remedy is by indictment or by information by the attorney-general. *Needham v. New York, etc., R. Co.*, 152 Mass. 61.

A town cannot, without a corporate vote, acquire rights in land by its officers having long taken gravel therefrom under a claim of right in the town. *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42.

A town may acquire by prescription a private right of way as appurtenant to a burial ground owned by the town. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325.

Eminent Domain.—As to a town's right of eminent domain, see *Trowbridge v. Brookline*, 144 Mass. 139; *Page v. O'Toole*, 144 Mass. 303; *Kenison v. Arlington*, 144 Mass. 456; *White v. Foxborough*, 151 Mass. 28.

In *Missouri*, a town cannot accom-

plish by an order, that which, under its charter, can be done only by an ordinance. So held, as to an ordinance which, without providing for the levy, assumed to allow abutting owners, on petition, to obtain an order for street improvements, to be paid for by special tax bills. *Trenton v. Coyle*, 107 Mo. 193.

Charter power to compel paving, imports power to compel repaving. *McCormack v. Patchin*, 53 Mo. 33; 14 Am. Rep. 440.

In *New Jersey*, the electors in a township meeting may vote money for the support of the poor, repairing pounds, providing roads, destroying noxious wild animals and birds, ascertaining the township lines, prosecuting and defending its common rights, and for other necessary charges and legal objects. *New Jersey Revision* (1877), p. 1194, § 11.

Street boundaries cannot be determined without allowing the abutters to be heard. *Voorhees v. Bound Brook* (N. J. 1893); 26 Atl. Rep. 710.

The authority of a town to contract for a water supply for ten years, was held not to import power to require the company, before laying the pipes, to agree to furnish the water for twenty years at a specified rate. *State v. Harrison*, 46 N. J. L. 79.

In *New York*, each town, as a body corporate, has capacity to sue and be sued; to purchase and hold lands within its own limits, and for the use of its inhabitants, subject to the power of the legislature over such limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers; and to make such orders for the disposition, regulation, or use of its corporate property, as may be deemed conducive to the interests of its inhabitants. *Bird*. *New York Rev. Stat.* (1890), p. 3075, § 1. The law of 1885, ch. 451, authorizing towns to borrow money for bridge purposes, did not affect the town's power in a meeting to raise a tax for road and bridge purposes. Nor did the law of 1886, ch. 259, as to the power of a special meeting to make a bridge appropriation, abolish the limitation as to the amount. *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477. A bequest to a town, to be absolute, must be for some corporate purpose. A bequest "for the benefit of the poor," was held invalid. *Fosdick v. Hempstead*, 125 N. Y. 581.

A town cannot, under 1 *New York Rev. Stat.*, p. 337, receive a bequest to be devoted under certain conditions to the erection of a town hall. Matter of *Underhill's Will*, 6 Dem. (N. Y.) 466.

The provision of *New York Sess. L.* (1891), ch. 164, for the expenditure of surplus moneys by the town authorities, does not apply to funds directed by Sess. L. (1880), ch. 212, and 1883, ch. 458, to purposes which exhaust them. *McKane v. Voorhies*, 19 N. Y. Supp. 141; 64 Hun (N. Y.) 634. A town or village may, by valid by-laws, prescribe limits for the sale of meat. *Bush v. Seabury*, 8 Johns. (N. Y.) 418. A by-law requiring a license from hucksters, grocers, etc., was held to be void, as in restraint of trade. *Dunham v. Rochester*, 5 Cow. (N. Y.) 462. But compare *Thomas v. Mt. Vernon*, 9 Ohio 290.

A street in an unincorporated village is subject to use for the purpose of supplying the inhabitants with water. This imposes no additional burden upon the fee of the street; hence the owners thereof cannot compel a removal of the water-pipes. *Witcher v. Holland Water-Works Co.*, 66 Hun (N. Y.) 619.

Actual acceptance by the municipal authorities, or implied acceptance by the public for due lapse of time, is necessary to a complete dedication of lands for a street. *In re Beach Ave.*, 70 Hun (N. Y.) 351. Posting of a map by the village trustees and working a part of the streets, imports acceptance. *People v. Underhill*, 69 Hun (N. Y.) 86; *People v. Kellogg*, 67 Hun (N. Y.) 546.

See the requisites of procedure under *New York Law* of 1853, ch. 62, to compel a railway company to take a street across its tracks in *People v. New York Cent.*, etc., R. Co., 69 Hun (N. Y.) 166.

In *Ohio*, a civil township is a body corporate, may sue and be sued, hold real estate by devise or deed, or personal property for its benefit for any useful purpose, sell and convey, etc. *Ohio Rev. Stat.* (1890), § 1376.

The State of *Ohio*, in its sovereign character, has reserved no property interest in the streets of a city or town. *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 306.

As to the construction of the "Taylor Law" of 1886, regulating rights and liabilities in local improvements, the front-foot rule, etc., see *Parsons v. Columbus* (Ohio, 1893), 34 N. E. Rep. 677; *Haviland v. Columbus* (Ohio, 1893), 34 N. E. Rep. 679; *Costello v. Wyoming*, 49 Ohio St. 202.

VI. DUTIES AND LIABILITIES—1. In General; Acts of Officers.—The general principles governing the liability of municipal corporations, which have been considered elsewhere in this work,¹ apply to the towns of many states. In the notes will be found many cases showing when, and to what extent, towns are liable for the acts of their officers.²

In *Vermont*, towns in existence when the constitution was formed, have no reserved sovereignty peculiar to themselves. Such town is equally with others estopped to deny the validity of its railroad bonds. Its rights and liabilities, under its action in the modern town meeting, are wholly statutory. *Bennington v. Park*, 50 Vt. 178.

In *Wisconsin*, towns of 2000 inhabitants may establish and maintain a free public library. *Wisconsin Annot. Stat.* (1889), § 931. A statute imposing a penalty for allowing animals to run at large excludes other remedies; and a by-law providing for their impounding and sale is invalid. *Miles v. Chamberlain*, 17 Wis. 446.

A town may get a person enjoined from obstructing a highway; *e. g.*, with logs and lumber. *Neshkoro v. Nest* (Wis. 1893), 55 N. W. Rep. 176. Compare *Eau Claire v. Matzke* (Wis. 1893), 56 N. W. Rep. 874.

As to requisites of proceedings of the town board in establishing a ditch, see *State v. Curtis* (Wis. 1893), 56 N. W. Rep. 475.

As to a town's rights in appropriating the rent of town buildings, see *Beaver Dam v. Frings*, 17 Wis. 398.

1. See *MANDAMUS*, vol. 14, pp. 88, 165; *MUNICIPAL CORPORATIONS*, vol. 15, pp. 1076, 1106; *POOR AND POOR LAWS*, vol. 18, p. 812; *PUBLIC OFFICERS*, vol. 19, p. 510.

2. In *Connecticut*, a town was held not to be bound by an award under a submission made without joint action of all the selectmen. *Haddam v. East Lyme*, 54 Conn. 34. A town was held not liable for damage from an extraordinary flood; its engineer having exercised skill and reasonable care in straightening the channel. *Diamond Match Co. v. New Haven*, 55 Conn. 510. Under the *Connecticut* statute providing that persons authorized to repair highways, may make any water-course for draining into or through any person's land, so far as necessary, a borough was held not liable for damage from acts of its servants, not wanton or negligent. *Bronson v. Wallingford*, 54 Conn. 513. A

person contracting for the building of a schoolhouse, was held chargeable with notice of the town committee's limitation of the sum and of outstanding debts to others thereon. It was immaterial that the town used the house. *Turney v. Bridgeport*, 55 Conn. 412. Statutory imposition of a duty upon a town to pay damages for sheep killed by dogs, does not in law imply any contract of the town to pay therefor without a consideration. *Davis v. Seymour*, 59 Conn. 531. For the requisites of allegation and proof to recover of a town the statutory penalty for failure of its selectmen to erect guide-posts, see *Bronson v. Washington*, 57 Conn. 346. The costs for which a town is eventually liable after committal of a prisoner by a justice of the peace, include only taxes; and not those for his support by the county-jail keeper. *Norwich v. Hyde*, 7 Conn. 528. No recovery can be had of the town for sheep killed by dogs, except the amount of the estimate made by the selectmen under *Connecticut Gen. Stat.*, § 3752. *Van Hoosear v. Wilton*, 62 Conn. 106.

In *Georgia*, a municipality is not liable for an error of judgment of its council in refusing a liquor license, no malice or corruption being shown. *Duke v. Rome*, 20 Ga. 635.

A municipality is not liable for the *ultra vires* acts of its officers; *e. g.*, in excavating a ditch outside the corporate limits. *Loyd v. Columbus*, 90 Ga. 20. A municipality is not liable for torts of its police officers. *McElroy v. Albany*, 65 Ga. 387; 38 Am. Rep. 791; *Wilson v. Macon*, 88 Ga. 455.

The constitutional right of compensation for property taken for public uses, was held not to apply to grain wet by a flood and declared by the municipal authorities to be dangerous to the public health. *Dunbar v. Augusta*, 90 Ga. 390.

In *Illinois*, a town is not liable to a landowner for damages from a highway commissioner's unlawful diversion of a water-course. *Cooney v. Hartland*, 95 Ill. 516. In the absence of

special statutory provision therefor, township and other public involuntary corporations are not liable civilly for neglect of duty. *Elmore v. Drainage Com'rs*, 135 Ill. 269.

One town is not liable to another for the support of a pauper after notification of offer and of the pauper's refusal to remove and be supported. *Fox v. Bristol*, 45 Ill. App. 330.

A charter provision for election of officers on a certain day, was held to be simply directory; failure to elect thereon did not prevent organization of the town. *Coles County v. Allison*, 23 Ill. 437.

The rule that one dealing with a public officer must see whether he is acting within his statutory authority, was applied to a village supervisor's lease of commons in *Tamm v. La-valle*, 92 Ill. 263.

The remedy of an abutter for damages from the highway commissioners' diversion of a stream, is against them individually, not against the town. *Cooney v. Hartland*, 95 Ill. 516.

A town owning the fee of the street, was held not liable to an abutter because of a street-railway company's heightening of the grade, causing an obstruction of his view, under the town's grant and legal authority to construct, etc. *Olney v. Wharf*, 115 Ill. 519; 56 Am. Rep. 178, *quoting* *Murphy v. Chicago*, 29 Ill. 286; 81 Am. Dec. 307, and *distinguishing* *Nevins v. Peoria*, 41 Ill. 507; 89 Am. Dec. 392.

In *Indiana*, a township is not bound by acts of its trustee performed after his successor is lawfully qualified. *Steinback v. State*, 38 Ind. 483. He may be enjoined from contracting debts beyond the limit prescribed in *Indiana* Rev. Stat. (1888), § 6006. *Middleton v. Greeson*, 106 Ind. 18. As to the requisites of practice in suits by or against townships, see *Vogel v. Brown Tp.*, 112 Ind. 317; *Cicero Tp. v. Shirk*, 122 Ind. 572. A town's power under *Indiana* Stat., § 4488, to borrow money for lawful purposes, does not import power to issue negotiable securities, to be sold free from equities that may be set up by the maker. *Merrill v. Monticello*, 138 U. S. 673.

A town was held not to be liable for an arrest by its marshal under an invalid ordinance and without a warrant. *Laurel v. Blue*, 1 Ind. App. 128, *citing* *Dill. on Mun. Corp.* (4th ed.), § 975.

A road supervisor is not such an agent of the township as will render it

liable for damages to abutting owners from the negligent construction of a ditch. *Union Civ. Tp. v. Berryman*, 3 Ind. App. 344. A municipality was held not to be liable for damages to A's house from the fall of a wall of B's partially burnt building across an alley, although the marshal had promised B to take it down if necessary. *Anderson v. East*, 117 Ind. 126.

One cannot recover of a township on a certificate issued by the trustees without consideration; *e. g.*, for school supplies never delivered. *State v. Hawes*, 112 Ind. 328.

The civil town or township, and the school town or township, being distinct corporations, can sue and be sued each in its own corporate name. *Wright v. Stockman*, 59 Ind. 65.

In *Iowa*, a township is a mere subdivision for governmental purposes, and has no corporate powers and liabilities as such. *West Bend v. Munch*, 52 Iowa 132. The name of the proper officer may, by amendment, be substituted for that of the township. *Wells v. Stomback*, 59 Iowa 376.

An incorporated town cannot escape liability for injuries sustained by reason of the unsafe condition of its streets, on the ground that they were put in such condition by the road-district supervisor. *Clark v. Epworth*, 56 Iowa 462.

A town was held not liable for injuries from fireworks, though the discharge was participated in by its officers and a majority of its citizens. *Ball v. Woodbine*, 61 Iowa 83; 47 Am. Rep. 805, *following* *Morrison v. Lawrence*, 98 Mass. 219.

A town was held not liable for the improper location of a ditch which it had authority to construct. *Wicks v. De Witt*, 54 Iowa 130.

In *Kansas*, a township was held liable for the expense of a notice of a special election called by the county commissioners. *Center Tp. v. Gilmore*, 31 Kan 675.

A municipality is not liable for injury to person or property from negligence of its police officers; *e. g.*, the marshal allowing a sham battle resulting in the death of a non-participant from a gun-wad. *Jolly v. Hawesville*, 89 Ky. 279.

The *Maine* Statute (Rev. Stat. (1883), ch. 84, § 30), authorizing executions upon judgments against towns to be issued against inhabitants' goods, does not contravene the constitutional in-

hibition of deprivation of one's property without due process of law. *Eames v. Savage*, 77 Me. 212; 52 Am. Rep. 751.

As to when equity will compel specific performance of a contract by a municipality, see *Gove v. Biddeford*, 85 Me. 393, *citing* *Rendall v. Frey*, 74 Wis. 26; *Horton v. Nashville*, 4 Lea (Tenn.) 39; *Mills v. Brooklyn*, 32 N. Y. 495.

A municipality may transfer to a railroad, a street and culvert, so as not to be liable for a personal injury from a defect thereof. *Lander v. Bath*, 85 Me. 141.

A town is not liable for the misconduct of a public officer in work—*e. g.*, a highway surveyor building a bridge—unless it has directed him therein. *Goddard v. Harpswell*, 84 Me. 499, *citing* *Bulger v. Eden*, 82 Me. 352; *Farrington v. Anson*, 77 Me. 406; *Cobb v. Portland*, 55 Me. 381; 92 Am. Dec. 598; *Mitchell v. Rockland*, 52 Me. 118; *Woodcock v. Calais*, 66 Me. 234; *Small v. Danville*, 51 Me. 359.

As to a town's liability for necessities furnished to sick or indigent persons, see *Kennebunk v. Alfred*, 19 Me. 221; *Brown v. Orland*, 36 Me. 376.

See the requisites of the clerk's notice to the assessors that a fine has been imposed under a conviction on indictment of the town for a defective highway, in *State v. Oxford*, 65 Me. 210.

As to the liability of a town under *Maine* Rev. Stat., ch. 123, to indemnify the owner of property destroyed by a mob, see *Brightman v. Bristol*, 65 Me. 426; 20 Am. Rep. 711.

A town was held not to be liable to its collector for the unauthorized act of its treasurer in levying a distress warrant against him. *Snow v. Brunswick*, 71 Me. 580.

The payee of a promissory note given by the treasurer of a town not authorized by statute to issue negotiable paper, was held not entitled to recover. *Persons v. Monmouth*, 70 Me. 262.

Towns bounded by the center of a highway cannot be jointly indicted for a defect therein. *State v. Thomaston*, 74 Me. 198.

Where one paid a tax a second time to get released from arrest, the town was held not to be liable for the arrest, nor for the money while in the hands of the collector; the taxpayer's remedy was against the collector as a trespasser. *Liberty v. Hurd*, 74 Me. 101.

A town was held not liable to pay

money, for money borrowed without authority by the selectmen, on a town order to pay an outstanding debt of the town. *Lincoln v. Stockton*, 75 Me. 141.

A town was held to remain liable upon a debt, notwithstanding the creditor's acceptance of the note of the town treasurer, believing it to bind the town. *Atkinson v. Minot*, 75 Me. 189.

In *Massachusetts*, in general, to hold a municipality liable for unlawful acts of its officers done *colore officii*, authorization or ratification must be shown. *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157.

Where three non-residents were appointed by the town as a "committee" to designate the location of a proposed meeting-house, it was held that a designation by only two was insufficient to bind the town. *Damon v. Granby*, 2 Pick. (Mass.) 345.

Further, as to the power of a committee to bind the town, see *Keys v. Westford*, 17 Pick. (Mass.) 273; *Hunneeman v. Grafton*, 10 Met. (Mass.) 454; *Upjohn v. Taunton*, 6 Cush. (Mass.) 310.

The selectmen cannot bind a town beyond the express statutory sphere of their official duty. In 1814, British soldiers took possession of Castine, and threatened violence unless their demand for cattle was complied with. An inhabitant, at the request of the selectmen, furnished a yoke of oxen. It was held that the town was not liable. And it was doubted if, even upon a town vote to indemnify him, a tax to pay for the sacrifice would be legal; his demand affecting the inhabitants in their individual, and not in their corporate capacity. *Haliburton v. Frankfort*, 14 Mass. 214.

Further, upon the rule that a town can be bound only within scope of purposes of incorporation, see *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Norton v. Mansfield*, 16 Mass. 48; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Anthony v. Adams*, 1 Met. (Mass.) 284.

The rule of *respondet superior* applied; and a town was held liable for the washing away of an abutter's land through negligence of a servant of the selectmen acting as its agent in replacing a bridge. *Hawks v. Charlemont*, 107 Mass. 414, *distinguishing* *Barney v. Lowell*, 98 Mass. 570.

As to the indictability of a town for a defective highway, see *Com. v. Taunton*, 16 Gray (Mass.) 228.

A town is not liable for the selectmen's omission to draw on the town treasurer, under *Massachusetts* Stat. (1859), ch. 225, for loss of sheep killed by dogs. *Chenery v. Holden*, 16 Gray (Mass.) 125.

An expenditure by a town is legal if the primary object be to subserve a public purpose, although it also involves, as an incident, an expense which, standing alone, would not be lawful; *e. g.*, the fitting up of rooms in a market house for rental. *Spaulding v. Lowell*, 23 Pick. (Mass.) 71. Followed in the Barre town-hall case. *Bates v. Bassett*, 66 Vt. 530.

Acceptance of a report of a town committee appointed to select a site and procure plans and estimates for a schoolhouse, was held not to ratify its doings in procuring services of an architect. *Brown v. Melrose*, 155 Mass. 587.

A town is liable to an abutter for damages for the negligence of a servant of the selectmen, in their construction of a highway pursuant to a town vote, acting as agents rather than as officers. *Deane v. Randolph*, 132 Mass. 475.

A lamplighter was held not to be such a servant or agent of the town as to preclude his recovering for injuries caused by a defective highway. *Eaton v. Woburn*, 127 Mass. 270.

After the owner has accepted the indemnity, under *Massachusetts* Stat. (1869), ch. 237, for land taken for a gravel and clay pit, he cannot insist on any informality in the selectmen's proceedings in laying out the land. *Hatch v. Hawkes*, 126 Mass. 177.

A town was held not to be liable for a trespass committed by road commissioners *de facto*. *Clark v. Easton*, 146 Mass. 43.

A town was held not liable for damages to an abutter's cellar from percolation from a catch-basin constructed by the highway surveyor. *Kennison v. Beverly*, 146 Mass. 467.

Authority of the selectmen to alter the location of a private way, was held not to bind the town by an acceptance of a revocable license from a railroad corporation to place the way on its land. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325.

In *Michigan*, as to a municipality's liability for the consequences of its officers' negligence, the trend of adjudication is in favor of the dissenting opinion of Judge Cooley in *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep.

450. See review of cases in *Detroit v. Osborne*, 135 U. S. 492.

A township is not liable for illegal proceedings of the drain commissioner. *Taylor v. Avon Tp.*, 73 Mich. 604.

In *Michigan*, an individual may sue to enjoin *ultra vires* acts of a municipality injuriously affecting him as taxpayer. *Alpena v. Kelley*, 97 Mich. 550.

A township is not accountable for money illegally levied for drain taxes; the drain commissioners are not its agents. *Dawson v. Aurelius Tp.*, 49 Mich. 479.

A newspaper cannot recover for printing the ordinances of a village, unless authorized by its legislative body. *Thornton v. Sturgis*, 38 Mich. 639.

License money due a township, but wrongfully paid to a village by the county treasurer, may be deducted by him from license money subsequently accruing to the village. *Grosse Point v. Wayne County Treas.*, 85 Mich. 44.

The supervisor is not such an agent of the town as to render it liable for his errors of judgment. *Davis v. Kalamazoo*, 1 Mich. N. P. 16.

A town was held not bound to reimburse a supervisor his expenses of a *quo warranto* suit for intrusion of a claimant to the office. *People v. Bingham Tp.*, 32 Mich. 492.

In *Minnesota*, a town is liable to an adjacent landowner for damage caused by acts of its supervisors, done within the scope of their authority, in opening and working highways. *Peters v. Fergus Falls*, 35 Minn. 549, citing *Gilman v. Laconia*, 55 N. H. 130; 20 Am. Rep. 175; *Haynes v. Burlington*, 38 Vt. 350; *McClure v. Red Wing*, 28 Minn. 186; *Blakely Tp. v. Devine*, 36 Minn. 53, citing *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Pye v. Mankato*, 36 Minn. 373.

In *Mississippi*, the mayor of a town is not liable for the increased face value of warrants drawn upon its treasury, which after their issuance, the clerk of its council had fraudulently raised, although the neglect by its officers to draw lines through the spaces, enabled the alteration to be made so skillfully as to prevent detection by *bona fide* purchasers. *Chandler v. Bay St. Louis*, 57 Miss. 326. The mere fact that a municipal officer's act was done *colore officii*, will not render the municipality liable. *Sherman v. Grenada*, 51 Miss. 186.

For the requisites of a garnishment,

under *Mississippi* Code (1880), § 1832, of a municipality, in an attachment in chancery, see *Dollman v. Moore*, 70 Miss. 267.

In *Missouri*, a municipality is not answerable in damages for the negligent acts of its officers in executing such powers as are conferred for the public good. *Jefferson County v. St. Louis County*, 113 Mo. 619.

The laying of a railway track in a street on grade is not unconstitutional as damaging abutters without compensation. *Gaus & Sons Mfg. Co. v. St. Louis, etc., R. Co.*, 113 Mo. 308.

As to the liability of a municipality for damages from a change of grade, see *Carson v. Springfield*, 53 Mo. App. 289.

In *New Hampshire*, a town was held not to be liable for damages caused by work of its selectmen in constructing a sewer, under supposed authority of a town vote. *Lemon v. Newton*, 134 Mass. 476.

A town was held not liable for an injury from negligence of its officers in removing a flagstaff not owned by the town. *Wakefield v. Newport*, 60 N. H. 374.

Original want of authority in a town officer to contract for the building of a new highway, was held not to exonerate the town from liability to an abutter for damages from its improper construction, accruing after allowing it to be left open for public travel. *Carpenter v. Nashua*, 58 N. H. 37.

A town was held not to be bound by a contract by one of the selectmen, not assented to by the others, to give the holder of a note a year's notice when the board should wish to pay it. *Strafford v. Welch*, 59 N. H. 46.

Neither the town treasurer nor the selectmen can bind the town by making or ratifying an unauthorized loan of its money. *Holderness v. Baker*, 44 N. H. 414.

As to presumptions against a town from acts of its officers, *i. e.*, the selectmen of one town presenting an account to those of another for medical attendance upon a pauper, see *Glidden v. Unity*, 33 N. H. 571.

Towns are chargeable for the support of prisoners committed to jail for the violation of ordinances. *Strafford County v. Somersworth*, 38 N. H. 21.

A town is liable for the repair of a bridge dedicated to the public use, though erected by individuals. *State v. Campton*, 2 N. H. 513.

A town's voting to raise money to

purchase land for a courthouse, and appointing a committee to apply to the legislature to have courts held there one term annually, were held to entitle a member thereof to compensation for services and expenses, whether the vote was legal or illegal. *Batchelder v. Epping*, 28 N. H. 354.

A separate penalty does not accrue for each intersection of roads at which the town has neglected to erect guideposts. *Clark v. Lisbon*, 19 N. H. 286.

In *New Jersey*, the township, and not the collector, is liable for a misappropriation of money to cover a deficit of the preceding year, if this was not directed by the township committee. *State v. Mathe*, 51 N. J. L. 216. *Mandamus* lies to compel a township committee to pay over damages for injury to animals from dogs, without showing assessment or collection. *State v. Neptune Tp.*, 52 N. J. L. 487.

In *New York*, a town is not liable for the misfeasance of its assessors or collectors, they not being its corporate agents. *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120. A municipality was held not to be liable for a personal injury from its neglect to prevent swine from running at large, contrary to its ordinance. *Levy v. New York*, 1 Sandf. (N. Y.) 465. *Compare*, as to injury sustained from a cannon discharge at the Mexican war mass meeting, *Boylard v. New York*, 1 Sandf. (N. Y.) 27; also from an injudiciously planned sidewalk, *Urquhart v. Ogdensburg*, 91 N. Y. 67; from a defective dry retaining wall. *Watson v. Kingston*, 114 N. Y. 88. A town was held estopped to deny its liability for a debt contracted by its supervisor, apparently, but not actually, within the scope of his powers. *Gifford v. White Plains*, 25 Hun (N. Y.) 606. A town was held liable to reimburse expenditures in good faith made by its agent or trustee in selling its bonds in aid of a railroad, although they had been adjudged invalid. *Lyons v. Chamberlin*, 25 Hun (N. Y.) 49. A town was held not to be bound by representations of its officers as to their compliance with the statutory prerequisites of a town loan. *Starin v. Genoa*, 23 N. Y. 439. One who is a taxpayer and resident of the town, may maintain an action in its behalf to compel the county treasurer to purchase its bonds to be canceled. *Clarke v. Sheldon*, 10 N. Y. Supp. 357; 57 Hun (N. Y.) 586. In *North Carolina*, no inhabitant's

property can be held for any liability of the municipality, except in case of special bond, or of fraud. *North Carolina Code* (1883), § 3821.

In *Ohio*, where the township trustees have, in good faith, rejected a physician's claim for relief of the poor, no action lies against the township therefor under *Ohio Rev. Stat.* (1890), § 1494. *Elizabeth Tp. v. White*, 48 *Ohio St.* 577. His written notice, if given within three days, relates back. *Urbana Tp. v. Houston*, 2 *Ohio Cir. Ct. Rep.* 14.

In *Pennsylvania*, a township is not liable to reimburse a supervisor for a penalty incurred by his neglect of duty. *Benton Tp. v. Kennedy*, 2 *Luz. Leg. Obs. (Pa.)* 316. A borough was held not to be liable for a personal injury from its police officer's neglect to prevent a crowd from discharging a cannon therein. *Norristown v. Fitzpatrick*, 94 *Pa. St.* 121; 39 *Am. Rep.* 771.

A landowner cannot recover of a township not invested with the right of eminent domain, damages from the opening of a public road. *Wagner v. Salzburg Tp.*, 132 *Pa. St.* 636.

A township cannot be bound by an agreement by one of several supervisors to reimburse a laborer, if he breaks his plough while mending a public road. *Somerset Tp. v. Parson*, 105 *Pa. St.* 360.

One town was held liable to another for one-half the reasonable expense of building a necessary bridge over a boundary stream. *Pottsville Borough v. Norwegian Tp.*, 14 *Pa. St.* 543.

In *Tennessee*, an abutting lot owner who does not own the fee in the street, cannot recover of the municipality, damages from the proper grading and use thereof by a railroad company. *Iron Mountain R. Co. v. Bingham*, 87 *Tenn.* 522.

In *Vermont*, the doctrine of *respondent superior* was held not to apply, and a village was held not to be liable where a personal injury resulted from an act of its street commissioner not within the scope of his employment, namely, his careless piling of surplus drain tiles, not corporate property. *Palmer v. St. Albans*, 60 *Vt.* 427.

A town was held not to be responsible for the act of one of the selectmen, misinforming a claimant as to the legal time of notice of injury from a highway defect. *Gregg v. Weathersfield*, 55 *Vt.* 385.

Where a claimant of damages from a highway defect was misled by a selectman unofficially, as to the time of pre-

liminary notice, and the town voted to pay \$200, it was held that he could not recover, if not stating in his offer of evidence that he forebore to sue, relying on the town's promise to pay. *Gregg v. Weathersfield*, 55 *Vt.* 385. Admissions of selectmen, not qualifying or connected with any official act, cannot bind the town. *Tower v. Rutland*, 56 *Vt.* 28. Under the statutory requirement that a town "shall be liable to make good all damages," a joint action on the case lies against a town and the town clerk for his official default. *Lyman v. Windsor*, 24 *Vt.* 575. An action lies against a town, though after the death of its constable, for his default. *Martin v. Wells*, 43 *Vt.* 428.

Municipal authorization to construct electric-light wires, was held to give a vested right not to be infringed by a company under a later contract. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 *Vt.* 377.

As to a town's liability to reimburse a selectman's payment of a town order, see *Burnham v. Strafford*, 53 *Vt.* 610.

An incorporated village was held not liable for injuries from the negligence of an engineer of the fire department in thawing out a hydrant. *Welsh v. Rutland*, 56 *Vt.* 228; 48 *Am. Rep.* 762, *citing* *Dill. on Mun. Corp.*, § 774.

"When a town, liable to keep in repair a highway or bridge, does not do so, it may be indicted for such neglect, by the grand jury of the county; and may be fined at the discretion of the court, whether any special damage has been entertained or not." *Vermont Rev. L.* (1880), § 3112.

A town is not liable for oral statements made by its clerk; nor are they evidence of what is or is not upon the town records. *Jarvis v. Barnard*, 30 *Vt.* 492.

As to when a town is bound by representations of its agent—*e. g.*, an overseer of the poor—see *Burlington v. Calais*, 1 *Vt.* 391; 18 *Am. Dec.* 691.

A town is not liable for unlawful acts of its overseers of the poor, not within the scope of their authority. *Chelsea v. Washington*, 48 *Vt.* 610.

A town is not liable for the acts or defaults of the selectmen in their statutory duties as to infected persons. *White v. Marshfield*, 48 *Vt.* 20.

An authorized transaction by one of the selectmen—*e. g.*, promising an enlistment bounty—may be presumed to be the act of the majority, and bind the town. *Guyette v. Bolton*, 46 *Vt.* 228.

2. Upon Contracts; Town Bonds.—The liability of municipal corporations in general, upon contracts, express or implied, and that of towns in certain special matters, have already been adverted to.¹ Some statutory liabilities, and adjudications thereon, are now to be noted.²

A town may, by ratification by its officers, be rendered chargeable upon a contract made in non-compliance with the statute thereon; *e. g.*, as to procedure in the town's purchase and sale of liquors. *Topsham v. Rogers*, 42 Vt. 189.

As to a town's liability for acts of its constable, see *Barber v. Benson*, 9 Vt. 171; *Bramble v. Poultney*, 11 Vt. 208; *McGregor v. Walden*, 14 Vt. 450; *Bank of Middlebury v. Rutland*, 33 Vt. 450.

As to the liability of a town for failure of its constable duly to serve a process, see *Rogers v. Fairchild*, 36 Vt. 641.

As to the apportionment between towns, of the expense of a highway, see *Rockingham v. Westminster*, 24 Vt. 288.

As to a town's duty to provide a by-way around a railroad obstruction of the highway, see *Batty v. Duxbury*, 24 Vt. 155.

A statutory requirement that towns shall repair injuries to bridges "as soon as may be," means dispatch commensurate with the importance of the road, the magnitude of the work, and the opportunity of procuring materials. *Briggs v. Guilford*, 8 Vt. 267.

The statutory limit of a load to 10,000 pounds, means exclusive of the vehicle in the liability of a town for highway insufficiency. *Howe v. Castleton*, 25 Vt. 162.

A town was held liable to indictment for neglect to open a highway alongside of a railroad, as ordered by the county court. *State v. Vernon*, 25 Vt. 244. So, also, for not erecting a bridge ordered by the road commissioners. *State v. Whitingham*, 7 Vt. 391. As to indictability for insufficiency of a new road on the discontinuance of an old one, see *State v. Fletcher*, 13 Vt. 124; *State v. Alburgh*, 23 Vt. 262. A town is not indictable for a nuisance—*e. g.*, a stagnant pool—not created by itself or its agents. *State v. Burlington*, 36 Vt. 521.

In *Washington*, indebtedness for water, sewerage and light purposes, does not constitute a part of the general indebtedness, but is authorized, under *Washington Const.*, art. 8, § 6, in excess of the five per cent. of municipi-

pal indebtedness permitted for general purposes. *Austin v. Seattle*, 2 Wash. 667. Compare *Baker v. Seattle*, 2 Wash. 576.

In *Wisconsin*, the facts that one of the town board, in the presence of another, told the path-master to render a town road fit for travel, and that the board allowed a portion of his claim therefor, were held not to amount to a contract making the town liable for the balance. *Deichsel v. Maine*, 8 Wis. 553.

Where the township school system exists, a town is not liable to an action on an order drawn by the town board of school directors on the town treasurer. *Miller v. Jacobs*, 70 Wis. 122.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1080; MUNICIPAL SECURITIES, vol. 15, p. 1204; MANDAMUS, vol. 14, p. 192.

2. See BRIDGES, vol. 2, p. 560; DRAINS, vol. 6, p. 23; HIGHWAY, vol. 9, p. 376; POOR AND POOR LAWS, vol. 18, p. 813; PUBLIC OFFICERS, vol. 19, p. 378; SCHOOLS, vol. 21, p. 748; STREETS, vol. 24, p. 1; TAXATION, vol. 25, p. 5.

In *Alabama*, the invalidity of contracts, because *ultra vires*, is more strictly maintained in favor of municipal, than of private corporations; the contract must be clearly within the scope of the objects and purposes of incorporation. Thus, power to build wharves does not import power to lease them without charge or revenue; and such lease is void. *Mobile v. Moog*, 53 Ala. 561, citing *Anthony v. Adams*, 1 Met. (Mass.) 286. So, also, was held to be invalid its purchase of land for an association to hold annual fairs thereon. *Eufaula v. McNab*, 67 Ala. 588; 42 Am. Rep. 118.

In *Arkansas*, no officer can bind a town by his declarations or admissions, or, without its authority, make contracts therefor. *Halbut v. Forrest City*, 34 Ark. 246. Statutory authority merely to subscribe, was held not to render valid town bonds issued in payment of railroad stock. *Dodge v. Memphis*, 51 Fed. Rep. 165, citing *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Hitchcock v. Galveston*, 96 U. S. 350;

Little Rock *v.* Merchants' Nat. Bank, 98 U. S. 198; Merrill *v.* Monticello, 138 U. S. 673.

In *Connecticut*, a statement in the record of a town meeting that it was "legally warned," is not sufficient evidence that the borrowing was specified in the notice of the town meeting so as to render the town liable on its treasurer's note therefor. Bloomfield *v.* Charter Oak Nat. Bank, 121 U. S. 121. A town voted to issue, in aid of a railroad, bonds payable in twenty years, or, at the option of the town, in ten. The officials executing them inadvertently omitted the optional clause. A majority of the court held that one taking them with knowledge of the facts, could not successfully contest a suit for their correction, nor complain of the town's delay of two years in instituting the suit. Essex *v.* Day, 52 Conn. 483. A town at a meeting inadequately warned, voted to guarantee bonds on certain conditions, and afterwards at a meeting regularly called, voted to let the conditions remain. The town clerk recorded the votes as having been legally taken. A majority of the court held that the town was not estopped to dispute the legality of the guaranty. Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22. The *bona fide* assignee of a note given by a town for the payee's enlistment, was held entitled to recover, notwithstanding the payee's desertion. Terrell *v.* Colebrook, 35 Conn. 188. Where a town offered a sum to every citizen drafted into the service of the *United States*, "and accepted by the board of examiners, who shall enter said service or procure an accepted substitute," it was held that one who was drafted, but, before examination, procured a substitute that was accepted, could not recover the sum. Reed *v.* Sharon, 35 Conn. 191. Town bonds issued in aid of a railroad, were held to be an "investment" therein, within a statute limiting the amount to be guaranteed to the amount so invested. Douglas *v.* Chatham, 41 Conn. 211.

In the *Dakotas*, as against *bona fide* holders of township bonds reciting that the conditions precedent to the issuance had been complied with, it is sufficient to estop from denial thereof, that the officers issuing had full control, and to declare that the bonds were issued in pursuance of a statute specifying it. Coler *v.* Dwight School Tp. (N. Dak. 1893), 55 N. W. Rep. 587.

As to the requisites of issuance of

school township bonds, see *Prairie School Tp. v. Haseleu* (N. Dak. 1893), 55 N. W. Rep. 938.

In *Georgia*, as to municipal authorization to issue bonds in aid of a railroad, see *Griffin v. Inman*, 57 Ga. 370.

As to requisites of the notice for the issuance of municipal bonds under *Georgia Code*, § 508i, see *Athens v. Hemerick*, 89 Ga. 674.

A municipal contract for gas for twenty years, each year's supply to be paid for quarterly during the year, was held to be operative only so long as neither of the parties repudiate it. Cartersville Imp., etc., *Co. v.* Cartersville, 89 Ga. 683.

A municipality cannot, as against a *bona fide* holder of its negotiable paper, set up that the statute enabling issuance thereof had not been complied with. Danielly *v.* Cabaniss, 52 Ga. 211.

As to the requisites of procedure in issuing township bonds, see *Bowen v. Greensboro*, 79 Ga. 709.

As to requisites of procedure in issuing bonds of *Illinois* towns or townships, see *Jonesboro City v. Cairo*, etc., R. Co., 110 U. S. 192; *Kankakee County v. Etna L. Ins. Co.*, 106 U. S. 668; *Pana v. Bowler*, 107 U. S. 529; *People v. Granville*, 104 Ill. 285; *Jacksonville*, etc., R. Co. *v.* Virden, 104 Ill. 339; *Aroma v. State Auditor*, 15 Fed. Rep. 843; *Prairie v. Lloyd*, 97 Ill. 179; *Windsor v. Hallett*, 97 Ill. 204; *Douglas v. Niantic Sav. Bank*, 97 Ill. 228; *Enfield v. Jordan*, 119 U. S. 680; *Oregon v. Jennings*, 119 U. S. 74; *Concord v. Robinson*, 121 U. S. 165; *People v. Getzendauer*, 137 Ill. 234; *Springfield*, etc., R. Co. *v.* Cold Spring Tp., 72 Ill. 603; *Chicago*, etc., R. Co. *v.* Coyer, 79 Ill. 373; *East Lincoln v. Davenport*, 94 U. S. 801; *Force v. Batavia*, 61 Ill. 99; *People v. Cline*, 63 Ill. 394.

As to the requisites of a petition for *mandamus* to compel town auditors to allow a claim, see *People v. Mount Morris*, 145 Ill. 427.

In *Indiana*, a party seeking to establish rights against a township under its trustee's contract—*e. g.*, for lease of congressional township lands—must show affirmatively that the antecedent statutory requirements have been complied with by him. *Anderson v. Prairie School Tp.*, 1 Ind. App. 34. As to township non-liability for fees of attorneys employed by the county board, see *Shirts v. Nobleville Tp.*, 122 Ind. 580. To bind the township for school supplies, they must have been de-

livered. *Litton v. Wright School Tp.*, 127 Ind. 81, *citing* *Grimsley v. State*, 116 Ind. 130. A township is not liable on a debt certificate fraudulently issued by the trustee in a conspiracy to overcharge for lightning-rods supplied to a school building. *Boyd v. Mill Creek School Tp.*, 124 Ind. 193. Under *Indiana* Rev. Stat., § 4446, the trustees are the sole judges of the right to purchase school land. *Craig School Tp. v. Scott*, 124 Ind. 72. A trustee cannot bind his township by contracting a debt in excess of the fund on hand, to which the debt is chargeable, and of the fund from the annual tax. *Boyd v. Black School Tp.*, 123 Ind. 1, 600; *Roseboom v. Jefferson School Tp.*, 122 Ind. 377. The party contracting must take notice of the limit of the trustee's power to bind the township. *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213.

The liabilities of the civil township are distinct from those of the school township of the same territory. *Carmichael v. Lawrence*, 47 Ind. 554; *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184; *Wingate v. Harrison School Tp.*, 59 Ind. 520; *Utica Tp. v. Miller*, 62 Ind. 230; *Harrison Tp. v. McGregor*, 67 Ind. 380.

In a municipal contract for a supply of gas or water, twenty-five years is not an unreasonable term. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114.

A note in addition to the signature "Trustees of S. Township," was held to bind the township, and not the trustee individually. *State v. Helms* (Ind. 1893), 35 N. E. Rep. 893.

A school township is *prima facie* liable upon the trustee's certificate for necessary school supplies. *Noble School Furn. Co. v. Washington School Tp.*, 4 Ind. App. 270.

General authority, under the *Indiana* statute to consolidate railroad companies, was held to import a transfer to the new company of the township's obligation upon subscription to the stock. *Poke v. Lake County*, 51 Fed. Rep. 769.

The *Indiana* Act of 1887, authorizing town trustees to issue bonds and levy "for general purposes," was held not to authorize a levy to pay a judgment for interest on bonds issued under the acts of 1852. *U. S. v. Cicero*, 50 Fed.

Rep. 147, *affirming* 41 Fed. Rep. 83, and *citing* *U. S. v. Macon County*, 99 U. S. 582.

As to the requisites of procedure in issuing town bonds, see *Clark v. Noblesville*, 44 Ind. 83; *Merrill v. Monticello*, 14 Fed. Rep. 628.

As to what condition—*e. g.*, as to the location of a depot, etc.—will or will not avoid a township subscription in aid of a railroad, see *Jager v. Doherty*, 61 Ind. 528. A taxpayer may have enjoined a town's unauthorized issuance of bonds. *Winamac v. Hudleston*, 132 Ind. 217.

In *Iowa*, a township clerk's order to a road supervisor, in pursuance of a settlement with the township trustees, made payable out of the assessment of a particular year, is payable out of the general township fund, and *mandamus* lies to enforce it. *Tobin v. Emmetsburg*, 52 Iowa 81.

Payment of road orders must be made, not out of the general fund, but each must be confined to the particular district. *Bradley v. Love*, 76 Iowa 397.

As to what will put a transferee upon inquiry as to the validity of district bonds, see *Bates v. Riverside School Dist.*, 25 Fed. Rep. 192; *Nesbit v. Riverside School Dist.*, 25 Fed. Rep. 635.

As to the procedure in issuing town bonds in aid of a railroad, see *Harwood v. Quinby*, 44 Iowa 385.

In *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 175, *Day, J.*, said: "When a bond issued in discharge of a judgment is placed upon the market, a purchaser who has no intimation of anything affecting its validity has a right to presume that the board of supervisors have been mindful of their interest and their duty, and that all available defenses have been presented and passed upon." Judge Brown, in his dissenting opinion in *Doon Tp. v. Cummins*, 142 U. S. 366, 380, cites this with approval, as also approved in *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26; *Miller v. Nelson*, 64 Iowa 458; *Chaffee County v. Potter*, 142 U. S. 355; *Powell v. Madison*, 107 Ind. 106.

In *Kansas*, a township may be estopped by its course of dealing with a railroad company, to deny the regularity of an issuance of bonds to pay its subscription to such road. *Brown v. Milliken*, 42 Kan. 769; *Kansas City, etc., R. Co. v. Rich Tp.*, 45 Kan. 275; *Hutchinson, etc., R. Co. v. Kingman County*, 48 Kan. 70. As to the limit of

such township aid in the act of 1885, see *Chicago, etc., R. Co. v. Osage County*, 38 Kan. 597.

An act authorizing a certain township to vote bonds to reimburse citizens for advances to build a courthouse, was held to be constitutional. *Linn County v. Snyder*, 45 Kan. 636. As to the requisites of town bonds, see *Montgomery v. St. Mary's Tp.*, 43 Fed. Rep. 362. As to *mandamus* to compel a levy to meet a bonded debt, see *Cherokee County v. Wilson*, 109 U. S. 621.

The fact that a township has issued bonds up to the limit of its power, does not preclude a city of the third class, formed from a portion thereof, to issue bonds in payment of stock subscribed in aid of a railroad. *Iola v. Merriman*, 46 Kan. 49.

As to the requisites of bonds in aid of improvement companies under *Kansas* Law of 1887, ch. 114, see *People's Nat. Bank v. Pomona*, 48 Kan. 55.

The *Kansas* Act of 1881, ch. 170, providing for the appointment of commissioners to refund the bonded indebtedness of Oswego township, has been held to contravene a constitutional inhibition of a special law where a general one can be applied. *Travelers' Ins. Co. v. Oswego Tp.*, 55 Fed. Rep. 361.

As to the power of townships under the *Kansas* laws of 1872 and 1874 to issue bonds for municipal indebtedness, see *Salt Creek Tp. v. King Iron Bridge, etc., Co.*, 51 Kan. 520.

As to school bonds under the law of 1891, see *Topeka Board of Education v. Welch* (Kan. 1893), 33 Pac. Rep. 654.

Where railway-aid town bonds recite the taking of each step required by the act authorizing their issuance, the town is estopped to allege their invalidity on any ground except that they were issued in violation of some constitutional or statutory requirement. *Washington v. Coler*, 51 Fed. Rep. 362, citing *Chaffee County v. Potter*, 142 U. S. 355; *Coloma v. Eaves*, 92 U. S. 491; *Lake County v. Graham*, 130 U. S. 674.

In the *Kansas* Act of 1876, ch. 107, § 14, the words, "principal and interest accruing from time to time by the terms of the bonds," were held not to require that all bonds should provide for annual payment on the principal. *Washington Tp. v. Coler*, 51 Fed. Rep. 362.

Township bonds purporting on their face to be issued under the *Kansas* special act of 1872, ch. 158, cannot be

deemed to have been issued under the general act. In the absence of statutory requirement thereof, the bonds gain no validity by the state auditor's indorsement. *Crow v. Oxford*, 119 U. S. 215. Compare *McClure v. Oxford Tp.*, 94 U. S. 429.

The burden of proof is on those attacking bonds which appear valid on their face. *State v. School Dist.*, 34 Kan. 237.

A township vote to provide for issuing bonds of \$500 each, was held not avoided by the fact that the legal appropriation could not be exactly so divided. *Turner v. Woodson County*, 27 Kan. 314.

Want of full compliance with the statutory requirement of thirty days' notice of the election, to authorize the issuance of town bonds, was held to render them void so that no person could be an innocent holder. *George v. Oxford*, 16 Kan. 72.

What conditions—*e. g.*, as to a location of depot, etc.—will or will not avoid a township subscription in aid of a railroad, are set forth in *Atchison, etc., R. Co. v. Jefferson County*, 21 Kan. 309.

A township was held to be estopped by recitals in its bonds to insist against a *bona fide* holder, that they were issued in excess of the proportion of the taxable property required by the *Kansas* Enabling acts of 1870 and 1872; or that the railroad had become consolidated. *Wilson v. Salamanca*, 99 U. S. 499.

A *bona fide* holder of township bonds was held not bound to look beyond their recitals and the *Kansas* Enabling act of 1870. *Marcy v. Oswego Tp.*, 92 U. S. 637.

Under the *Kansas* statute declaring all custom grist-mills to be "public mills," they are a public use in aid of which the town thereby benefited may issue bonds, under the Enabling act as to internal improvements. *Burlington Tp. v. Beasley*, 94 U. S. 310.

As to the requisites of procedure in issuing township bonds, see *Montgomery v. St. Mary's Tp.*, 43 Fed. Rep. 362.

In *Kentucky*, an ordinance may properly give a municipal officer discretion to sell the bonds at a lower rate of interest than that fixed therein. *Frantz v. Jacob*, 88 Ky. 525.

As to what constitutes authorization or ratification of a municipal officer's employment of counsel, see *Owensboro v. Weir* (Ky. 1893), 24 S. W. Rep. 115.

In *Louisiana*, a contract need not be

made with a municipality *eo nomine*. It will be binding thereon, if it recites authorization therefrom. *Schwartz v. 32 Flatboats*, 14 La. Ann. 243.

A town authorized by a special act to issue bonds, must not contravene the inhibition in *Louisiana Rev. Stat.*, § 2448, against exceeding the means provided to pay them; its liability does not extend to the excessive issuance. *Oubre v. Donaldsonville*, 33 La. Ann. 386; *Johnson v. Donaldsonville*, 33 La. Ann. 366.

Validity of claims against a town, in settlement whereof its bonds were issued, cannot be questioned in a suit on the bonds. *Dugas v. Donaldsonville*, 33 La. Ann. 668. And this, even though prescription had run on original claims when the bonds were issued. *Maurin v. Donaldsonville*, 33 La. Ann. 671.

In *Maine*, a town that has accepted a fund bequeathed in trust for an educational or other charitable purpose, is responsible for its safety, and liable for interest, if using it otherwise. *Bangor v. Beal*, 85 Me. 129; *Ayer v. Bangor*, 85 Me. 511.

The date of maturity of a town order is that specified in the specific vote, though not recited in the order. *Willis v. French*, 84 Me. 593.

A town order once paid cannot be again negotiated in payment of other debts owing by the town. *Mitchell v. Albion*, 81 Me. 482.

The payment of its debt with money hired by its officers without its authority or ratification will not charge the town. *Hurd v. St. Albans*, 81 Me. 343.

One cannot recover upon a town order, without showing agency in fact of the drawee or acceptor. *Sturtevant v. Liberty*, 46 Me. 457.

As to the rights of indorsees of town orders, see *Emery v. Mariaville*, 56 Me. 315.

The inhabitants' use of a highway bridge, was held not to import a promise by the town to pay for building it. *Knowlton v. Plantation No. 4*, 14 Me. 20.

Proceedings of a town treasurer and selectmen, were held to be conclusive as to the fulfillment of prerequisites of issuance of town bonds. *Deming v. Houlton*, 64 Me. 254; 18 Am. Rep. 253.

A town is held to be bound by a contract made by a minority of its committee and ratified by a majority. *Hanson v. Dexter*, 36 Me. 515.

As to the prerequisites of recovery against a town or plantation for money lent in pursuance of a vote to pay mil-

itary bounties, see *Bessey v. Unity*, 65 Me. 342.

A town authorized to issue bonds, has been held equitably estopped to plead irregularities therein. *Shurtleff v. Wiscasset*, 74 Me. 130.

As to the requisites of procedure in issuing town bonds, see *Lane v. Embden*, 72 Me. 354; *Stevens v. Anson*, 73 Me. 489.

In *Massachusetts*, in order to render a municipal corporation liable as trustee (or garnishee), the contract must be complete and the debt fixed upon. *Hadley v. Peabody*, 13 Gray (Mass.) 200. *Compare Potter v. Cain*, 117 Mass. 238. A town's adoption of the report of a committee appointed to supervise the building of a schoolhouse, was held not to render the town liable for expenditures in excess of the limitation; it not appearing that the report informed the town of the excess. *Brown v. Melrose*, 155 Mass. 587.

The power under *Massachusetts Stat.* (1855), ch. 394, to subscribe for railway stock, was held to import power to issue negotiable bonds. The town committee may deliver the bonds at one time instead of by installments. *Com. v. Williamstown*, 156 Mass. 70.

A town is not liable as upon contract, to a house owner, for the unlawful seizure and occupation of his premises by the town board of health, as a small-pox hospital, without his leave. *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334.

A town appointed a committee to investigate a town claim against H. for certain pistols alleged to have been wrongfully disposed of, pending which investigation, H. deposited money with A., a member thereof, to hold until he explained the matter to the town, which money, without his authorization, the committee paid into the town treasury. It was held that on the town's vote to repay, H. could maintain an action against it for money had and received; moreover, that on A.'s death, the vote was admissible in evidence, and was not revocable by a subsequent vote to rescind it. *Hall v. Holden*, 116 Mass. 172.

Town officers' knowledge that one who had contracted to alter a highway had not completed the work within the stipulated time, and their failure to object to his continuing at it, was held to constitute a waiver on behalf of the town. *Snow v. Ware*, 13 Met. (Mass.) 42.

As to the liability of a town upon

its vote to pay a bounty for military enlistment, see *Shepard v. Turner*, 13 Allen (Mass.) 92; *Andrews v. Prouty*, 13 Allen (Mass.) 93; *Estey v. Westminster*, 97 Mass. 324; *Rand v. Worcester*, 98 Mass. 126; *Barker v. Chesterfield*, 102 Mass. 127.

As to a town's liability to one furnishing supplies upon an order of the overseer of the poor, see *Ireland v. Newburyport*, 8 Allen (Mass.) 73.

One who has contracted with a town is not affected by a rescission vote, whereof he had no notice. *Allen v. Taunton*, 19 Pick. (Mass.) 485.

For the requisites of procedure in issuing town bonds, see *Pearsons v. Ranellett*, 110 Mass. 120.

In *Michigan*, if a township bond does not show on its face authority to issue it, the holder takes it subject to the defense of entire illegality. *Bogart v. Lamotte Tp.*, 79 Mich. 294. Under *Michigan* Gen. Stat. (1882), § 1786 — that the poor "shall be supported at the expense of the township" — the law raises an implied promise on the part of the township to furnish such support, and the township is liable for necessities furnished, after due notice to the supervisor that the person is a township charge, and his refusal, etc. *Eckman v. Brady Tp.*, 81 Mich. 70. But compare *McCaffrey v. Shields*, 54 Wis. 645. A township is liable to a physician employed by the board of health to treat a contagious disease. *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

Mandamus will not lie to compel the payment of township orders repudiated as outlawed, without a clear showing of their validity and consideration. *Avery v. Krakow Tp.*, 73 Mich. 622.

For the construction of divers local acts restricting the issuance of municipal bonds, see *Muskegon v. Gow*, 94 Mich. 453; *Tillotson v. Saginaw*, 94 Mich. 240.

A special statute (*Michigan* Local Acts (1889), No. 376) authorizing the issuance of township bonds to pay outstanding orders, is not unconstitutional for not requiring the assent of the electors, thus leaving it to the township board to determine their validity. *Boyce v. Attv. Gen'l*, 90 Mich. 314, 326.

In *Minnesota*, a party contracting is chargeable with notice of the restricted power of the town authorities therein. *Newbery v. Fox*, 37 Minn. 141. In *Montana*, so, also, as to statutory limitations upon the municipal corporate authorities. *Lebscher v. Custer County*, 9 Mont. 315.

A town is not liable on its bonds issued under the unconstitutional *Minnesota* Laws (1887), ch. 106, § 7, allowing issuance thereof in aid of a railroad. *Plainview v. Winona*, etc., R. Co., 36 Minn. 505.

Under the *Minnesota* Town-Bond Law of 1878, the board may waive the issuance of stock to the town subsequently to the election authorizing the issuance of the bonds. *Finlayson v. Vaughn* (Minn. 1893), 56 N. W. Rep. 49.

Recitals in town bonds stating a compliance with the conditions precedent, have been held conclusive evidence in favor of the purchaser. *Marshall v. Elgin*, 3 McCrary (U. S.) 35.

For the requisites of procedure in issuing town bonds, see *State v. Highland*, 25 Minn. 355; *State v. Roscoe*, 25 Minn. 445.

In *Missouri*, a municipality whose trustees had, without any authorizing ordinance, ordered a fire-engine, was held not to be liable on any implied contract to pay, etc. *Schell City v. L. M. Rumsey Mfg. Co.*, 39 Mo. App. 264. As to the liability upon interpleader, etc., in equity, of a municipality to materialmen, creditors of an absconded contractor of a job upon a public building, the sureties of whom had completed it, see *St. Louis v. O'Neil Lumber Co.*, 42 Mo. App. 586. An ordinance making a water company "liable for all damages occasioned" by fire from an inadequate water supply, was held not to render privy to accruing rights and liabilities an insurance company compelled to pay consequent loss. *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118.

In *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444, in deciding that a municipality was not liable for the loss of a brewery through a fireman's negligence, the court, by Adams, J., said: "It was not the intention of the legislature, in conferring power on the city to establish a fire department, to render it responsible as an insurer for losses by fire. The power conferred was a legislative or discretionary power, which the city authorities might in their wisdom exercise or not. The creation of the fire department was not for the peculiar benefit of the corporation, but for the public. And the officers of this department, although appointed by the city, are public officers, and not agents of the city in the sense that renders the city liable for their acts or omissions of duty. The doc-

trine of '*respondere superior*' does not apply." So held, also, as to the neglect of municipal officers to abate a hogpen nuisance near a plaintiff's hotel. *Armstrong v. Brunswick*, 79 Mo. 319.

The *Missouri* Act of 1872, forbidding the officers to loan the credit of a municipality without the assent of two-thirds of the voters, is merely prohibitory and imports no power to loan with such assent; and the town bonds of Moberly, reciting such assent, are nevertheless void. *Jarroll v. Moberly*, 103 U. S. 580.

Where a *Missouri* Railroad law of 1868 provided for township subscriptions in aid of railroads to pass "through or near such townships," a town, after paying regularly for three years, interest on its bonds, was, as against a *bona fide* holder, held to be precluded from questioning that a road nine miles distant was "near." *Kirkbride v. Lafayette County*, 108 U. S. 208.

An action for money had and received for past-due coupons of unauthorized town bonds, was held to be an action on an implied contract within the *Missouri* Statute of Limitation to five years. *Morton v. Nevada*, 52 Fed. Rep. 350.

The *Missouri* constitutional inhibition of legislation authorizing "any county, city, or town" to become a stockholder, etc., was held to extend to a township; and a holder of coupons of bonds issued in payment, and containing recitals putting him on inquiry, was held not to be entitled to recover thereon. *Harshman v. Bates County*, 92 U. S. 569. But compare *Jordan v. Cass County*, 3 Dill. (U. S.) 185.

A town cannot set up against a *bona fide* holder of its bonds that it was not duly incorporated under the *Missouri* law. *Aller v. Cameron*, 3 Dill. (U. S.) 198.

Innocent holders of town bonds are held to have the burden of proof, that the vote at the election for their issuance complied with the statute. *Carpenter v. Lathrop*, 51 Mo. 483.

In *Montana*, where a statute imposes upon municipal corporate authorities a duty—*e. g.*, issuance of warrants or coupon bonds—and they fail to perform it, the law of *respondere superior* does not apply. *Territory v. Cascade County*, 8 Mont. 396. The clause in *Montana* Comp. Stat. (1887), p. 106, § 189—rendering liable to garnishment all "persons" having, etc.—includes municipal corporations. *Waterbury v.*

Deer Lodge County, 10 Mont. 515, citing *Wallace v. Lawyer*, 54 Ind. 501, and distinguishing the case of a direct execution, *Merwin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204. Whether the debt is sufficiently fixed and settled upon, is for the trial court to determine, under § 190.

In *Nebraska*, the township cannot, by neglect to levy the necessary taxes, escape its liability upon one's contract with the supervisor, to support its poor. *Waltham v. Mullall*, 27 Neb. 483.

In *Nebraska*, statutory authority to borrow money to pay for the sites, and to erect and furnish school buildings, was held not to import power to issue bonds to be bargained away and delivered to a contractor to erect and furnish a schoolhouse; nor the recitals to estop to defend a suit by an innocent purchaser for value before maturity. *State v. School Dist. No. 4*, 16 Neb. 182, distinguishing *State v. School Dist. No. 4*, 13 Neb. 82; *Gould v. Sterling*, 23 N. Y. 456.

In *New Hampshire*, the health officer cannot render the town liable for medicines, etc., furnished to inhabitants who are not paupers. *McIntire v. Pembroke*, 53 N. H. 462.

A town's receiving and appropriating liquors, knowing them to have been illegally purchased by its agent, was held to bind it as ratifying the agent's authority. *Backman v. Charlestown*, 42 N. H. 125.

A town, after ratifying an unauthorized payment made by its selectmen, and thereby obtaining its quota, was held not entitled to recover it back, either from the recruits or the selectmen. *Greenland v. Weeks*, 49 N. H. 472.

A town bond conditioned to perform an act unauthorized by law—*e. g.*, to build or maintain part of a bridge in another town—is void. *Concord v. Boscawen*, 17 N. H. 465.

In *New Jersey*, no action lies against a township to recover for work done on roads in advance of an appropriation, though one be afterwards made. Nor is the township bound by its committee's acceptance of an order of a road overseer in favor of a third person, directing payment of money to be appropriated in the future to a road district. *Wayne Tp. v. Cahill*, 49 N. J. L. 144. A suit lies on township bonds, although a special mode of payment is given by statute. *Morrison v. Bernards*, 36 N. J. L. 219. The restriction

(*New Jersey Rev.*, p. 1203, § 54), upon the issuance of township bonds only on certain conditions, does not apply where a lawful debt has already been incurred. *Union Tp. v. State*, 45 N. J. L. 182. Power in a township, under the *New Jersey Act of 1864*, to pay bounties to volunteers by issuance of its bonds, imports power in the township committee to execute the bonds. *Middleton v. Mullica Tp.*, 112 U. S. 433.

The requirement in *New Jersey Rev.*, p. 1203, § 54, as to the issuance of township bonds, applies only to optional incurrence of debt; not where a debt is already incurred and obligatory. *Union Tp. v. State*, 45 N. J. L. 182.

In an action on a township bond, the plaintiff may rely on the title of any prior *bona fide* holder for value. *Montclair v. Ramsdell*, 107 U. S. 147.

A *New Jersey* township was held to be estopped by recitals in its bonds, from setting up against a *bona fide* holder that the issuance was in excess of the amount authorized. *New Providence v. Halsey*, 117 U. S. 336.

Statutory authority of a township committee to order a tax to pay interest on township bonds, was held to import power to order a tax to pay interest on notes given in lieu of certain bonds matured. *State v. Smith*, 47 N. J. L. 473.

In *New York*, as to the issuance of new bonds and the cancellation of old ones, see *New York Sess. L.* (1892), p. 510.

As to the liability of a town under the Town-Bonding Act of 1869, ch. 907, and 1871, ch. 925, see *Cherry Creek v. Becker*, 123 N. Y. 161; *Hoag v. Greenwich*, 133 N. Y. 152. As to a town's right under the general railroad law of 1871, ch. 283, to have the sinking fund applied in payment of its bonds, see *Crowninshield v. Cayuga County*, 124 N. Y. 583; *Spaulding v. Arnold*, 125 N. Y. 194. Town bonds are not necessarily invalidated by illegality in the statutory provision for levying an assessment to pay them. *Horn v. New Lots*, 83 N. Y. 100. As to the requisites of a town's contract for a water supply, under the Act of 1889, ch. 369, see *Nicoll v. Sands*, 131 N. Y. 19.

Town bonds were held not to be invalidated by the holder's affixing seals omitted by the signers. *Armfield v. Solon*, 19 N. Y. Supp. 44; 64 Hun (N. Y.) 633.

Coupons of town bonds are held to partake of the character of commercial

paper, and to bear interest, though no agreement to pay compound interest be shown. *Williamsburgh Sav. Bank v. Solon*, 65 Hun (N. Y.) 166.

As to the right of issuance of new bonds to retire old ones, see *Poughkeepsie v. Quintard*, 65 Hun (N. Y.) 141.

As to prerequisite presentation of a claim to the village trustees, see *Mark v. West Troy*, 69 Hun (N. Y.) 442.

A town is liable to reimburse moneys in good faith advanced to it to pay an indebtedness, although the transaction was *ultra vires*. *Wells v. Salina*, 71 Hun (N. Y.) 559.

Although bonds issued by the commissioners under the Bonding Act of 1869, ch. 907, are void if made payable in twenty, instead of thirty, years, they may bind the town under the implied promise to repay the loan. *Hoag v. Greenwich*, 133 N. Y. 152.

Village bonds stolen and put on the market before issued, are held not binding on the village. *Germania Sav. Bank v. Suspension Bridge* (Supreme Ct.), 26 N. Y. Supp. 98.

Annulment by the *New York* supreme court of an order of a county judge for execution by commissioners of town coupon bonds to a railway company, was held to render invalid the issuance. One suing on detached coupons could not recover against the town without establishing his *bona fide* ownership. The town would not be estopped by a judgment in his favor upon other coupons detached from the same bonds. *Stewart v. Lansing*, 104 U. S. 505, citing *Cromwell v. Sac County*, 94 U. S. 351.

The statutes of 1869 and 1871, providing for municipal bonds in aid of railways and an appropriation of taxes therefor, apply to both the original issue and the new bonds issued to retire them. *Barnum v. Sullivan County*, 137 N. Y. 179.

Further, as to the right of a town, village, or city issuing bonds in aid of a railway to apply taxes collected on the property of the railroad in the municipality in payment of the bonds, see *Oneida v. Madison County*, 136 N. Y. 269; *People v. Cayuga County*, 136 N. Y. 281; *Woods v. Madison County*, 136 N. Y. 403; *Ackerson v. Niagara County*, 72 Hun (N. Y.) 616.

Persons appointed commissioners in a town's issuance of bonds in exchange for railroad stock, can contract only as expressly authorized by the enabling statute; e. g., they cannot stipulate that

the proceeds of the bonds shall be used to purchase ties that shall be their property until laid in a completed road, and that a part of the road shall be completed by a certain date. And the company, though having tendered the stock, may insist on the invalidity of the contract; and with the void contract would fall any guaranty of performance. *Joslyn v. Dow*, 19 Hun (N. Y.) 494.

Town commissioners who have received tax money to pay coupons, cannot set up invalidity of the town bonds, even under a town resolve to resist and be indemnified. *First Nat. Bank v. Wheeler*, 72 N. Y. 201.

A jurisdictional defect in the issuance of town bonds—*e. g.*, that the petition did not appear to be made by a majority of the taxpayers—was held available in defense of non-payment. *Wilson v. Canadea*, 15 Hun (N. Y.) 218. As to the burden of proof of a jurisdictional defect in town bonds, see *Angel v. Hume*, 17 Hun (N. Y.) 374.

Want of location of the railroad route within the town, as prescribed by the *New York General Railroad Law* of 1850, was held not to invalidate town bonds issued under the *New York Enabling Act* of 1869. *Smith v. Yates*, 15 Blatchf. (U. S.) 89.

Town bonds and coupons issued without seal of the commissioners, contrary to the requirement of the *New York* statute therefor, were held void, although their wording showed a seal to be intended. *Avery v. Springport*, 14 Blatchf. (U. S.) 272.

One buying, at a discount, bonds in aid of a railroad, knowing that the town officers had exceeded their authority in exchanging the bonds for an equal nominal amount of stock, leaving it in the power of the railroad company to sell at a discount, was held not to be a *bona fide* holder and to take subject to other defenses. *Starin v. Genoa*, 23 N. Y. 439. Compare *Gould v. Sterling*, 23 N. Y. 456; *Gould v. Venice*, 29 Barb. (N. Y.) 442.

A holder of town bonds is not precluded from suing the town thereon, by the mere fact that the statute makes it the duty of the county board to levy a tax to pay them. *Marsh v. Little Valley*, 64 N. Y. 112.

County supervisors cannot raise money or issue bonds on the credit of a town without a vote of a majority of its electors. *People v. Livingstone County*, 34 N. Y. 516.

A taxpayer may maintain an action

to enjoin a town from unlawfully issuing bonds. *Ayers v. Lawrence*, 59 N. Y. 192.

As to the effect of an amendment of a village charter upon a contract for laying a sidewalk, see *Parr v. Greenbush*, 72 N. Y. 463.

The legislature cannot, either absolutely or conditionally, authorize towns to issue bonds and "donate" the proceeds to a private corporation—*e. g.*, to build a railroad between two villages. *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

Town bonds cannot be issued to aid a corporation created for a private purpose—*e. g.*, to erect a dam and saw-mill in a village on the Delaware. *Weismer v. Douglas*, 4 Hun (N. Y.) 201; 64 N. Y. 91; 21 Am. Rep. 586. Compare the *Brooklyn Bridge* case, *People v. Kelly*, 76 N. Y. 489.

In an action on coupons of town bonds issued, by the railroad commissioners under the *New York Act* of 1866, ch. 398, the town was held not to be precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the taxpayers had not been obtained. *Cagwin v. Hancock*, 84 N. Y. 533.

The legislature cannot constitutionally dispense with the town's consent required by a previous law. *Hardenbergh v. Van Keuren*, 16 Hun (N. Y.) 17; *People v. Batchellor*, 53 N. Y. 128; 13 Am. Rep. 480.

The statutes providing for the bonding of towns, for railroad purposes, were repealed by *New York Const.*, art. 8, § 11, except so far as relating to contracts actually made when it went into effect. No legal obligation was created until the stock subscription was made. *Buffalo, etc., R. Co. v. Railroad Com'rs*, 5 Hun (N. Y.) 485.

Compliance with the statutory requirement in the issuance of town bonds, cannot be questioned collaterally. *Pierce v. Wright*, 6 Lans. (N. Y.) 306.

After a town had issued bonds and their validity had been questioned, a statute was passed authorizing the issuance of new bonds in lieu thereof, at a lower rate. It was held that these were valid. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490.

A town claiming the proceeds of a bond, was held estopped to deny its validity. *Lyons v. Chamberlain*, 89 N. Y. 578.

A town may be required to pay lost negotiable bonds on receiving a proper bond of indemnity. *Manhattan Sav.*

Inst. v. East Chester, 44 Hun (N. Y.) 537.

Acts of town officers tending to show ratification, were held admissible on the question of validity of its bond. And the validity is determinable by the law in force at the time of their sale; for their sale constitutes their "issue." Brownell v. Greenwich, 44 Hun (N. Y.) 611.

A town which had been fraudulently induced by B. to issue bonds in aid of a railroad company that had not complied with the law, was obliged to pay them after B. had sold them to *bona fide* purchasers. It was held that the town had a right of action against him. Farnham v. Benedict, 107 N. Y. 159, reversing 39 Hun (N. Y.) 22.

One purchasing a town bond from a *bona fide* holder for value before maturity, may recover, although knowing that the town disputed its liability thereon. Butterfield v. Ontario, 32 Fed. Rep. 891. Compare Bodley v. Emporia Nat. Bank, 38 Kan. 59.

A town, for its own benefit destroying its bonds and issuing new ones, was held to waive a defense which might have been set up against the old bonds. Chandler v. Attica, 18 Fed. Rep. 299.

As to the requisites of procedure in issuing town bonds, see Mentz v. Cook, 108 N. Y. 504; Alvord v. Syracuse Sav. Bank, 98 N. Y. 599; Ontario v. Hill, 99 N. Y. 324; Solon v. Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1; Mitchell v. Strough, 35 Hun (N. Y.) 83; Thompson v. Mamakating, 37 Hun (N. Y.) 400; Cowdrey v. Canadea, 16 Fed. Rep. 531; Thomas v. Lansing, 14 Fed. Rep. 618; Mellen v. Lansing, 19 Blatchf. (U. S.) 512; 20 Blatchf. (U. S.) 278; Currie v. Lewiston, 15 Fed. Rep. 377; Third Nat. Bank v. Seneca Falls, 15 Fed. Rep. 783; First Nat. Bank v. Walcott, 19 Blatchf. (U. S.) 370; Carrier v. Shawangunk, 20 Blatchf. (U. S.) 307; McCall v. Hancock, 20 Blatchf. (U. S.) 344; Calhoun v. Delhi, etc., R. Co., 28 Hun (N. Y.) 379; Rich v. Mentz, 19 Fed. Rep. 725; Barker v. Oswegatchie, 10 N. Y. Supp. 834; 57 Hun (N. Y.) 594; Berlin Iron Bridge Co. v. Wagner, 57 Hun (N. Y.) 346; People v. Hulbert, 59 Barb. (N. Y.) 446; Knapp v. Newtown, 1 Hun (N. Y.) 268; Marsh v. Little Valley, 4 Thomp. & C. (N. Y.) 116; People v. Morgan, 55 N. Y. 587; Venice v. Breed, 1 Thomp. & C. (N. Y.) 131; Clark v. Oliver, 1 Thomp. & C. (N. Y.) 570; People v. Suffern, 68 N. Y. 321; Phelps

v. Yates, 16 Blatchf. (U. S.) 192; Phelps v. Lewiston, 15 Blatchf. (U. S.) 131; Smith v. Ontario, 15 Blatchf. (U. S.) 267; Stewart v. Lansing, 15 Blatchf. (U. S.) 281; Gray v. York, 15 Blatchf. (U. S.) 335; Foote v. Hancock, 15 Blatchf. (U. S.) 343; Springport v. Teutonia Sav. Bank, 75 N. Y. 397; 84 N. Y. 403; Wellsborough v. New York, etc., R. Co., 76 N. Y. 182; Syracuse Sav. Bank v. Seneca Falls, 21 Hun (N. Y.) 304; 86 N. Y. 317; Federgreen v. Fallsburgh, 25 Hun (N. Y.) 152; Potter v. Greenwich, 26 Hun (N. Y.) 326; Horton v. Thompson, 71 N. Y. 513.

As to requisites of procedure in issuing town bonds in aid of a railroad, under the *New York* acts thereon of 1857 and 1859, amending that of 1856, ch. 64, see Duanesburgh v. Jenkins, 57 N. Y. 177. No subsequent statute can legalize bonds in aid of a railroad issued by a commissioner under color of right, but not legally authorized, assuming to act for a town on the proposed route thereof. Duanesburgh v. Jenkins, 46 Barb. (N. Y.) 294. Compare People v. Clark, 53 Barb. (N. Y.) 171.

In *North Carolina*, as to the requisites of a valid issuance of town bonds, see Lynchburg, etc., R. Co. v. Person County, 109 N. Car. 159.

The requirement of *North Carolina* Act of 1861, ch. 176, that town bonds be signed by the town magistrate, treasurer and commissioners, was held to be merely directory; and the bonds were held valid, though signed only by the magistrate and treasurer. Bank of Statesville v. Statesville, 84 N. Car. 169.

An innocent holder of school bonds, issued under an unconstitutional act, was held chargeable with knowledge of their illegal origin. Duke v. Brown, 96 N. Car. 127; Markham v. Manning, 96 N. Car. 132.

A purchaser of town bonds issued under an illegal vote, was held chargeable with knowledge of their invalidity. Duke v. Brown, 96 N. Car. 127; Markham v. Manning, 96 N. Car. 132.

The *Ohio* Law of 1889 (86 Ohio Laws 7), providing for the issuance of municipal bonds for natural-gas works, and for a sinking fund for their redemption, was held not to be a special act; and the purpose is a use for which the taxing power can be constitutionally exercised. State v. Toledo, 48 Ohio St. 112.

Upon the validity of town bonds, and the estoppel of taxpayers as against

holders, see *State v. Van Horne*, 7 Ohio St. 327; *Goshen Tp. v. Shoemaker*, 12 Ohio St. 624; 80 Am. Dec. 386.

A town was held liable for borrowed money, though the loan was not expressly authorized by its charter. *Bank of Chillicothe v. Chillicothe*, 7 Ohio 31; 30 Am. Dec. 185.

Where, in order to secure a township vote in aid of a railroad, certain parties, with the railway company's knowledge, executed a mortgage to secure indemnity, it was held that, in the absence of any privity of contract with the bondholders, the mortgagor was not estopped to deny the validity of the bonds. *Hopple v. Hipple*, 33 Ohio St. 116.

Under *Ohio Rev. Stat.*, § 1494, making that township liable for relief to a pauper "only in such amount as the trustees determine to be just and reasonable," a physician cannot recover therefor after their *bona fide* rejection of his claim. *Elizabeth Tp. v. White*, 48 Ohio St. 577.

In *Oklahoma*, a *de jure* successor of a *de facto* municipality comprising the same territory and people, is liable for the valid contracts thereof. *Blackburn v. Oklahoma*, 1 Okl. 202.

The territorial legislature may properly provide for a village's payment of the debts of the preceding provisional government. *Guthrie v. Territory*, 1 Okl. 188.

In *Pennsylvania*, a township is liable to suit on a warrant of its road commissioners, legally drawn upon its treasurer, after his refusal to pay. *East Union Tp. v. Comrey*, 100 Pa. St. 362. A township order does not bear interest. *East Union Tp. v. Ryan*, 86 Pa. St. 459; *Snyder v. Bovaiard*, 122 Pa. St. 442.

A statute authorizing township officers to issue bonds and levy a tax to pay the same, must be strictly pursued. *Meek v. Bayard*, 53 Pa. St. 217.

A contract to furnish natural gas to a borough, with proviso for a decrease of burden *pro rata*, according to the number of franchises granted to other parties, was held valid. *School Dist. v. Ohio Valley Gas Co.*, 154 Pa. St. 539.

The lien of a municipal claim was held to be discharged by sheriff's sale made after the work was done, and before the claim was filed. *Philadelphia v. Cox*, 1 Pa. Dist. Rep. 280.

A borough's issuance of bonds to fund a debt, only a portion of which is beyond the constitutional limit, is an indivisible transaction, and the whole is

invalid. *Millerstown v. Frederick*, 114 Pa. St. 435.

In *South Carolina*, the bonded debt of a municipality cannot exceed eight per cent. of the assessed value of its taxable property. *South Carolina Acts* (1884), p. 690.

As to what is a valid issuance of municipal bonds upon a vote by property, see *Wilson v. Florence* (S. Car. 1893), 17 S. E. Rep. 835; 18 S. E. Rep. 792. As to limit on the bonded debt, see *State v. Cornwell* (S. Car. 1893), 18 S. E. Rep. 184.

If the charter of a municipality be void, its bonds are void, even in the hands of a *bona fide* holder for value. *Ruohs v. Athens*, 91 Tenn. 20.

The bare power given to municipalities by the *Tennessee Act* of 1842, to subscribe to the capital stock of railway companies, was held not to import authority to pay the subscription in bonds. *Green v. Dyersburg*, 2 Flip. (U. S.) 477.

Authorization of a *Tennessee* town to subscribe for railroad stock, was held not to enforce power to issue bonds in payment. And such bonds cannot be validated by the mayor's consent that a decree be entered declaring them valid. *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160.

In *Texas*, where a municipal charter required that bonds specify the purpose of issuance, mere mention of the date of the ordinance by virtue whereof they were issued, without stating its title or contents, was held not to protect an innocent holder for value. *Barnett v. Denison*, 145 U. S. 135. In a municipal charter, power to borrow money does not import power to issue bonds. *Brenham v. German American Bank*, 144 U. S. 173. Further, as to municipal bonds, sinking fund, etc., see *Austin v. Nalle*, 85 Tex. 520. A municipality is liable to garnishment. *Laredo v. Nalle*, 65 Tex. 361.

In *Vermont*, as to the requisites and procedure in town subscriptions in aid of railroads, see *Vermont Rev. L.* (1880), § 2760 *et seq.* On refusal of the town treasurer to pay an order of the selectmen or overseer of the poor, the holder may recover of the town, with interest from date of demand. *Vermont Rev. L.* (1880), § 2712. The assignee of an order may sue in his own name. *Davenport v. Johnson*, 49 Vt. 403.

One's omission to present to the town auditor certain items for his expenditures as town officer, was held not to preclude him from recovering in

assumpsit against the town therefor. *Judevine v. Hardwick*, 49 Vt. 180.

A town furnishing necessities to a minor resident sick with small-pox, was held entitled to recover therefor from the town of his settlement. *Brattleboro v. Stratton*, 24 Vt. 306.

A town that had availed itself of the benefit of an enlistment contract, was held to be estopped to repudiate it, on the ground that only one of the selectmen was cognizant of its terms. *Earle v. Wallingford*, 44 Vt. 367.

A town can charge itself for a bounty to volunteers by a vote offering it, and a volunteer's enlistment, without a formal assent by the selectmen. *Jackman v. New Haven*, 42 Vt. 591.

A soldier complying with all the conditions of a town's vote offering a bounty, may recover it, although he did not enlist in reliance thereon, nor under influence thereof. *Davis v. Landgrove*, 43 Vt. 442; *Hill v. Eden*, 41 Vt. 195. But compare *Atwood v. Lincoln*, 44 Vt. 332; 46 Vt. 213; *Sanders v. Bolton*, 47 Vt. 276; *Josselyn v. Ludlow*, 44 Vt. 534. Further, as to the liability of a town upon its vote to pay a bounty for military enlistment, see *Davis v. St. Albans*, 42 Vt. 590; *Gale v. Jamaica*, 39 Vt. 610; *Steinberg v. Eden*, 41 Vt. 187; *Hunkins v. Johnson*, 45 Vt. 131; *Bucklin v. Sudbury*, 43 Vt. 700.

As to the requisites of procedure in issuing *Vermont* town bonds, and the rights of holders as dependent thereon, see *First Nat. Bank v. Dorset*, 16 Blatchf. (U. S.) 62.

In *Virginia*, as to restrictions upon municipal subscriptions to internal improvements, see *Virginia Code* (1887), § 1243.

Power to borrow money imports power to issue bonds therefor. *Bunch v. Fluvanna County*, 86 Va. 452.

As to a condition precedent in municipal bonds that the railway company subscribe to blast-furnace stock, see *Echols v. Bristol* (Va. 1893), 17 S. E. Rep. 943.

In *West Virginia*, as to the power of towns, villages, and cities to issue bonds, the restrictions, etc., see *West Virginia Code* (1891), p. 1018 *et seq.*

In *Wisconsin*, as to the purposes for which towns may issue bonds, see *Wisconsin Annot. Stat.* (1889), § 942. As to the requisites of valid town bonds, see *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543; *De Forth v. Wisconsin*, etc., R. Co., 52 Wis. 320; 38 Am. Rep.

737; *Lynch v. Eastern*, etc., R. Co., 57 Wis. 430. When, by law, there is no separate road fund, town orders purporting to be drawn thereon, are payable out of the general fund. *Martin v. Jacobs*, 77 Wis. 31. The town, and not the board of supervisors, is liable on a drainage contract. *Hohl v. Westford*, 33 Wis. 323.

A town is not liable on an order drawn against its treasurer, until demand and refusal. *Packard v. Bovina*, 24 Wis. 382.

A town sued by an innocent holder, was held estopped to deny the date of its bonds, or to allege that they were signed after the clerk had resigned, and not in compliance with the *Wisconsin* Act of 1826, ch. 126, enabling the town to issue them. *Weyauwega v. Ayling*, 99 U. S. 112.

Under authority to issue bonds in aid of a railroad, a town may issue negotiable debentures, if this be an ordinary and convenient form of security. *Bushnell v. Beloit*, 10 Wis. 195.

Town bonds were held invalid for being issued before the authorizing act had taken effect. *Rochester v. Alfred Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378.

The absence of any record in the town clerk's office of an affidavit of notice, as required by the Enabling act, was held to put bond-holders on inquiry and to preclude recovery, although the bonds recited compliance, etc. *Veeder v. Lima*, 19 Wis. 280.

A taxpayer may maintain an action to enjoin the issuance of bonds to pay a stock subscription not binding on the town. *Noesen v. Port Washington*, 37 Wis. 168.

The sworn certificate of the chairman of the board of town supervisors upon town bonds, that the condition of their issuance relating to the completion of the *Wisconsin* Central Railroad had been fulfilled, was held to estop the town from denying their validity. *Menasha v. Hazard*, 102 U. S. 81. The fact that the railroad, in aid of which town bonds had been issued, was built by the company's assignee, and that the stock tendered was worthless, was, by a majority of the court, held to afford no ground for enjoining delivery of the bonds. *Lynch v. Eastern*, etc., R. Co., 57 Wis. 430. A physician employed by town supervisors to attend a poor family, cannot recover for service rendered after the expiration of their term, without direct proof that the contract so

3. Torts—*a.* IN GENERAL.—The liability of towns as distinguished from municipal corporations is generally only such as is defined and prescribed by statute. No liability can arise from the performance of acts wholly outside of the general powers conferred upon them, even though the act be sanctioned by a majority vote, or be subsequently ratified.¹ Towns and townships may be liable for injuries to persons or property for failure to perform their duties and obligations with respect to streets and highways. In the notes will be found many decisions as to this liability.²

extended. *Jones v. Lind*, 79 Wis. 64. As to bonds reciting to be issued on the faith and security of improvement assessments, and the equity to enjoin issuance in excess of the *Wisconsin* constitutional limit of five per cent. on the taxable property, see *Fowler v. Superior* (Wis. 1893), 54 N. W. Rep. 800. As to the requisites of procedure in issuing town bonds, see *Sauerhering v. Iron Ridge, etc., R. Co.*, 25 Wis. 447.

In *Wyoming*, as to the issuance of town bonds, see *Wyoming* Sess. L. (1890), p. 110; bonds for water-works, p. 138; coupon bonds, Sess. L. (1891), p. 368. No debt can be created except on vote; also not exceeding two per cent. of the assessed valuation of the taxable property, except as provided in this act (ch. 89), or for supplying the town with water, p. 369, § 7.

1. *Morrison v. Lawrence*, 98 Mass. 219; *Parsons v. Goshen*, 11 Pick. (Mass.) 396.

In *Anthony v. Adams*, 1 Met. (Mass.) 284, Shaw, C. J., said: "Where individuals, although professing to act under color of authority from municipal corporations, do acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate powers of the towns, and not done in the execution of any corporate duty imposed upon the town by law, the town is not liable for the damages occasioned by such acts. Wherein otherwise towns might be rendered responsible upon implied liabilities, in cases where they cannot bind themselves as a corporation by an expressed vote of inhabitants; for it is now well settled that a town in its corporate capacity will not be bound even by the expressed vote of the majority to the performance of contract or other legal duties not coming within the scope of the objects and purposes for which they are incorporated.

A town cannot be held liable for

damages resulting from work which it has no authority to carry on. *Lemmon v. Newton*, 134 Mass. 476; so it cannot be held liable for acts which result in creating a nuisance, when the acts complained of are not within the scope of its corporate powers. See *v. Deering*, 79 Me. 343; *Cushing v. Bedford*, 125 Mass. 526.

2. See also *HIGHWAY*, vol. 9, p. 398; *STREETS*, vol. 24, p. 87.

In *Arkansas*, a town is not liable to a person for an injury resulting from its failure to repair a street. *Arkadelphia v. Windham*, 49 Ark. 139; *Fort Smith v. York*, 52 Ark. 84.

In *Colorado*, proof that a street in the business part of a town is a public thoroughfare generally traveled, and that the proper authorities have voluntarily assumed to keep it in repair, is presumptive evidence of a dedication; and the town may be liable for injuries from a defect therein. *Salida v. McKinna*, 16 Colo. 523.

The fact that a traveler injudiciously chose a side track, when the main track of the highway was passable and safe, was held to exonerate the town from liability for injuries caused by his heavy load breaking through ice. *Burr v. Plymouth*, 48 Conn. 460.

In an action against a town for death from an alleged defect in a highway—*e. g.*, insufficient guard at the bank of a mill pond—the burden is upon the plaintiff to prove that the decedent exercised reasonable care and prudence. *Lutton v. Vernon*, 62 Conn. 1; *Ryan v. Bristol* (Conn. 1893), 27 Atl. Rep. 309. A town was held not liable for a death from the falling of weights attached to a flag stretched over a highway. The statutory requirement of "good and sufficient repair," might still have been fulfilled. *Hewison v. New Haven*, 34 Conn. 136, citing *Hixon v. Lowell*, 13 Gray (Mass.) 59. As to what circumstances the jury are to consider in determining a town's liability

for injuries from an alleged highway defect, see a case involving the effect of the ancient custom of local residents joining in breaking paths through snow-drifts, excusing the selectmen's inaction. *Seeley v. Litchfield*, 49 Conn. 134; 44 Am. Rep. 213. As to what circumstances are to be considered by the jury in determining whether a highway was "reasonably safe," see *Lee v. Barkhamstead*, 46 Conn. 213. Further, as to the liability of towns to persons injured by defects of highways, the requisite notice, etc., see *Connecticut Gen. Stat.* (1888), § 2673 *et seq.*; *Lilly v. Woodstock*, 59 Conn. 219; *Manning v. Woodstock*, 59 Conn. 224; *Biesiegel v. Seymour*, 58 Conn. 43; *Seeley v. Bridgeport*, 53 Conn. 1; *Brown v. Southbury*, 53 Conn. 212; *Burlington v. Schwarzman*, 52 Conn. 181; 52 Am. Rep. 571; *Cloughessey v. Waterbury*, 51 Conn. 405; 50 Am. Rep. 38; *Tuttle v. Winchester*, 50 Conn. 496. As to the rights and liability of towns or boroughs in turning water from highways, see *Connecticut Gen. Stat.* (1888), §§ 2683, 2747; *Bronson v. Wallingford*, 54 Conn. 513. A town was held liable to one who had contracted therewith to keep a certain highway in repair, for so depositing materials as to choke a drain and injure the road. *McNary v. Chamberlain*, 34 Conn. 384; 91 Am. Dec. 732. An abutter was held entitled to recover the value of a sidewalk destroyed by a grade crossing. *Shelton Co. v. Birmingham*, 62 Conn. 456.

In *Georgia*, a town was held liable to the tenant of a house demolished by the town authorities to prevent the spread of a conflagration, for the destruction of his furniture. *Dawson v. Kuttner*, 48 Ga. 133.

A municipality was held not to be liable to one who, when aware of the defect, walked into a hole in the sidewalk. *Sheats v. Rome* (Ga. 1893), 17 S. E. Rep. 922. But compare *Ball v. El Paso* (Texas Civ. App. 1893), 23 S. W. Rep. 835. Further, as to municipal liability for defective streets, see *Bryan v. Macon* (Ga. 1893), 18 S. E. Rep. 351.

In *Illinois*, an incorporated town was held liable for injuries from a defective bridge, although the township authorities had assumed to keep it in repair. *Mechanisburg v. Meridith*, 54 Ill. 84.

Municipal obligation to keep the streets in repair is not suspended during the change from town to village

organization, under the *Illinois* statute of 1872. *Evanston v. Gunn*, 99 U. S. 660.

A village is not bound to insure against the condition of a sidewalk, caused by an extraordinary snow-fall packing and freezing. *Gibson v. Johnson*, 4 Ill. App. 288.

One injured because of the unsafe condition of a drain-covering used by the public as a street crossing, was held entitled to recover of the municipality. *Champaign v. Petterson*, 50 Ill. 61. Compare the hay-scale platform case, *Whitney v. Essex*, 42 Vt. 520.

A town is liable equally with a natural person in trespass *de bonis asportatis*, for taking the goods of another than the execution defendant. *Wolf v. Boettcher*, 64 Ill. 316.

The *Illinois* rule as to contributory negligence, was applied in an action against a town for injury from a defective sidewalk. *Senger v. Harvard* (Ill. 1893), 35 N. E. Rep. 137.

In *Indiana*, a town is not liable for an illegal arrest made without warrant and under an invalid ordinance. *Laurel v. Blue*, 1 Ind. App. 128, *citing* *Dillon Mun. Corp.* (4th ed.) 975; *Anderson v. East*, 117 Ind. 126.

A township is not liable to an abutter for injury from the road supervisor's work in repairing. *Union Civil Tp. v. Berryman*, 3 Ind. App. 344. But compare *Jeffersonville v. Myers*, 2 Ind. App. 532.

A town is not responsible to a property owner for failure to exercise its power to provide drainage. *Monticello v. Fox*, 3 Ind. App. 431.

As to a municipality's liability to an owner of low land, for allowing a drain to become clogged up, see *Valparaiso v. Cartwright* (Ind. App. 1893), 35 N. E. Rep. 1051.

The fact that the town trustee first knew of the defect in the sidewalk only two hours before the accident, was held not to be conclusive of due care on the part of the town. *Jewell v. Sullivan*, 5 Ind. App. 188.

Upon a general verdict, the appellate court may presume that the municipality had notice of a sidewalk defect. *Fort Wayne v. Patterson*, 3 Ind. App. 34. But compare *Rosedale v. Ferguson*, 3 Ind. App. 596; *Nappanee v. Buckman* (Ind. App. 1893), 34 N. E. Rep. 609.

A municipality was held liable for a personal injury from an iron gutter-crossing in a much traveled street becoming worn smooth; the defect having

remained ten months. *Lyon v. Logansport* (Ind. 1893), 35 N. E. Rep. 128.

As to the liability of a municipality for a personal injury from an electric wire negligently fastened, see *LaFayette v. Ashby* (Ind. App. 1893), 34 N. E. Rep. 238.

One cannot recover of the township for the sheep killed by dogs, without strict compliance with the statute as to ten days' written notice, etc. *Abell v. Prairie Civ. Tp.*, 4 Ind. App. 599.

The rule that a pedestrian has a right to presume that an unlighted sidewalk is in a safe condition, applied where the injury was from an excavation made by a third party with the plaintiff's knowledge, and without the consent of the town. *Elkhart v. Ritter*, 66 Ind. 136.

A township is not liable for an injury caused by a neglect to keep a highway in repair. *Yeager v. Tippecanoe Tp.*, 81 Ind. 46.

A town is liable to an abutter for damages from negligently obstructing a drain in street grading. *Princeton v. Gleske*, 93 Ind. 102.

The probability of slight consequential damage to an abutter's land from the town's change of a water-course, was held to be no ground for an injunction. *Sullivan v. Phillips*, 110 Ind. 320.

A town empowered to require an abutter to improve the sidewalk is, upon proof of notice and negligence, only liable for an injury from his excavating. *Dooley v. Sullivan*, 112 Ind. 451.

In *Iowa*, a municipality was held not to be liable for the false imprisonment of a spectacles peddler, under an unconstitutional ordinance requiring a license fee. *Trescott v. Waterloo*, 26 Fed. Rep. 592.

The fact that a street has not been accepted by special ordinance, will not preclude recovery by one injured from a defect therein. *Byerly v. Anamosa*, 79 Iowa 204, *distinguishing* *Laughlin v. Washington*, 63 Iowa 652.

Expert testimony is admissible as to the durability of the material of an alleged rotten sidewalk. *McConnell v. Osage*, 80 Iowa 293.

To establish a presumption that the municipality had notice of the defect, evidence is admissible that for the entire length of the block the sidewalk was defective. *McConnell v. Osage*, 80 Iowa 293, *following* *Armstrong v. Ackley*, 71 Iowa 76, and *distinguishing* *Ruggles v. Nevada*, 63 Iowa 185.

Although an ordinance may not be

the standard of care, its provisions may be properly considered in determining whether a sidewalk was properly constructed. So held, as to one requiring certain board walks to have three stringers; that on which the accident occurred having only two. Proof that the municipal officers had sent a man to repair the defective planking, was held to establish notice of the defect. *Smith v. Pella* (Iowa, 1892), 53 N. W. Rep. 226.

A decayed bill-board standing against a sidewalk and tending to unsafety, was held to render the walk "defective," within the statute requiring notice to the municipality within ninety days after a personal injury therefrom. *Blivens v. Sioux City* (Iowa, 1892), 52 N. W. Rep. 246.

For facts considered insufficient to warrant a presumption of the municipality's knowledge of the defect in a sidewalk, see *Theissen v. Belle Plaine*, 81 Iowa 118.

Where a quarry owner obstructed a street by rocks from a bluff, it was held that the municipality was liable for appropriating a portion to repair the street, and could not counter-claim for cost of a removal of the remainder. *Kemper v. Burlington*, 81 Iowa 354.

In a suit against a town for injury from a loose plank, evidence that a sidewalk was generally out of repair in its vicinity, was held inadmissible. *Ruggles v. Nevada*, 63 Iowa 185. But *compare* *Armstrong v. Ackley*, 71 Iowa 76.

Unless required by statute, no claim need be made against the town before suit for injuries from a defective sidewalk. *Green v. Spencer*, 67 Iowa 410.

The fact that before the accident, a member of the town council had ordered an abutter to repair certain sidewalk defects, was held not to charge the town with notice of the defect—loosened planking—that caused the accident, although at the same place. *Carter v. Monticello*, 68 Iowa 178.

As to what circumstances are to be considered by the jury in determining the liability of a town for injuries from an alleged defective highway, see a case of an excavation mound, *Stafford v. Oskaloosa*, 57 Iowa 748; *Thomas v. Brooklyn*, 58 Iowa 438; *Beazan v. Mason*, 58 Iowa 233; *Sikes v. Manchester*, 59 Iowa 65; *Cressy v. Postville*, 59 Iowa 62; *Parkhill v. Brighton*, 61 Iowa 103.

In *Kansas*, neglect of road overseers

to erect depth indicators at fords, as required by *Kansas* Gen. Stat. (1889), § 5514, does not render the town liable as for a defective highway, under *Kansas* Laws (1887), ch. 237. *Quincy Tp. v. Sheehan*, 48 Kan. 620.

A municipality was held not to be liable for damages caused by the caving in of a drain, planned by its engineer to be constructed by private parties. *Kansas City v. Brady* (Kan. 1893), 34 Pac. Rep. 884.

As to when a municipality is not bound to provide danger signals or barriers at excavations near streets, see *Mulvane v. South Topeka*, 45 Kan. 45; *Kansas City v. Birmingham*, 45 Kan. 212.

Lapse of time and other circumstances considered to raise a presumption of notice to the municipality of a defect in a sidewalk, are considered in *Kansas City v. Bradbury*, 45 Kan. 381; *Abilene v. Cowperwait* (Kan. 1893), 34 Pac. Rep. 795.

Kansas had, in 1879, no express statute imposing on townships a liability for injuries from a defective highway. *Elkenberry v. Bazaar Tp.*, 22 Kan. 556; 31 Am. Rep. 198.

In *Kentucky*, the rule of liability for torts as to towns and like municipal corporations, is like that established in *Alabama*, *Arkansas*, *Illinois*, etc. In *James v. Harrodsburg*, 85 Ky. 101, the court, by Pryor, C. J., in deciding that the town was not liable for injury to a pedestrian from a citizen's blasting on his private property, said: "The power to abate a nuisance may be expressly given; but the failure to provide the means of removing the nuisance, or the omission of its officers to remove it when the means are provided, gives no cause of action to those who are injured by this neglect of duty. The party creating the nuisance is liable in a civil action, and may be indicted for the offense," citing *Davis v. Montgomery*, 51 Ala. 139; 23 Am. Rep. 545, and *distinguishing Parker v. Macon*, 39 Ga. 729.

In *Maine*, no town is liable for damages from a defective public way where no statute gives any action; none is given to the father of a child whose life is lost by the defect. *Frazer v. Lewiston*, 76 Me. 531. In an action against a town for death from a highway defect, the plaintiff has the burden of showing that the deceased was in the exercise of due care. *Merrill v. North Yarmouth*, 78 Me. 200; 57 Am. Dec. 794.

An action against a town, being in

derogation of the common law, only lies upon proof of strict compliance with the statute as to the twenty-four hours' notice. *Haines v. Lewiston*, 84 Me. 18.

The occurrence of a thaw, was held to be sufficient notice to a town of the unsafe condition of a highway partially obstructed by snow and only broken out over a frozen ditch. *Savage v. Bangor*, 40 Me. 176; 63 Am. Dec. 568.

As to when an individual inhabitant's knowledge of a highway defect imports notice to the town officers, see *Mason v. Ellsworth*, 32 Me. 271; *Tuell v. Paris*, 23 Me. 556; *Springer v. Bowdoinham*, 7 Me. 442; *French v. Brunswick*, 21 Me. 29.

Where the driver of a sled heavily loaded with hay, knew that there was an insufficiency of snow-breaks or "turn-outs," and was injured in trying to pass a large load of logs met, it was held that he could not recover of the town, without proof of having previously given to the municipal officers the notice required by *Maine* Stat. (1879), ch. 156, § 3. *Haines v. Lewiston*, 84 Me. 18, *distinguishing Holmes v. Paris*, 75 Me. 559. To render a town liable for a highway obstruction—*e. g.*, boiler left over night on its way to a navy yard—the town officers must have notice that it was there needlessly and unlawfully. *Bartlett v. Kittery*, 68 Me. 358. The statutory notice of claim for an injury cannot be waived by a municipal officer. *Veazie v. Rockland*, 68 Me. 511. A town was held not to be liable for injury from a defect in a portion of a highway not affecting the safety of the usually traveled portion. *Dickey v. Maine Tel. Co.*, 46 Me. 483. A town is not bound to make a highway passable for its entire width. *Tasker v. Farmingdale*, 85 Me. 523. The law requires no particular width for the traveled portion. *Penley v. Auburn*, 85 Me. 278. A town is not bound to keep a road in good condition at any greater width than is demanded by the public needs. *Farrell v. Oldtown*, 69 Me. 72. The safety required is only that in view of such casualties as may reasonably be expected to happen to travelers. *Morse v. Belfast*, 77 Me. 44, *quoting Chapman, C. J.*, in *Macomber v. Taunton*, 100 Mass. 256; "Ditches are so necessary for the proper drainage of the carriage-way that they are held not to be defects, improperly constructed, though travelers may be liable to fall into them in the dark;" also *quoting Peters, J.*, in

Spaulding v. Winslow, 74 Me. 528: "There are many thousands of such places within this state. If railings were required for them, towns would have extraordinary burdens to maintain their roads." The statutes do not undertake to define precisely what imperfection is a "defect," or what negligence on the part of the town authorities is a want of due care; this is for jurors to determine. *Morse v. Belfast*, 77 Me. 44.

The fact that the unsafety resulted from a railway company's alteration of the highway, was held not to exonerate the town from liability for a consequent personal injury. *Phillips v. Veazie*, 40 Me. 96; *Veazie v. Penobscot R. Co.*, 49 Me. 119.

A traveler perceiving a highway to be undergoing repairs, and only a narrow passage-way to be opened, is bound to exercise the caution of a man of ordinary prudence. Otherwise, he cannot recover of the town for consequent injury, even though there was no posted notice of danger. *Jacobs v. Bangor*, 16 Me. 187; 33 Am. Dec. 652.

A statutory requirement of safety and convenience imports the placing of light where repairs of a highway are left incomplete at night. *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243.

As to what circumstances the jury are to consider in determining whether a highway is kept by the town "safe and convenient" within the statute, see *Church v. Cherryfield*, 33 Me. 460; *Morton v. Frankfort*, 55 Me. 46; *Frost v. Portland*, 11 Me. 271; *Johnson v. Whitefield*, 18 Me. 286; 36 Am. Dec. 721; *Merrill v. Hamden*, 26 Me. 234; *Lowell v. Moscow*, 12 Me. 300; *Farrar v. Greene*, 32 Me. 574; *Brown v. Watson*, 47 Me. 161; 74 Am. Dec. 482; *Crumpton v. Solon*, 11 Me. 335; *Den-nett v. Wellington*, 15 Me. 27; *Libbey v. Greenbush*, 20 Me. 47; *Foster v. Dixfield*, 18 Me. 380; *Verrill v. Minot*, 31 Me. 299; *Moore v. Abbott*, 32 Me. 46; *Willey v. Ellsworth*, 64 Me. 57.

A town is liable for the condition of a toll-bridge connecting two highways. *Bradbury v. Benton*, 69 Me. 194.

Where two towns had united in maintaining a bridge over the boundary stream, it was held that the liability of one of them for a defect on its own side of the line, was not affected by the fact that the other town was also negligent. *Perkins v. Oxford*, 66 Me. 545.

In an action for an injury from a defect in an alleged town way, the town is

not estopped to deny the allegation by the mere fact that its officers gave materials for its improvement to one using it as a private way. *Gilpatrick v. Biddeford*, 51 Me. 182.

A town was held not to be liable for injury to land from a wrongdoer choking a highway culvert; the town officers not being in fault of act or neglect. *Peck v. Ellsworth*, 36 Me. 393.

A town is not liable for damages to an abutter from an overflow caused by a defect in a highway drain, unless required by statute or at common law to construct a drain. *Estes v. China*, 56 Me. 407.

A municipality was held not to be liable for damages to an abutter, from the insufficiency of a culvert built by a railway company in its location on a street. *Lander v. Bath*, 85 Me. 141.

There being no statute authorizing a town to construct sewers, it is not liable for a nuisance created in the digging, etc., before their completion. *Bulger v. Eden*, 82 Me. 352.

A town was held to be liable for an injury caused by a ram kept upon its poor-farm for propagation, but negligently suffered to run at large. *Moulton v. Scarborough*, 71 Me. 267; 36 Am. Rep. 308.

In *Massachusetts*, under the statute of 1869, authorizing county commissioners to change the channel of a stream running to tide-water, as they deem necessary for drainage, a town or city is not liable to a riparian owner above for damages from the consequent back-flowage. *Cochrane v. Malden*, 152 Mass. 365. As to the remedy of a riparian owner for pollution of the stream by street drainage, see *Bainard v. Newton*, 154 Mass. 255.

A town was held liable for damages from its neglect to keep a common drain unchoked. *Bates v. Westboro'*, 151 Mass. 174. But as to gutter water flooding adjoining land, see *Collins v. Waltham*, 151 Mass. 196, and compare *Woodbury v. Beverly*, 153 Mass. 245.

An abutter under a permit entering his drain into a public sewer, was held not entitled to recover for damage to his cellar for the inadequate size of the sewer. *Buckley v. New Bedford*, 155 Mass. 64. Compare *Livingstone v. Taunton*, 155 Mass. 363.

A town having accepted the statute authorization to lay water-pipes, etc., was held liable for injuries to a traveler from the defective construction, although no statutory action lay for a

highway defect. *Hand v. Brookline*, 126 Mass. 324.

A town was held to be liable for injuries from the negligent management of its poor-farm, namely, an employé's wagon colliding with a blind man; the managers being at the same time overseers of the poor, highway surveyors, and selectmen. *Neff v. Wellesley*, 148 Mass. 487.

A town was held not to be liable for injury to a traveler from an obstruction in a highway—a railroad trestle—where the selectmen had done their statutory duty of applying to the county commissioners for its removal. *Flanders v. Norwood*, 141 Mass. 17.

A town is not liable for an injury from a defect in a bridge or its approaches which a railway company is bound by law to keep in repair; and this, though the town has contracted therewith to keep it in repair, has made repairs to it within six years, has known of the defect, and failed to warn the public thereof. *Rouse v. Somerville*, 130 Mass. 361. Nor would the railway corporation be liable therefor, without the notice required by *Massachusetts Stat. (1877)*, ch. 234. *Dickie v. Boston*, etc., R. Co., 131 Mass. 516.

A town giving the free use of a public building for an entertainment was held not to be liable to a person attending it and injured by falling into a trench near the building and outside the highway. *Larrabee v. Peabody*, 128 Mass. 561. *Compare*, as to municipal non-liability for injuries from defective walks on Boston Common, a pleasure-ground furnished by the city not for gain, *Steele v. Boston*, 128 Mass. 583. Nor is liability for such injury thereon, imported by the fact that part of the town common is occupied by a building used for pecuniary benefit to the town. *Clark v. Waltham*, 128 Mass. 567. But *compare Burnham v. Boston*, 10 Allen (Mass.) 290.

A town which has assumed the duties of school districts is liable for an injury to a scholar from a dangerous excavation in the schoolhouse yard, owing to the negligence of the town officers. *Bigelow v. Randolph*, 14 Gray (Mass.) 541.

A town is liable for a defect in a dedicated private way near its entrance into the highway, unless the public be properly cautioned. *Paine v. Brockton*, 138 Mass. 564.

Where a dangerous and accessible place was nine feet from the highway

location, and over thirty feet from the traveled part, it was held, that the town was not liable for failure to erect a barrier. *Barnes v. Chicopee*, 138 Mass. 67; 52 Am. Rep. 259. *Compare Kelley v. Columbus*, 41 Ohio St. 263.

Where the accident occurred twenty-five feet from the road, the absence of a railing was held not to be a defect for which the town was liable. *Hudson v. Marlborough*, 153 Mass. 218.

Proof that a generally traveled sidewalk had been formally laid out, is not necessary in order to establish liability of the municipality for injury from a defect therein. *Weare v. Fitchburg*, 110 Mass. 334.

In an action for injury from a defect in a road used as a town way, the town may show that the road had not been laid out and accepted as a highway. *Jones v. Andover*, 9 Pick. (Mass.) 146; *criticised in Higginson v. Nahant*, 11 Allen (Mass.) 534.

General uninterrupted public use of a road as a highway for twenty years, was held to import dedication and acceptance, rendering the town liable for want of repair thereof. *Jennings v. Tisbury*, 5 Gray (Mass.) 73.

As to what is non-user of a highway amounting to such discontinuance as to preclude recovery of the town for an injury from its non-repair, see *Tinker v. Russell*, 14 Pick. (Mass.) 279.

A town was held liable for a personal injury upon a highway undergoing repairs; its officers having reason to know that the barriers were often taken down and left. *Howard v. Mendon*, 117 Mass. 590.

A town or other municipality is bound only to keep a street or sidewalk "safe and convenient for travelers;" not to insure them from snow or ice falling from a roof-gutter. *Hixon v. Lowell*, 13 Gray (Mass.) 59.

The fact that the unsafety resulted from a railway company's alteration of the highway, was held not to exonerate the municipality from liability for a consequent personal injury. *Currier v. Lowell*, 16 Pick. (Mass.) 170. But *compare* the criticism by Shaw, C. J., in *Vinal v. Dorchester*, 7 Gray (Mass.) 421, that, "*Currier v. Lowell* carries the liability of towns to its extreme extent in this respect." Therein he held Dorchester not to be liable for injury from a railway track, illegally laid across a highway. *Compare* also the case of an aqueduct easement, where the town was

nevertheless held liable. *Merrill v. Wilbraham*, 11 Gray (Mass.) 156.

Where insufficient width was an alleged defect of a highway, evidence that vehicles had often met there and passed with room to spare, and without accident, was held inadmissible. *Aldrich v. Pelham*, 1 Gray (Mass.) 510.

The fact that a traveler driving a high-spirited horse had previously seen and passed a culvert hole, but now did not think of it, owing to mental preoccupation with business, was held not conclusive of contributory negligence. *Gilman v. Deerfield*, 15 Gray (Mass.) 577.

A stone remaining in a highway twenty-four hours, may be a defect rendering the town liable, although its position has meanwhile been changed by human agency. *Macarty v. Brookline*, 114 Mass. 527. But compare the case of a new cover to a coal-hole, substituted after the notification. *Crosby v. Boston*, 118 Mass. 71.

Further, as to what circumstances the jury are to consider in determining whether a highway is kept by the town "reasonably safe and convenient for travelers," see the case of a stone left in a traveled portion, *Bigelow v. Weston*, 3 Pick. (Mass.) 267; a stone not in the road-bed, *Smith v. Wendell*, 7 Cush. (Mass.) 408; lumber out of the traveled path, *Snow v. Adams*, 1 Cush. (Mass.) 443; want of a railing, *Hayden v. Attleborough*, 7 Gray (Mass.) 338; traveler's venturing outside the path, *Tisdale v. Norton*, 8 Met. (Mass.) 388; time of existence of defect, *Brady v. Lowell*, 3 Cush. (Mass.) 121; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Murdock v. Warwick*, 4 Gray (Mass.) 178; a post in a line of road undefined by fences, *Coggswell v. Lexington*, 4 Cush. (Mass.) 307; a telegraph post, *Young v. Yarmouth*, 9 Gray (Mass.) 386; a daguerrean saloon outside the traveled path, *Keith v. Easton*, 2 Allen (Mass.) 552; an awning over a sidewalk falling, *Day v. Milford*, 5 Allen (Mass.) 98; the slant as to ice formation, *Stanton v. Springfield*, 12 Allen (Mass.) 566; a horse that had dropped dead, *Cook v. Charlestown*, 13 Allen (Mass.) 190; traveler leaping from a carriage just before reaching a culvert hole, *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; persistent traveling into snow-drifts, *Horton v. Ipswich*, 12 Cush. (Mass.) 488; traveler's near residence and familiarity with the defect,

Frost v. Waltham, 12 Allen (Mass.) 85; post-hole left by building movers unguarded in a foggy night, *Pollard v. Woburn*, 104 Mass. 84; narrowness and crookedness of way, *Smith v. Wakefield*, 105 Mass. 473; recognition of a foot-path by long use, *Whitford v. Southbridge*, 119 Mass. 564; one venturing outside the traveled way on an unrailed culvert to rescue his servant from the water, *Harwood v. Oakham*, 152 Mass. 421.

As to restrictions upon expert testimony in an action against a town for personal injury from an alleged negligent filling of a trench dug in laying street pipes, see *Stoddard v. Winchester*, 157 Mass. 567. Record of the town vote as to locating a sewer and appropriating money, is admissible in an action for personal injury. *Breen v. Field*, 157 Mass. 277. So, also, evidence of the taxation and the amount of appropriation for highways the year preceding the accident, on the question of the town's diligence. *Weeks v. Needham*, 156 Mass. 289.

In *Logan v. New Bedford*, 157 Mass. 534, it was held that the circumstances rendered the danger of a pedestrian's falling from a bank wall too unusual to require a barrier at the sidewalk.

One cannot recover for injury from a defect in a highway, suffered while not using it for travel; *e. g.*, for a playground. *Tighe v. Lowell*, 119 Mass. 472. So held where a child was injured by sitting down upon an unplaced curbstone. *Lyons v. Brookline*, 119 Mass. 491.

One cannot maintain an action against a town for injury received by him because of a highway defect, when he was traveling on the Lord's day neither from necessity or charity; and the burden is on him to show other purpose. *Bosworth v. Swansea*, 10 Met. (Mass.) 363; 43 Am. Dec. 441.

The Sunday defense need not be specially averred. Illness of a marketman, was held not to render it a work of necessity for his servant to travel to fulfill an agreement to supply a customer with fresh meat. *Jones v. Andover*, 10 Allen (Mass.) 18.

Walking for exercise and air Sunday evening, was held not to preclude the recovery. *Hamilton v. Boston*, 14 Allen (Mass.) 475. Nor going to buy medicine for a sick child. *Gorman v. Lowell*, 117 Mass. 65. But otherwise, the returning from a funeral by a circuitous route merely to make a social call.

Davis v. Somerville, 128 Mass. 594; 35 Am. Rep. 399.

The corporate doings of a *Massachusetts* town are as entirely political as are those of the general legislative court. An action for libel will not lie against a town for publication of defamatory matter in the official report of a duly appointed investigating committee, accepted and printed by the town. *Howland v. Maynard*, 159 Mass. 434.

Under the *Massachusetts* Act of 1786, ch. 18, actual notice to the town officers was not necessary to render the town liable for injury from an open and visible highway defect that could have been prevented by ordinary diligence. *Lobdell v. New Bedford*, 1 Mass. 153; *Reed v. Northfield*, 13 Pick. (Mass.) 94.

A town was held liable without notice, for an injury from a trench left unguarded by one with whom it had contracted to lay a water-pipe and to guard and light the same at night. *Brooks v. Somerville*, 106 Mass. 271.

In order to hold a town responsible on the ground of implied notice of a defect in the road, there should be such a condition of things as fairly to indicate that there may at any time be danger in using the road. Thus, a town was held not to be liable for an injury from a defect in a highway, whereof it had no notice other than that implied from a fact of a heavy storm and the digging of a trench for a water-pipe; six months intervening. *Stoddard v. Winchester*, 154 Mass. 149.

Taking one of the selectmen to the place next day, and describing the accident, and sending a letter to them asking compensation, was held to be sufficient notice to the town. *Harris v. Newbury*, 128 Mass. 321.

In *Blank v. Livonia Tp.*, 79 Mich. 1, in deciding that the township was not liable for injury from the breaking of a bridge-stringer imperceptibly weakened by "dry rot," the court, by *Champlin, J.*, said: "Townships are not insurers of the safety of the bridges and highways within their limits. . . . They are liable for a neglect of this duty only when it is shown that such township has had reasonable time and opportunity, after knowledge or notice to such township that such highway or bridge has become unsafe or unfit for travel, to put the same in proper condition for use, and has not used reasonable diligence therein." But the authorities must take notice, at their peril, of the width of a roadway required by

the necessities of travel, in a given case. *Sebert v. Alpena*, 78 Mich. 165.

Michigan Sess. L. 1887, No. 264, must be construed to render a township liable for injuries from a defective crosswalk in an incorporated village. *Frery v. Allen Tp.*, 91 Mich. 666. A road turnpike and in use fifteen years, was held to be, within *Michigan* Stat. (1882), § 1315, such a public highway that the town would be liable for injuries to a traveler from colliding, at a point opposite cleared land, with a log partially imbedded therein. *Langworthy v. Green Tp.*, 88 Mich. 207. Where, beside a highway on a river bank, the barrier was a breakwater of slabs, and there were two underminings in the fillings, into only one of which a danger signal had been thrust, it was held that the town was liable for injuries to a rider of a horse falling into the unguarded one while avoiding a mud-hole. *Wakeham v. St. Clair Tp.*, 91 Mich. 15.

Contributory negligence will not be presumed from knowledge of the existence of a defect in a sidewalk; but it enjoins commensurate care. *Dittrich v. Detroit* (Mich. 1893), 57 N. W. Rep. 125. Compare *Hohn v. Carver* (Minn. 1893), 56 N. W. Rep. 826.

As to evidence presumptive of long continuance of the defect in a sidewalk, town official's knowledge, etc., see *Edwards v. Three Rivers*, 96 Mich. 625; *Alberts v. Vernon*, 96 Mich. 594.

Proof that the defendant municipality ought to have known of the rotten condition of the sidewalk and had had sufficient time, with reasonable diligence, to repair it, was held sufficient. *Fuller v. Jackson*, 92 Mich. 197.

As to what is a defect in a crosswalk over a street car track, for which a municipality is liable, see *Bigelow v. Kalamazoo*, 97 Mich. 121.

A resolution of the council that trees in a sidewalk be cut down, was held not to establish notice to municipal officers of a defect from the settling of the walk, leaving a stump projecting. *Lappread v. Detroit*, 95 Mich. 255.

There can be no recovery against a municipality for injury from an ordinary danger incident to the use of a street car track for driving purposes, *e. g.*, the sinking of a wagon-wheel in the ruts outside the rails in a narrow, unpaved street. *Kornetszki v. Detroit*, 94 Mich. 341.

A village council's authorization to sign water-works bonds, was held not

to import power in the president to deliver them. *Portsmouth Sav. Bank v. Ashley*, 96 Mich. 670.

A municipality, having erected a market building with columns resting upon piers without anchors, was held liable for a personal injury from its being blown down in a gale. *Barron v. Detroit*, 94 Mich. 601.

A township was held liable for injury from the breaking down of a bridge not kept strong enough to support the original test weight. *Stebbins v. Keene Tp.*, 60 Mich. 214. So, also, as to defects in a bridge, discoverable by the proper watchfulness of its officers. *Stebbins v. Keene Tp.*, 55 Mich. 552.

Further, as to what circumstances the jury are to consider in determining a town's liability for injuries from an alleged highway defect, see *Medina Tp. v. Perkins*, 48 Mich. 67; *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52; *Dotton v. Albion*, 50 Mich. 129. See also the case of a woman running for a physician, and injured by the misplaced planking of a cross-walk earlier in the evening near the residence of the village commissioner. *Dotton v. Albion*, 50 Mich. 130; 57 Mich. 575.

In *Minnesota*, as to the care of highways, a township is a mere governmental agency. *Pine City v. Munch*, 42 Minn. 342; *Hutchinson Tp. v. Filk*, 44 Minn. 536. A town has no statutory liability to an individual for damages from a defective highway; its duty therein is only to the state. *Altnow v. Sibley*, 30 Minn. 186; 44 Am. Rep. 191, citing *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332, and *distinguishing* *Shurtle v. Minneapolis*, 17 Minn. 308.

As to the liability of a municipality to an administrator for the death of a child, occasioned by a highway defect, see *Nichols v. St. Paul*, 44 Minn. 494.

As to municipal liability, where the topography of a ravine shows necessity for special care in grading and sluicing, see *Stoehr v. St. Paul* (Minn. 1893), 56 N. W. Rep. 250.

Evidence of the bad condition of the sidewalk four weeks after the consequent accident, was held admissible. *Johnson v. St. Paul*, 52 Minn. 364.

The traveler's previous knowledge of the defect in the sidewalk does not always preclude recovery of the municipality for personal injury therefrom. *Maloy v. St. Paul* (Minn. 1893), 56 N. W. Rep. 94. But compare *Wright v. St. Cloud* (Minn. 1893), 55 N. W. Rep. 819.

Whether a lapse of nine hours with-

out repairing, after a defective grading had been placed over a coal-hole in a sidewalk on a much-traveled street, proves culpable negligence in the municipality, is for the jury to determine. *Stellwagen v. Winona* (Minn. 1893), 56 N. W. Rep. 51.

One town resident damaged not differently, nor more than others, by a lawful change of a highway route, cannot maintain an action therefor. *Conklin v. Fillmore County*, 13 Minn. 454.

The fact that the injured person knew that a platform erected by a store proprietor in a public street was unsafe from want of an adequate railing, was held not to exonerate the village from liability. *Estelle v. Lake Crystal*, 27 Minn. 243.

A village was held liable for a personal injury from neglect to properly cover a street culvert. *O'Gorman v. Morris*, 26 Minn. 267.

One's previous knowledge of a street defect will not necessarily bar his recovery for a consequent injury. *McKenzie v. Northfield*, 30 Minn. 456.

In *New Hampshire*, where a public sewer is being constructed with due care, neither the municipality nor the contractor is liable for an incidental injury; *e. g.*, to gas-pipes. *Portsmouth Gas Light Co. v. Shanahan*, 65 N. H. 233, citing the rock-blast case, *Nashua Iron, etc., Co. v. Worcester, etc., R. Co.*, 62 N. H. 159.

In an action for injuries from a defective highway, the defendant town is not estopped to deny that the highway was established in the statutory method. *Tilton v. Pittsfield*, 58 N. H. 327; *Wentworth v. Rochester*, 63 N. H. 244. But omission to comply with a directory statutory requirement—*e. g.*, to record the certificate in thirty days—cannot be availed of. *Randall v. Conway*, 63 N. H. 513.

The statement of claim required by *New Hampshire Gen. Laws*, ch. 75, to be filed within ten days after the injury from a defective highway, must be filed by the plaintiff's husband; a filing by the injured wife is insufficient. *Sargent v. Gifford* (N. H. 1891), 27 Atl. Rep. 306.

The sending by mail to the town clerk, the notice of injury from a highway defect, is not a "filing," within the *New Hampshire Statute* of 1885, and this, although he received it, and at once showed it to the chairman of the selectmen. *Sowter v. Grafton*, 65 N. H. 207.

One who, after standing in the street for nearly five minutes on Decoration Day to see a procession form, was injured by the falling of a lumber pile, was held not to be "traveling upon a highway." *Varney v. Manchester*, 58 N. H. 430; 40 Am. Rep. 592.

In the absence of contrary evidence, the plaintiff may be presumed to be a "traveler" at the time of the injury. *Norris v. Haverhill*, 65 N. H. 89.

A town is liable for damages to an abutting landowner from accumulations through neglect to repair a highway drain. *Gilman v. Laconia*, 55 N. H. 130; 20 Am. Rep. 175.

Although a road be defective, no recovery can be had of the town for an injury not proven to be caused thereby. The liability is not affected by *New Hampshire Laws* (1887), ch. 101, requiring the surveyor in June and August to remove loose obstructions. *Judd v. Claremont* (N. H. 1892), 23 Atl. Rep. 427.

In an action for injuries to a traveler on the highway, evidence that the defendant had previously directed that her horse be shod to remedy the fault of stumbling, is admissible. *Sprague v. Bristol*, 63 N. H. 430.

The selectmen's admission of the town's liability for a highway accident, is proper evidence against the town. *Gray v. Rollinsford*, 58 N. H. 253.

As to when the town's knowledge of the defect will be presumed, see *Howe v. Plainfield*, 41 N. H. 135.

The town's liability to keep a highway in repair is to be presumed until actual discontinuance. *Winship v. Enfield*, 42 N. H. 197.

In an action for injury from defect of a highway, the town is estopped to plead that a portion thereof was laid out wider than the petition prayed for. *Proctor v. Andover*, 42 N. H. 348. So, also, as to pleading other irregularities in the selectmen's proceedings. *Haywood v. Charlestown*, 43 N. H. 61.

The fact that a traveler failed to obey the law to keep to the right, was held not to preclude him for recovering of the town for injury from his sleigh's colliding with a snow-covered log on the left side in passing a heavily loaded sled. *Gale v. Lisbon*, 52 N. H. 174.

As to the invalidity of the Sunday defense to a traveler's action against the town, for injury from a highway defect, see *Dutton v. Weare*, 17 N. H. 34; 43 Am. Dec. 590.

In general, the practice of neighbor-

ing towns as to repair of roads, is inadmissible on the question of town officer's due care. *Littleton v. Richardson*, 32 N. H. 59. But compare *Packard v. New Bedford*, 9 Allen (Mass.) 200; *Raymond v. Lowell*, 6 Cush. (Mass.) 524. So, also, is inadmissible in proof the fact that a sidewalk was defective from ice, and that other persons had slipped there. *Hubbard v. Concord*, 35 N. H. 52; 69 Am. Dec. 520.

In A's action against a town for an injury from a highway accident while riding with B, evidence was held inadmissible of the town's having made a payment to B for B's injury then resulting. *Grimes v. Keene*, 52 N. H. 330.

A town that had prepared a good road-bed west of a stone protruding eight inches, was held liable for an injury from a traveler's colliding therewith, in passing east of it in a roadway wherein went almost the entire travel. *Saltmarsh v. Bow*, 56 N. H. 428. So, also, in case of a highway turn-out into a private way. *Stark v. Lancaster*, 57 N. H. 88.

A town was held to be liable for a defect in a highway crossing, though it was caused by a railroad company. *Sides v. Portsmouth*, 59 N. H. 24.

Further, as to what circumstances the jury are to consider in determining a town's liability for injury from an alleged defect, see a case of one traveling in the night without a light, *Daniels v. Lebanon*, 58 N. H. 284; wheelmarks upon a log, *Plumer v. Ossipee*, 59 N. H. 55; the selectmen's unqualified offer to indemnify, *Gray v. Rollinsford*, 58 N. H. 253; town's denial of road's statutory establishment, *Tilton v. Pittsfield*, 58 N. H. 327.

In *New Jersey*, although a municipality is liable for personal injuries from an obstruction or hole in a street or sidewalk, the author thereof is primarily liable to the party injured. *Durant v. Palmer*, 29 N. J. L. 544. In case of personal injury from a defective sidewalk, a township is suable only for such neglect as makes all townships liable under the act of 1859, § 20; the application is limited by Pamph. Acts (1860), p. 554, and 1874, p. 237. *Dupuy v. Union Tp.*, 46 N. J. L. 269. Surface water is a common enemy to each landowner; and a municipality is not liable for damages from its flowage down a new street passing over the crest of a hill, and connected with transverse streets, unless drawing off the water of a natural water-course. *Union v. Durkes*, 38 N. J. L. 21.

A township is liable for damages from the diversion of surface water from its natural flow in street grading. *West Orange Tp. v. Field*, 37 N. J. Eq. 600.

The statutory recovery for injuries from a defective "road," was held not to apply to a street. *Rahway v. Carter* (N. J. 1893), 26 Atl. Rep. 96.

In *New York*, as to the requisites of notification to the highway commissioners, of the defect, see *Embler v. Wallkill*, 132 N. Y. 222.

In an action against a village for an injury from a defect occasioned by the village itself—e. g., in packing a water main—no proof of notice is necessary. *Riddle v. Westfield*, 65 Hun (N. Y.) 432.

As to the requisites of notice of injury from a highway defect under the *New York* Law of 1890, ch. 568, § 16, see *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25. As to notice of claim under *New York* Laws (1889), ch. 440, see *Freligh v. Saugerties*, 70 Hun (N. Y.) 580.

In the *New York* Law of 1886, ch. 572, which limits to one year actions against a municipality for personal injury, the requirements of notice, etc., is not inconsistent with that of the Buffalo charter requiring presentation of the claim to the common council, and must nevertheless be complied with. *Curry v. Buffalo*, 135 N. Y. 366.

Existence of a hole in a sidewalk for two or three weeks, was held sufficient to charge the town with notice. *Foels v. Tonawanda* (Supreme Ct.), 27 N. Y. Supp. 113.

Existence of a hole in a sidewalk for four years, was held to show negligence of the municipal officers. In this case, an action for the breaking of both bones of a leg in a hole in a sidewalk, a verdict for \$5000 was held not to be excessive. *Beltz v. Yonkers* (Supreme Ct.), 26 N. Y. Supp. 106.

Municipal officers may properly await a change of temperature before entirely clearing a sidewalk of ice. *Durr v. Green Island*, 71 Hun (N. Y.) 260; *Kleng v. Buffalo*, 72 Hun (N. Y.) 541; *Taylor v. Yonkers*, 105 N. Y. 206; 59 Am. Rep. 492.

The highway commissioner's knowledge of a long existing excavation without guard, was held sufficient to impose liability upon the town for a consequent personal injury. *Smith v. Clarkstown*, 69 Hun (N. Y.) 155.

The knowledge of the superintendent employed by commissioners of village

water-works, of a street defect, was held to be that of the village, and to render it liable for a consequent injury. *Deyoe v. Saratoga Springs*, 1 Hun (N. Y.) 341.

The *New York* Law of 1889, ch. 453, did not diminish the duties of highway commissioners. That of 1881, ch. 700, substituted the corporate liability of the town for the individual liability of the courts. That of 1890, ch. 568, § 16, made the town liable for injury from a defect existing through the commissioners' negligence. *McGuinness v. Westchester*, 66 Hun (N. Y.) 356.

The *New York* Law of 1881, ch. 700, transfers from the town to the highway commissioner the liability for injury from his neglect of duty, although that officer still must make reparation. Thus, the liability of a town for a defective highway is commensurate with that of the highway commissioners before the act. *Bryant v. Randolph*, 133 N. Y. 70. Compare *Clapper v. Waterford*, 131 N. Y. 382; *Glasier v. Hebron*, 131 N. Y. 447; *Whitney v. Ticonderoga*, 127 N. Y. 40.

In an action for injuries from a bridge defect, the plaintiff cannot adduce evidence of repairs made by the town highway commissioner after the accident. *Getty v. Hamlin*, 127 N. Y. 636.

The fact that a railroad company is, in the first instance, to determine the method of restoration of a highway crossing, does not exonerate a town from liability for injuries from the dangerous steepness or sharpness of curve of the approaches. *Bryant v. Randolph*, 14 N. Y. Supp. 844; 60 Hun (N. Y.) 581. Under the statutory limitation of six years, a highway loses its legal character as such, if impassable for that period, although the non-user was first caused by a trespasser. *Horey v. Haverstraw*, 124 N. Y. 273.

The rule that long continuance of the bad condition is not proof that the highway was not dangerous, was applied in an action against a town for injury from a sleigh slipping off an embankment without other fender than an earth filling at a diagonal water-bar. *Lane v. Hancock*, 67 Hun (N. Y.) 623. Compare the case of a sand pile remaining five months. *Tiers v. New York* (Supreme Ct.), 26 N. Y. Supp. 688.

A town is not obliged to prepare the entire width of the highway for the public use. One driving a top-heavy loaded sleigh upon the untraveled portion,

was held chargeable with contributory negligence, notwithstanding an alleged encroaching fence-post. *Cleveland v. Pittsford*, 72 Hun (N. Y.) 552.

Whether one's driving his truck upon a portion of the approaches to a bridge intended for foot passengers only, would preclude his recovery of the municipality for his injury from the structure's giving way, see *Fisher v. Cambridge*, 133 N. Y. 527.

Whether a stone placed in a street to protect a tree from vehicles is an obstruction for which the village is liable, is a question for the jury. *Dougherty v. Horseheads* (Supreme Ct.), 26 N. Y. Supp. 642.

The fact that a street-railway company had torn up the street and an injunction had been applied for, was held not to relieve a municipality from liability for personal injury from a defective crossing. *Dale v. Syracuse*, 71 Hun (N. Y.) 440.

A municipality was held not to be liable for an injury to a pedestrian who, in the night, stepped in a drainage opening between the ends of two curb-stones not on the sidewalk nor at the termination of a cross-walk. *Harrigan v. Brooklyn*, 67 Hun (N. Y.) 85.

An abutter has no vested interest in the grade of a street as established. His right to recover for change thereof depends entirely upon statute. *Smith v. White Plains*, 67 Hun (N. Y.) 81.

A pedestrian injured by an ice formation from an unauthorized awning over a sidewalk, must seek a remedy against the municipality and not against the proprietor. *McConnell v. Bostelmann*, 72 Hun (N. Y.) 238.

An abutter interfering with a sidewalk—*e. g.*, by water from a locomotive tank freezing—was held liable to a woman injured by failure to restore it to a safe condition; she need not sue the municipality. *Thuringer v. New York Cent., etc., R. Co.*, 71 Hun (N. Y.) 526. So, also, as to obstructing by goods. *McCarty v. Flagler*, 69 Hun (N. Y.) 134.

Requisites of procedure under *New York Law of 1890*, ch. 561, in an action against the municipality for a personal injury, are found in *Eagan v. Rochester*, 68 Hun (N. Y.) 331.

In an action for injury from an icy sidewalk, evidence of the cause of the accumulation is not admissible without allegation in the complaint. *Woolsey v. Ellenville*, 69 Hun (N. Y.) 489. The complaint must allege notice and presentation of the claim under the *New*

York Village Law of 1889, ch. 440. *Arthur v. Glens Falls*, 66 Hun (N. Y.) 136.

A pedestrian's knowledge of an icy sidewalk before the accident, was held to preclude recovery for a personal injury. *Weston v. Troy*, 139 N. Y. 281. *Compare Kleng v. Buffalo*, 72 Hun (N. Y.) 541.

A village was held to be liable for an injury from a defective sidewalk, although the trustees were primarily responsible for its condition. *Haskell v. Penn Yan*, 5 Lans. (N. Y.) 43.

The acceptance of an abutter's sidewalk by a village may be shown by the trustees' acquiescence in its use, rendering the village liable for an injury from its defects. *Hiller v. Sharon Springs*, 28 Hun (N. Y.) 344.

A village having power to repair streets and prevent obstructions, was held liable for an injury from a defective sidewalk built without its authority. *Saulsbury v. Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122.

A village permitting, for three weeks, drippings to accumulate and freeze three feet high on a sidewalk, was held liable for consequent injury to a pedestrian. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

Further, as to what facts the jury are to consider in determining the liability of a town or village for injuries from alleged highway defects, see the case of an unguarded ravine bridge. *Maxim v. Champion*, 50 Hun (N. Y.) 88. For a case of commissioners' knowing that fenders had been washed away, see *Fay v. Lindley*, 58 Hun (N. Y.) 601; a case of a horse's stumbling on loose stones and being precipitated down an embankment, *Reid v. Ripley*, 59 Hun (N. Y.) 628.

A town was held not to be liable for injuries from an obstruction in a highway, consisting of a culvert over an overflow passage from the New York City aqueduct, built by that city under legislative authority. *Riley v. Greenburgh* (Supreme Ct.), 3 N. Y. Supp. 322.

As to the liability of a municipality to a mill owner for pollution from a defective sewer, see *Schrivver v. Johnston*, 71 Hun (N. Y.) 232.

A municipality neglecting after notice to change its plan of a sewer, was held liable to one consequently injured. *Munk v. Watertown*, 67 Hun (N. Y.) 261.

A village is not liable to an insurance company for the destruction of insured property through the insufficiency of the water supply to extinguish fire.

Springfield F., etc., Ins. Co. v. Keeseville (Supreme Ct.), 26 N. Y. Supp. 1094.

As to the liability of a municipality to a riparian neighbor for diversion of a stream, see *Ordway v. Canisteo*, 66 Hun (N. Y.) 569.

A municipality was held liable for injury to private property from the noise and vibration of pumping works. *Morton v. New York*, 140 N. Y. 207.

As to the liability of a municipality for nuisance of discharge of rockets, see *Speir v. Brooklyn*, 139 N. Y. 6. As to the liability to a pier owner for dumping, necessitating extra dredging, see *Hill v. New York*, 139 N. Y. 495.

In *Ohio*, as to a landowner's remedy for damages in the locating of a township road, etc., see *Frevert v. Finrock*, 31 Ohio St. 621.

The statutory requirement that a village shall cause the streets "to be kept open and in repair and free from nuisance," was held not to render it liable for a personal injury from its authorities' neglect to prevent a disorderly assemblage from firing a cannon therein. *Robinson v. Greenville*, 42 Ohio St. 925; 51 Am. Rep. 857.

In *Pennsylvania*, a township is liable for a personal injury from a defective road kept open by its authorities, although on ground condemned by a railroad company. *Aston Tp. v. McClure*, 102 Pa. St. 322. A township is liable for a defect in a highway substituted by a railroad company, but under the township's care. *Dalton v. Upper Tyrone Tp.*, 137 Pa. St. 18. A township is not liable for damages from a latent defect in a bridge, unless the supervisors had notice thereof and a reasonable time to repair. *Zimmerman v. Conemaugh* (Pa. 1886), 2 Cent. Rep. 361.

Under the local act (*Pennsylvania* L. 1869, p. 625), imposing on "each taxpayer" the duty of making and repairing foot-walks (his bill therefor to be deducted by the supervisors from his road tax), the township was held not to be liable for personal injuries from a defect therein. *Chartiers Tp. v. Langdon*, 114 Pa. St. 541; *Langdon v. Chartiers Tp.*, 131 Pa. St. 77.

A township was held not to be liable for damages from an overflow caused by an error of judgment of its supervisors, in the erection of a bridge. *Shieb v. Collier Tp.* (Pa. 1887), 11 Atl. Rep. 366.

The township, and not the borough,

is liable for personal damages from water thrown upon a highway by a borough, if the township had accepted the burden. *West Bellevue v. Huddleston*, 1 Mon. (Pa.) 129.

A township is bound to construct a highway or bridge only according to its probable use in view of the common travel and business over it. A traction engine thereon was held to be a nuisance. *Com. v. Allen*, 148 Pa. St. 358.

The rule that a municipality is not required to assume that its bridges will be used in an extraordinary manner, was applied to an action to recover of a township for the breaking down of a steam traction threshing machine. *Clulow v. McClelland*, 151 Pa. St. 583, following *McCormack v. Washington Tp.*, 112 Pa. St. 583.

A municipality is not bound to take precaution against extraordinary conjunction of circumstances; e. g. that a traveler familiar with a road and stone-pile, will so drive that his horses, startled by the firing of guns, will crush his leg. *Hieffer v. Hummelstown*, 151 Pa. St. 304.

A municipality is not bound to pave a street to meet the requirement of a new and unusual use or wants special to a particular abutter. One opening a rag and paper warehouse on a narrow alley paved with cobble stones, and getting it into bad condition with heavy teams, was held not entitled to recover of the municipality for a consequent injury to a horse and truck. *Megargee v. Philadelphia*, 153 Pa. St. 340.

A traveler assuming a known risk, and driving with loose rein upon an embankment slope at a road curve, was held not entitled to recover from the township for the consequent injury. *Mueller v. Ross Tp.*, 152 Pa. St. 399. Compare *Lynch v. Erie*, 151 Pa. St. 381.

One knowing of a defect in a corduroy road, yet assuming the risk of upsetting his wagon by driving over it, was held not entitled to recover of the township for the consequent injury. *Winner v. Oakland Tp.*, 158 Pa. St. 405.

A township was held not liable for the almost impassibility of a public road, due to wet weather and miry soil. *Brendlinger v. New Hanover Tp.*, 148 Pa. St. 93.

A municipality was held liable for negligently allowing material, in grading a street, to fall upon an abutter's garden and shrubbery. *Gardner v. Scranton City*, 1 Pa. Dist. Rep. 805.

As to what is due care on the part of a municipality in leaving a pool or well open to access by children on the public grounds, see *Barthold v. Philadelphia*, 154 Pa. St. 109.

As to whether a municipality is liable for an injury or death from allowing the repeated placing of machinery and castings on a sidewalk, see *Davis v. Corry*, 154 Pa. St. 598.

The duty of a township to guard a highway is not affected by the concurrent use of the way as a log-way. *Kelley v. Mayberry Tp.*, 154 Pa. St. 440.

A municipality leaving for weeks a street water-pipe or stop-cock so out of repair as easily to frighten horses, was held liable for a consequent personal injury. *Baker v. North East Borough*, 151 Pa. St. 234.

Notice to a person, prior to his election as burgess, of a defect in a sidewalk, was held not to render the borough liable. *Lohr v. Philipsburgh*, 154 Pa. St. 246.

A municipality was held liable for damage to an abutter's land from an overflow caused by the negligent construction of a bridge. *Krug v. St. Mary's*, 152 Pa. St. 30, following *Al-lentown v. Kramer*, 73 Pa. St. 406.

Further, as to municipal liability for injuries from a defect in a sidewalk, see *Feather v. Reading*, 155 Pa. St. 187.

A township was held not to be bound so to build a bridge as to support a steam threshing machine transported by a traction engine. *McCormick v. Washington*, 112 Pa. St. 185.

Where a woman's horse took fright at piles of lumber projecting into the highway, ran away, and was killed, it was held that the township was not exonerated from liability merely because the person causing the nuisance was also responsible. *North Manheim Tp. v. Arnold*, 119 Pa. St. 380.

Where a road was fifteen feet wide and sufficiently passable, a township was held not to be liable for an injury from a horse's taking fright at a long pile of quarry-stones. *Jackson Tp. v. Wagner*, 127 Pa. St. 184.

A borough was held not to be liable to an abutter for damage from an overflow of a natural water-course from a highway in possession of a turnpike company, without proof of having assumed control thereof. *Buchert v. Boyertown* (Pa. 1889), 17 Atl. Rep. 190.

A township having authority to build a superstructure to render safe a railway's bridge, is liable for an injury from

a defect in such superstructure. *New Tp. v. Davis*, 77 Pa. St. 317.

A township is not exonerated from liability for injuries from its omission to erect barriers necessary for the safety of travelers, by its want of power to tax itself beyond one per cent. on the county valuation. *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

A township was held liable for an injury from a defect primarily caused by a railway company, but allowed to continue. *Aston v. McClure*, 102 Pa. St. 302.

As to what circumstances the jury are to consider in determining the town's liability for injuries from an alleged highway defect, see *Easton v. Neff*, 102 Pa. St. 474; 43 Am. Rep. 213.

In *Rhode Island*, a town allowing snow, after twenty-four hours, to obstruct a team in a highway, is finable not less than \$10, nor more than \$100, unless the surveyor had begun removal, and completes it within three days. *Rhode Island Pub. Stat.* (1882), p. 172.

A town or city charged with a public duty in consideration of valuable privileges, is liable to a person suffering special injuries from its neglect of such duty; as to the application of the doctrine of *respondet superior* therein, see the case of a street rendered unsafe by the water commissioners throwing a stream from a hydrant, frightening horses. *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434.

A town is liable for personal injury from a highway defect, although an accident—e. g., rain falling and freezing on loosened cobble-stones—concurred as a proximate cause, if, without the defect, such disaster would not have resulted. *Hampson v. Taylor*, 15 R. I. 83.

A *Rhode Island* statute of 1798, required towns to keep highways "safe and convenient for travelers at all seasons." The court declined to lay it down as a rule of law that treading down snow so the sidewalk be not blocked up, was sufficient; it is for the jury to determine from the circumstances of each case. *Providence v. Clapp*, 17 How. (U. S.) 161.

The statute requiring towns to keep highways in good repair, was held not to apply to a large show-board falling upon a pedestrian. *Taylor v. Peckham*, 8 R. I. 349.

No notice to a town in *Rhode Island* was necessary to render it liable for an injury from a highway defect.

Hull v. Richmond, 2 Woodb. & M. (U. S.) 337.

An abutter cannot maintain an action against the town for damages from the escape of surface water from the highway, resulting from usual change of grade presumably contemplated and paid for at the laying out. *Wakefield v. Newell*, 12 R. I. 75; 34 Am. Rep. 598. Otherwise, if from unusual change thereof. *Inman v. Tripp*, 11 R. I. 520.

In *Vermont*, where the county court ordered a bridge to be built at the joint expense of four towns, and the town at which one end was located maintained the approach thereto at its own expense, it was held that all four were liable for a personal injury from a defect in such approach. *Tyler v. Williston*, 62 Vt. 269.

A town is not liable for an injury which is the result of causes that common sagacity and forecast on the traveler's part could have anticipated and provided against. *Noyes v. Morristown*, 1 Vt. 353; *Briggs v. Guilford*, 8 Vt. 264; *Lester v. Pittsford*, 7 Vt. 158; *Kelsey v. Glover*, 15 Vt. 708.

A town is not liable for an injury or death resulting from the insufficiency of a road that has never been accepted by it or dedicated to public use. So held, where, owing to the impassability of a bridge during repairs, the highway surveyor and others, without official direction, repaired an old fordway, and a physician, for considerations of haste, preferring the fordway to a circuitous route, though knowing the stream was rapidly rising, drove in and was drowned. *Hyde v. Jamaica*, 27 Vt. 443.

A town's responsibility as to the removal of private property from a highway when consisting of objects liable to scare horses—e. g., charred bales of hay near a railway depot—is higher than in case of objects incident to the soil and country. *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600.

The rule restricting a town's liability as to the traveled portion of the highway, was applied in a case of injury to a pedestrian from a defect in the planking of the platform of an old hay-scale, over which at fifteen feet distance from the regular cart rut was, for twenty years, a natural footpath, which the town had never assumed to keep in repair. *Whitney v. Essex*, 38 Vt. 270.

In an action by a tin peddler for an injury caused by a defect in a "neighborhood road," evidence that the highway

surveyor told him that after passing a certain other defect he could "get along safe enough," was held admissible. So, also, evidence of the surveyor's official means to make repairs seasonably. *Clark v. Corinth*, 41 Vt. 449. So, also, is admissible parol evidence of acts of the town officers. *Emery v. Washington, Brayt. (Vt.)* 130. So, also, in an action for injury from a defect in a new road, evidence that the selectmen had discontinued the old road; and this, though some other person had torn away their fence across the new one; they knowing and not replacing. *Blodgett v. Royalton*, 17 Vt. 41; 42 Am. Dec. 476. But evidence of mere consent by the selectmen that one may travel on a road, will not render the town liable for an accident; there must have been some act recognizing it as a highway. *Blodgett v. Royalton*, 14 Vt. 288. As to what is tantamount to a formal opening of a highway rendering the town liable for defects therein, see *Whitney v. Essex*, 42 Vt. 520.

No action lies under *Vermont Gen. Stat.*, ch. 25, § 41, making two towns jointly liable for an injury from a defect in a bridge erected by them, if only one of the towns has received the statutory notice. *Brown v. Fairhaven*, 47 Vt. 386.

The statutory prohibition of fast driving upon a bridge, was held not to apply to one driving faster than a walk upon the approaches, so as to prevent his recovering for injuries from a defect in a trestle. *Weeks v. Lyndon*, 54 Vt. 638.

A village's acceptance of a charter, giving it merely supervision of the highway, was held not to impose thereon liability for an injury from a highway defect. *Parker v. Rutland*, 56 Vt. 224.

A town is liable for an injury from a defect in a margin which its authorities have suffered to become, by use or otherwise, a part of the roadway. *Potter v. Castleton*, 53 Vt. 435.

A town was held to be liable for an injury to a traveler from the defective condition of a so-called winter road, running parallel with an impassable highway, and used by the public for many winters. *Coates v. Canaan*, 51 Vt. 131.

Further, as to what circumstances the jury are to consider in determining the "sufficiency" of a highway, see a case involving the width of a track beaten in snow, *Sessions v. Newport*, 23 Vt.

9; *Barton v. Montpelier*, 30 Vt. 650; a case of coasting not forbidden by the selectmen; *Hutchinson v. Concord*, 41 Vt. 271; 98 Am. Dec. 584; ground sinking through a latent defect, *Prindle v. Fletcher*, 39 Vt. 255; purposes of a "pent road," *Loveland v. Berlin*, 27 Vt. 713; a log, although not in a space not embraced in the original road survey, *Bagley v. Ludlow*, 41 Vt. 425; descending a hill with horses smoothshod behind, and wheels unconfined, *Allen v. Hancock*, 16 Vt. 230; abutter's excavation outside the traveled track, *Rice v. Montpelier*, 19 Vt. 470; an unguarded embankment six inches outside the highway, *Drew v. Sutton*, 55 Vt. 586; 45 Am. Rep. 644; running away habits of a team, *Cheney v. Ryegate*, 55 Vt. 499.

In *Wisconsin*, towns are liable for damages from highway defects, in proportion to their responsibility for repairs. *Wisconsin Annot. Stat.* (1889), § 1339.

A town is liable for injuries from its neglect to notify travelers against using a side track as accessible and as much traveled as the prepared track. *Cartright v. Belmont*, 58 Wis. 370.

A town cannot escape liability for a fatal injury from a defect in a highway, by the facts that it had a remedy over against its officers, and that its means of repair were inadequate. *Burns v. Elba*, 32 Wis. 606.

A town is liable for injury from a defect in a highway, if in the worked and traveled part, though wide enough for three teams abreast. *Matthews v. Baraboo*, 39 Wis. 674.

The statutory liability refers only to roads and bridges that are public highways, which the town is bound to repair. *Green v. Bridge Creek*, 38 Wis. 450; 20 Am. Rep. 18.

In an action against a town for injuries from a defect in a bridge, it may be shown that at other points it was out of repair. *Spearbracker v. Larabee*, 64 Wis. 573.

A town and a village, were held to be jointly and severally liable for a fatal injury to one navigating a stream, caused by the negligent management of the draw of a bridge controlled by them. *Weisenberg v. Winneconne*, 56 Wis. 667.

One injured upon a temporary passageway around snow-drifts, was held to be chargeable with knowledge, that the overseer, though working with the approval of the town supervisors, had

no authority to work it as a public highway. *Bogie v. Waupun*, 75 Wis. 1.

A town sued for injury from a horse's taking fright in the evening at an object in the road—e. g., a mortar-box—may not show that horses went by during the day without fright. *Bloor v. Delafield*, 69 Wis. 273.

A traveler familiar with the locality, and venturing to cross a stream swollen by an extraordinary freshet, must use care commensurate with the risk. *Hopkins v. Rush River*, 70 Wis. 10.

The *Wisconsin* Law of 1889, ch. 471, making a town or city liable for injury from a street defect, applies to a case of injury from a defect caused by negligence or default of a person, whether or not sustaining a contract relation to the town or city. *Kollock v. Madison*, 84 Wis. 458.

A town was held to be liable for injuries causing the death of a pedestrian, from stepping upon an upturned nail in a board near a sidewalk. *Pittenger v. Hamilton* (Wis. 1893), 55 N. W. Rep. 423.

The fact that the owner of a store, in front of which he had been permitted to put a hatchway in the sidewalk, was not properly guarding it when open at the time of an accident, was held not to exempt the municipality from liability for the consequent personal injury. *McClure v. Sparta*, 84 Wis. 269.

As to liability for an injury from the deposit of matter in the street, see *Raymond v. Keseberg*, 84 Wis. 302. In this case it was held that the right of a lot owner in a city, when building, to deposit building materials and earth upon the adjoining street, is the right of an abutter as such alone and not as an owner of the fee of any part of the street. It is therefore founded on and limited by reasonable necessity, to be determined, in the absence of municipal regulations, by the circumstances of each particular case. In an annotation of this case in 19 L. R. A. 643, it is said that this decision seems to be the first expressed decision on the subject. The note says that the doctrine of the case cannot be deemed in any sense doubtful or in conflict with any of the reported decisions of the courts; and reference is made in the note to *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; 32 Am. Dec. 261; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Mallory v. Griffey*, 85 Pa. St. 275; *Hundhausen v. Bond*, 36 Wis. 29.

b. COINCIDENTAL PROXIMATE CAUSES.—There is a large class of torts wherein the town's negligence is but one of two coincidental proximate causes. The general rule in such cases may be simple, but its application to the widely various circumstances is multiplex. In the *New England* states, where the phraseology of the statutes defining the responsibility of towns for the condition of highways and bridges is quite similar or identical, the decisions have been quite uniform. Many cases, especially the later ones in the *New York* court of appeals, turn wholly upon the degree of improbability of the concurring causes, or the rarity and unexpectedness of the conjuncture.¹

As to responsibility for an injury from a depression left in the street in laying a gas-pipe, see *Grundy v. Janesville*, 84 Wis. 574.

A town was held not liable for damages from a surface-water overflow. *Champion v. Crandon*, 84 Wis. 405.

As to when failure of a municipality to remove ice from a sidewalk crossing is not actionable negligence, see *Chamberlain v. Oshkosh*, 84 Wis. 289. Further, as to injury from a defective sidewalk, see *Woodward v. Boscobel*, 84 Wis. 226.

A plaintiff's knowledge of the tendency of ice formation in the locality of the sidewalk accident, was held to constitute contributory negligence, precluding recovery from the municipality. *Hausman v. Madison* (Wis. 1893), 55 N. W. Rep. 167.

In an action for injuries from a defective street, a general denial throws on the plaintiff the burden of proving the statutory filing of statement for the town board. *Eron v. Stevens Point* (Wis. 1893), 55 N. W. Rep. 410.

The fact that a child seven years old was using a sidewalk for play as well as travel at the moment of the accident, will not prevent her recovery of the municipality for the defect that caused the injury. So held as to her rolling a hoop on her way to join her playmates. *Reed v. Madison*, 83 Wis. 171.

As to what are admissible special interrogatories to the jury in an action by a child against a municipality for injuries from a defect in a sidewalk, see *Reed v. Madison* (Wis. 1893), 56 N. W. Rep. 182.

Further, as to what circumstances the jury are to consider in determining a town's liability for injuries from an alleged highway defect, see the case of a runaway horse, *Goldsworthy v. Linden*, 75 Wis. 24.

As to what circumstances the jury are to consider in determining whether

a highway is "safe," see a case concerning boulders outside the traveled path. *Wheeler v. Westport*, 30 Wis. 392.

Where epilepsy developed in consequence of one's exposure and agitation in striving in vain to rescue his horses that had fallen into a stream, because of a defect in a bridge, a verdict for him against the town for \$700 was held not to be too excessive. *Jaquish v. Ithaca*, 36 Wis. 108.

Failure to give to the municipal authorities the formal statutory notice of the highway defect, was held not to defeat an administrator's recovery for the consequent death of the intestate; notice to one alderman sufficing. *McKelgue v. Janesville*, 68 Wis. 50.

The burden of proving actual notice to the town is on the plaintiff. *Bailey v. Spring Lake*, 61 Wis. 227.

A finding that the defendant municipality had "no notice" of the defective condition of the sidewalk before the accident, was held to negative both actual and constructive notice; and to be no ground for reversal for mere evidence that the street commissioner had ordered the abutting owner to repair the walk at another point. *Bergevin v. Chippewa Falls*, 82 Wis. 505.

As to the requisites of notice under *Wisconsin* Rev. Stat., § 1339, also of allegation and proof on the issue whether a steamboat on wheels was a street obstruction naturally calculated to frighten horses, see *Cairncross v. Pewaukee*, 78 Wis. 66. As to what defect in a road culvert will render a town liable for a consequent personal injury, see *Rumrill v. Delafield*, 82 Wis. 184.

Further, as to the requisites of the notice to the town authorities of injury from an alleged highway defect, see *Weber v. Greenfield*, 74 Wis. 234.

1. See NEGLIGENCE, vol. 16, p. 441; HIGHWAY, vol. 9, p. 376 *et seq.*

In *Vermont*, the statutory expression

being "good and sufficient repair," *Vermont* Rev. L. (1880), § 3043, in an old and still leading case, *Hunt v. Pownal*, 9 Vt. 411, where the concurring cause of the disaster was the unscrewing of a nut from a tongue-bolt, the court, by Redfield, J., said: "In every case of damage, occurring on the highway, we could suppose a state of circumstances, in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against these constantly occurring accidents, that towns are required to guard, in building highways." The law hereon is not altered by *Vermont* Sess. L. (1882), No. 13, as to "insufficiency" of any bridge, etc. *Willard v. Sherburne*, 59 Vt. 361.

In *Vermont*, moreover, a town has been held to be liable for injuries received by a traveler while trying to extricate his horse that had broken through a defective bridge. *Stickney v. Maidstone*, 30 Vt. 738. But it has there been held that a town is not liable for an injury caused by a traveler's voluntary divergence from the traveled path. *Rice v. Montpelier*, 19 Vt. 470. Otherwise, if he be forced into the ditch by accident, and the injury result from an obstruction lying there. So held, where a traveler's horse, passing a saw-mill at a point where a log was high on one side of the traveled path, swerved, and, being suddenly reined in, sprang and threw the wagon-wheel against a sled-crook in a slight ditch on the other side. *Cassedy v. Stockbridge*, 21 Vt. 391.

In *Missouri*, the foregoing words of Judge Redfield, in *Hunt v. Pownal*, 9 Vt. 411, were quoted with approval in *Hull v. Kansas City*, 54 Mo. 598; 14 Am. Rep. 487, a case where the concurrence was the entanglement of the traveler's lines by his horse's tail, and a case having the same concurring entanglement, *Fogg v. Nahant*, 98 Mass. 578, was distinguished under the statute.

In *Massachusetts*, the statutory expression being "reasonably safe and convenient for travelers" (*Massachusetts* Pub. Stat. (1882), p. 347, § 1), the town is not liable, if the primary cause of the disaster was the uncontrollability of the traveler's horse. *Titus v. Northbridge*, 97 Mass. 258; 93 Am. Dec. 91; *Babson v. Rockport*, 101 Mass. 93.

Compare the case of entangled leading-lines, *Fogg v. Nahant*, 98 Mass. 578.

A town may be liable for a defect or obstacle in a highway, although the innocent act of a third person—*e. g.*, an approaching wagon-driver causing the entanglement of a telephone wire—concurrent in causing the injury. *Hayes v. Hyde Park*, 153 Mass. 514.

A town is not liable for injury to a traveler, if it cannot be determined what part resulted from a highway defect, and what part from his own negligence. *Horrigan v. Clarksburg*, 150 Mass. 218.

A traveler may recover of a town for injuries from the insufficiency of the height of a wall as a barrier, when his horse had taken fright. *Hinckley v. Somerset*, 145 Mass. 326.

A town was held not to be liable for injuries to a traveler from his horse's taking fright at a stone pile in the grass within the limits of the highway. *Bemis v. Arlington*, 114 Mass. 507.

A town is not answerable to a traveler for injury from any defect in a highway for which it would not be liable to indictment, and *vice versa*. So held, where a horse, frightened by a whippetree's becoming unbolted and hitting his legs, ran against loose stones nearly eight feet from the cart-rut of a highway, thirty-four feet wide. *Howard v. North Bridgewater*, 16 Pick. (Mass.) 189.

See the case of a frightened horse, in *Howe v. Lowell*, 101 Mass. 99; and that of a traveler injured in leaping from his carriage while the horse was struggling to rise from a fall at a defective stop-water, *Sears v. Dennis*, 105 Mass. 310. Imperfect vision in a traveler's horse, if one suitable to be driven, will not preclude recovery for injury from a defective highway. *Wright v. Templeton*, 132 Mass. 49.

A town would not be liable for an injury caused solely by the selectmen's acting as a statutory board; *e. g.*, putting up a bright-red drinking trough. Otherwise, if a horse, frightened thereat without the traveler's fault, draws the carriage into a highway defect, causing his injury. *Cushing v. Bedford*, 125 Mass. 526.

If one is carefully traveling on a dark night in a narrow highway, and, to avoid an unrailed embankment on the right, turns to the left, thereby colliding with an approaching carriage, he may recover of the town for the consequent injury. *Flagg v. Hudson*, 142 Mass. 280; 56 Am. Rep. 674.

In an action for injuries from the falling of the span of the portion of a Merrimac bridge that a town was bound to maintain, evidence was held admissible that the cause of the fall was the accumulation of snow, or excessive weight of planking, or defect of the iron work, or all these causes combined. *Whitman v. Groveland*, 131 Mass. 553.

One cannot recover of a municipality for injury from a defect, if his own unlawful act concurred therein. So held where the plaintiff, while intoxicated, was violating an ordinance against driving over a bridge faster than a walk. *Heland v. Lowell*, 3 Allen (Mass.) 407; 81 Am. Dec. 670. Compare *Tuttle v. Lawrence*, 119 Mass. 276.

In an action against a town for personal injuries from a defective highway, an instruction that plaintiff could not recover if without drunkenness he would not have been injured, was held proper. *Loftus v. North Adams* (Mass. 1893), 35 N. E. Rep. 674.

In *Maine*, the statutory expression being "safe and convenient for travelers," (*Maine Rev. Stat.* (1883), p. 251, § 52), the town was held not to be liable for injury from a defective bridge, where the primary cause was the startling of the horse by an animal's jump into the stream. *Moulton v. Sanford*, 51 Me. 127. Upon the question of causation, the words "through the defect," etc., were considered. Compare *Coombs v. Topsham*, 38 Me. 204. For a review of the *Maine* statutory provision concerning causation, the duty of the traveler as to notice, etc., see *Haines v. Lewiston*, 84 Me. 18, stated in the last note.

Where the wrought part of a highway was sufficiently wide for safe transit, but a traveler's horse, meeting cows with boards on their horns, became frightened and ran the wagon against a blasted rock within the highway limits, it was held that the town was not liable for his consequent injury. *Perkins v. Fayette*, 68 Me. 152.

A town was held liable for injury to a horse from the miry condition of a roadside watering place, although an unskillful woman was the driver. *Cobb v. Standish*, 14 Me. 198.

Under *New Hampshire* Pub. Stat. (1891), p. 224, § 1, "Towns are liable for damages happening to any person, his team, or carriage traveling upon a highway or bridge thereon, by reason of any obstruction, defect, or insufficiency, or want of repair which

renders it unsuitable for travel thereon." In the leading case the concurrence was a latent defect in the traveler's wagon, and the town was held to be liable. *Winship v. Enfield*, 42 N. H. 197.

A town was held liable for the injury suffered by one's tripping on a stone improperly in the highway, but not for that caused by his thereupon falling into a cellar which he maintained as a nuisance. *Lavery v. Manchester*, 58 N. H. 444.

Where the overturning of a traveler's load from a highway defect, frightened his horses into escaping, and after running ninety rods, they collided with another traveler, the town was held to be liable for the consequent final injury, as natural and probable. *Merrill v. Claremont*, 58 N. H. 468.

In *Connecticut*, the statutory expression being "towns shall build and repair all necessary highways and bridges" (*Connecticut Gen. Stat.* (1888), § 2666), where the concurrence was a freshet, the town was held to be liable, even though, had the railing been higher, there would have been more danger that ice floes would sweep away the bridge. *Bronson v. Southbury*, 37 Conn. 199.

In *Rhode Island*, the statutory expression being "safe and convenient for travelers," where, at a curve in a road, having ample roadway, a hitching post was so placed with reference to the general course of travel as to be dangerous, it was held that the town was liable for a traveler's injuries from collision therewith at night, while trying to rein in his horse startled by a vehicle behind. *Yeaw v. Williams*, 15 R. I. 20. So, also, in case of another concurring accident for which no person was responsible. *Hampson v. Taylor*, 15 R. I. 83. But otherwise, where a collision with a post outside the traveled way occurred through an approaching driver's not sufficiently turning out. *Mahogany v. Ward*, 16 R. I. 479.

L. left carloads of castings in a highway, frightening the horse of B., a traveler, which ran away, throwing out B. and wife, who recovered of L. for the consequent injury, a judgment which was baffled by L.'s discharge in bankruptcy. It was held that B. and wife could recover of the town therefor, it and L. not being joint tortfeasors. *Bennett v. Fifeild*, 13 R. I. 139; 43 Am. Rep. 17, *disapproving* on the question of proximate causes, the four *Mas-*

sachusetts decisions, *Kingsbury v. Dedham*, 13 Allen (Mass.) 186; 90 Am. Dec. 191; *Cook v. Charlestown*, 98 Mass. 80; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Mass. 571; and *approving Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Winship v. Enfield*, 42 N. H. 217; *Chamberlain v. Enfield*, 43 N. H. 356; *Bartlett v. Hooksett*, 48 N. H. 18; *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. Norwich*, 39 Conn. 376; 12 Am. Rep. 396; *Young v. New Haven*, 39 Conn. 435; *Foshay v. Glen Haven*, 25 Wis. 288.

In *Upper Canada*, the *New Hampshire* and *Vermont* cases have been followed. *Sherwood v. Hamilton*, 37 U. C., Q. B. 410.

In *Indiana*, so, also, where the concurrence was an unexpected fright of the traveler's horse. *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612.

A town that had licensed a person to maintain a tripod and a fire to make candy on a street, was held liable to a traveler injured by the frightening of a horse of ordinary gentleness. *Rushville v. Adams*, 107 Ind. 475.

In *Illinois*, so, also, upon concurrence of fright, etc., it being held, moreover, that where a sidewalk is devoted to the common use of vehicles and foot passengers, the municipality is bound to make it safe for both classes of travelers. *Lacon v. Page*, 48 Ill. 499.

And see a case where a horse shied, and through want of a bridge railing, the sleigh was precipitated to the ice below. *Rockford v. Russell*, 9 Ill. App. 229.

In *Iowa*, so, also, upon concurrence of fright, etc. *Manderschid v. Dubuque*, 25 Iowa 108.

There, also, a municipality was held liable for the breaking of a leg of a traveler's horse, by a heap of rubbish which had accumulated through the incapacity of a culvert. *Hazzard v. Council Bluffs*, 79 Iowa 106. But one cannot recover if his own negligence was one of the proximate causes of the injury. *Portman v. Decorah* (Iowa, 1893), 56 N. W. Rep. 512.

In *Wisconsin*, so, also, where the horse staggered in a fit, etc. *Houfe v. Fulton*, 29 Wis. 296. The fact that the frightened horse broke its bit, need not be taken into consideration. *Cairncross v. Pewaukee* (Wis. 1893), 56 N. W. Rep. 648.

In *Michigan*, where a traveler was killed by his horse becoming frightened at a locomotive and throwing the

buggy against a lumber pile that did not extend over the traveled portion of the street, which had thirty-one feet clear, it was held that the municipality was not liable. *McArthur v. Saginaw*, 58 Mich. 357; 55 Am. Rep. 687.

A township was held to be liable for injury to one trying to hold, till aid might arrive, a horse struggling with one foot caught in a bridge hole. *La Duke v. Exeter Tp.*, 97 Mich. 450.

Further, as to when a defect or obstruction is or is not the proximate cause of an accident to a horse otherwise frightened, see *Bleil v. Detroit* (Mich. 1893), 57 N. W. Rep. 117; *St. Clair Mineral Springs Co. v. St. Clair*, 96 Mich. 463; *Langworthy v. Green Tp.*, 95 Mich. 93.

One cannot recover if his own negligence was one of the proximate causes of the injury. *Kuhn v. Walker Tp.*, 97 Mich. 306.

In *Mississippi*, where a pedestrian, being suddenly admonished by his companion of a defect in the sidewalk, necessitating a turn down steps, stumbled over a gutter, it was held that there was contributory negligence exempting the municipality from liability. *Vicksburg v. Hennessy*, 54 Miss. 391; 28 Am. Rep. 354, citing *Rusch v. Davenport*, 6 Iowa 443; *Raymond v. Lowell*, 6 Cush. (Mass.) 524. Compare the cases of the decayed sill of a street water-tank, *Nesbitt v. Greenville*, 69 Miss. 22; and of the frightened horse, *Butler v. Oxford*, 69 Miss. 618.

In *Georgia*, where a traveler's horse, frightened by a steam whistle, precipitated him down an embankment having no guard rail, it was held to be for the jury to determine the liability of the municipality. *Atlanta v. Wilson*, 59 Ga. 544; 70 Ga. 714. A municipality was held liable for a woman's personal injuries at night, from disrepair of a sidewalk, although she had declined her husband's offer to escort her. *Atlanta v. Martin*, 88 Ga. 21. So, also, notwithstanding the pedestrian's deviation from the line of the sidewalk, *Atlanta v. Buchanan*, 76 Ga. 585. But compare *Zettler v. Atlanta*, 66 Ga. 195. Also the case of noise of a street car preventing the pedestrian on an unlighted street from hearing a horse without a driver approaching, *Gaskins v. Atlanta*, 73 Ga. 746. Also the case of an extraordinary rainfall bursting a canal bank, thus destroying crops, *Savannah v. Cleary*, 67 Ga. 153. Also that of the frightened horse, Jack-

son *v.* Buena Vista, 88 Ga. 466. Also that of a peculiar culvert, *Milledgeville v. Brown*, 87 Ga. 596.

In *New York*, so, also, was the town held liable where, in the night, at a curve in the road, a traveler's horses kept straight on, precipitating the wagon down an unguarded embankment. *Ivory v. Deerpark*, 116 N. Y. 477. Otherwise, where the road was straight. Where it was seventeen feet wide, with a sloping declivity to a pond, and for ten feet unguarded by fence or bushwoods, a traveler, in daylight, stopped her cutter, and directed a boy that was driving an approaching sleigh, to come and pass. A barrel rolled from the sleigh, frightening her horse, which backed at right angles, and upset her into the water. She had long known the place to be unguarded. It was held that the town was not liable; that the duty of "active vigilance" of corporate authorities within the *New York* law, is only a relative term, reversing the decision of the supreme court herein, *Glazier v. Hebron*, 62 Hun (N. Y.) 137; *Glazier v. Hebron*, 131 N. Y. 447. So, also, where a horse, frightened by a bicycle, shied over a wide sidewalk, down an embankment, was the case held to fall within the "rare conjuncture class," for which the town or village ought not to be held liable; the requirement, in the *Yonkers* charter, of railings at an "exposed place" meaning a place dangerous as applied to not improbable accidents. *Hubbell v. Yonkers*, 104 N. Y. 434.

In *Monk v. New Utrecht*, 104 N. Y. 552, the court, by Ruger, C. J., said: "No possible difficulty existed in this case to prevent a traveler from following either the road or sidewalk by marks which could both be seen and felt, and it would be imposing a burden beyond all precedent to require a town to remove irregularities in the surface of the land, outside of the road, for fear that some traveler might wander there and thus sustain injury."

In *New York*, moreover, it has been a general rule, that in case of concurrent proximate causes of a highway accident, it must not be attributed to one without the operation whereof it would not have happened. So held, where the driver of a frightened blind horse, in avoiding an ash-pile negligently permitted by the commissioner to remain on one side of the street, collided with a hydrant nozzle on the other side thereof. *Ring v. Cohoes*, 13 Hun (N.

Y.) 76; 77 N. Y. 83; 33 Am. Rep. 574.

A village was held liable for an injury to a traveler from his horse's taking fright at an advertising banner of seine-twine suspended across a street; and evidence was admissible that other horses had been frightened thereat. *Champlin v. Penn Yan*, 34 Hun (N. Y.) 33.

A town was held not to be liable for the death of a runaway horse that had got into an excavation between the roadway and an abutment, during a bridge repairing; the fordway being ordinarily safe without a barricade. *Stacy v. Phelps*, 47 Hun (N. Y.) 54.

As a general rule, in an action against a town for injury from a defective highway, a non-suit should not be granted merely for the contributory act of the plaintiff, if it was one as to the character of which men of ordinary prudence may differ. So held, where the driver of a wagon along a mountain pass, on being warned that he could not safely pass a certain snow-slide pile, truly replied that he could not turn back, and in proceeding the wagon was precipitated over the declivity. *Atwater v. Veteran*, 6 N. Y. Supp. 907; 52 Hun (N. Y.) 613.

In *Pennsylvania*, the *Vermont* rule prevails. On one side of a highway was a hole, in size over a cubic foot, and on the other, a pile of stones over twenty feet long, placed there by the town supervisor. Travelers' horse, after passing safely, was frightened by a loose donkey, and turning around, broke a wheel of the buggy, and the end of the axle striking the hole, they were thrown out against the stones. It was held that the township was liable. *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145. Similar accident, *Jackson Tp. v. Wagner*, 127 Pa. St. 184; 133 Pa. St. 61. Compare the Fairmount Park accident, *Hey v. Philadelphia*, 81 Pa. St. 44. See also *Worilow v. Upper Chichester Tp.*, 149 Pa. St. 40; *Kieffer v. Hummelstown*, 151 Pa. St. 304.

A town was held to be liable for injury from want of a barrier, although one cause was the horse's taking fright at a steam thresher near the road. *Burrell Tp. v. Uncapher*, 117 Pa. St. 353. But compare the case of an injury to a foot passenger from a runaway horse on a bridge having no barrier between the footway and the driveway. *Lehigh County v. Hoffort*, 116 Pa. St. 119.

A township was held liable for in-

VII. OFFICERS—1. Election or Appointment.—Ordinarily, the general statutes designate the town officers.¹ In some states, the legislature incorporating a town may appoint the officers to exercise their functions until a regular election.² The functions of an officer of a given title in one state may not be identical with those of the officer of that name in another state.³

juries from a frightened horse running on the railroad parallel with the highway, although the railroad company's negligence contributed to the result. *Plymouth Tp. v. Graver*, 125 Pa. St. 24.

A municipality should so guard by barriers the approaches to dangerous places that even skittish horses may be driven along the highway with safety. So held, where a railroad ran parallel with the street, and twelve feet below. *Pittston v. Hart*, 89 Pa. St. 389. So, also, where miners had made an excavation. *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 376. So, also, where the horse was frightened at a plank nailed over a hole in a bridge without railing. *Newlin Tp. v. Davis*, 77 Pa. St. 317.

1. See ELECTION, vol. 6, p. 255; PUBLIC OFFICERS, vol. 19, p. 417.

2. In *Virginia*, this is so, notwithstanding that *Virginia* Const., art. 6, § 20, provides that town officers shall be chosen by electors of such towns. *Roche v. Jones*, 87 Va. 484.

3. In *Alabama*, "The business of the corporation is managed by an intendant and five councilors, who are styled the corporate authorities of the town and hold office for one year," etc. *Alabama* Code (1886), § 1491. The three township trustees appointed by the county superintendent of education, perform the same duties as those formerly required of the town superintendent. *Alabama* Acts (1891), p. 554.

Where, under an erroneous belief that a town charter had been forfeited by non-user, there was an abortive reincorporation and election by the sheriff for an intendant and councilmen, it was held that these were *de facto* officers, and that their successors, elected on their order, were *de jure* incumbents of *de jure* offices, their titles being derived from the first charter. *Butler v. Walker* (Ala. 1893), 13 So. Rep. 261.

As to the election of municipal officers, see *Anniston v. Davis* (Ala. 1893), 13 So. Rep. 331.

In *Arizona*, the board of county supervisors "shall appoint from the *bona*

fide tax-paying electors" of an incorporated township "three discreet persons as trustees of said corporation." *Arizona* Rev. Stat. (1887), § 154. This board of trustees appoints the marshal, the assessor, and the treasurer, § 161.

In *Arkansas*, the corporate authority of a town "organized for general purposes, shall vest in one mayor, one recorder, and five aldermen," chosen by ordinary election and known as the council. *Arkansas* Dig. Stat. (1884), §§ 791, 792. The county court, and in some cases the governor, may appoint officers of a new township, § 6445. Every township shall have two justices of the peace, § 4017.

In *California*, the duties of the township assessor are like those of the county assessor; and he may appoint deputies, etc. *California* Pol. Code (1885), § 4109, note.

As to the election of officers in the six classes of municipal corporations respectively, under *California* Act of 1883, see *California* Pol. Code, p. 737.

In *Colorado*, the six town trustees are chosen at successive annual elections. This board appoints the recorder, treasurer, town attorney, and marshal. *Colorado* Annot. Stat. (1891), §§ 4508, 4513, 4520.

In *Connecticut*, "Each town shall annually elect selectmen, and such officers of local police as the laws may prescribe." *Connecticut* Const., art. 10, § 2. Tax assessors are not "local police." *Dibble v. Merriman*, 52 Conn. 214. If the number of assessors or members of the board of relief, or selectmen to be elected, be two, no person shall vote for more than one; nor, if three or four, for more than two; nor, if five or six, for more than three. *Connecticut* Gen. Stat. (1888), § 46. No town clerk or selectman can be registrar of voters, § 42. The selectman first named on a plurality of the ballots as actually cast is "first," and is *ex officio* town agent, § 48; *Mallett v. Plumb*, 60 Conn. 352.

In the *Dakotas*, "There shall be elected . . . one trustee from each district in the town, and also a clerk, assessor, treasurer, marshal, and justice

of the peace." *Dakota Comp. Laws* (1887), § 1036.

In *Florida*, each town, village, or hamlet elects annually a mayor, clerk, and marshal. The council consists of the mayor and not more than nine nor less than five aldermen. *Florida Rev. Stat.* (1892), § 661.

In *Georgia*, the town or village annually elects "a mayor, recorder, and five councilmen, who together shall form a common council;" each must be a resident thereof. *Georgia Code* (1882), § 779.

In *Idaho*, the first board of trustees is appointed by the county commissioners. The successors are chosen by the qualified electors of the town. *Idaho Rev. Stat.* (1887), § 2225. The board of trustees appoint the assessor, § 2239. The marshal, corporation counsel, etc., are elected by the qualified voters, § 2232.

In *Illinois*, "At the annual town meeting in each town, there shall be elected by ballot one supervisor (who shall be *ex officio* overseer of the poor), one town clerk, one assessor, and one collector, who shall severally hold their offices for one year and until their successors are elected and qualified, and such justices of the peace, constables, and highway commissioners as are provided by law;" also in certain towns having 4000 inhabitants, an assistant supervisor. *Illinois Rev. Stat.* (1891), p. 1498. To be eligible, one must be a legal voter, and a resident of the town for one year, p. 1502. The town highway commissioner is elected triennially, p. 1510.

A general act repealing all inconsistent provisions in earlier acts, was held, as to the election of town trustees, to prevail over a special act of incorporation. *Kelly v. Gahn*, 112 Ill. 23.

The disqualification of village trustees, arising from a tax debt, may be removed by payment after election. *People v. Hamilton*, 24 Ill. App. 609.

As to requisites of eligibility to a town office, see *Laimbeer v. People*, 48 Ill. 490.

A person eligible and duly elected to the office of town clerk, but refusing to assume the duties, may be compelled by *mandamus*. *People v. Williams*, 145 Ill. 573.

In *Indiana*, there is elected annually a town clerk and treasurer (who may be the same person), and "from each district" in the town, a trustee; this meaning for each district, but by the voters of the whole town. *Indiana*

Rev. Stat. (1888), § 3308; *Mullikin v. Bloomington*, 49 Ind. 62. Also, annually, a town marshal, § 3325. As to the procedure in the first election of trustees, see § 3311. Under the act of 1889, the township trustee may hold over until his successor is appointed, although ineligible for a new appointment. *State v. Bogard*, 128 Ind. 480.

One who has received a certificate of election as township trustee, given bond, and taken the qualifying oath, is entitled to the office, as against an incumbent whose term has expired, though another be contesting the election. *De Armond v. State*, 40 Ind. 469.

The offices of township trustee and supervisor of ways are lucrative, and cannot be held by the same person. *Creighton v. Piper*, 14 Ind. 182.

In *Iowa*, "The corporate authority of incorporated towns organized for general purposes, shall be vested in one mayor, one recorder, and six trustees, to be elected by the people, who shall be qualified electors residing within the limits of the corporation, and who shall constitute the council of the incorporated town. . . . The council of an incorporated town shall have power to provide by ordinance for the election of a treasurer, and such subordinate officers as they may deem necessary for the good government of the corporation, to prescribe their duties and compensation, or the fees they shall be entitled to receive for their services, and to require of them an oath of office and a bond, with surety, for the faithful discharge of their duties. The election of any such officer shall be at the regular annual election, and no appointment of any officer shall endure beyond one week after the qualification of the members of the succeeding council." *McClain's Iowa Code* (1888), §§ 698, 701.

Moreover, in each township, there shall be elected three trustees, one clerk, one assessor, two constables, and two justices of the peace; but where a city or incorporated town is situated in a township, the trustees of the township may order the election of one or two additional justices and constables, and at least one justice and constable shall reside within the limits of such city or town. *McClain's Iowa Code* (1888), § 526. As to the procedure in the election of assessors, see *McClain's Iowa Code* (1888), § 528. *State v. Finger*, 46 Iowa 25.

A township officer may be elected at

an adjourned meeting on a day later than that prescribed by the statute therefor. *Carter v. McFarland*, 75 Iowa 196.

In *Kansas*, the officers annually elected in each municipal township are one trustee, one clerk, one treasurer, constables equal to the number of justices, and one road overseer in each district. Justices of the peace are elected each alternate year. *Kansas Gen. Stat.* (1889), § 7065. As to qualifications of municipal officers, see *State v. Barnes* (Kan. 1893), 33 Pac. Rep. 621.

In *Kentucky*, each town annually elects five trustees, and they may fill vacancies in the board. *Kentucky Gen. Stat.* (1887), p. 1238. They also appoint a clerk, assessor, town-warden, collector and treasurer, p. 1239.

The judge of a town is an "officer," within *Kentucky Const.*, art. 6, § 6, as to the election of officers, etc. *Buckner v. Gordon*, 81 Ky. 665.

A charter requirement of a majority of the votes cast in order to elect an officer, *e. g.*, an engineer, was held not to preclude the council from adopting a regulation dropping, upon the fourth roll-call, the lowest candidate. *Morton v. Youngerman*, 89 Ky. 505.

In *Maine*, "Annual town meetings shall be held in March, and the voters shall then choose, by a major vote, a clerk, three, five, or seven inhabitants of the town to be selectmen and overseers of the poor, when other overseers are not chosen, three or more assessors, two or more fence-viewers, treasurer, surveyors of lumber, tythingmen, sealers of leather, measurers of wood and bark, constables, collectors of taxes, and other usual town officers; and if one-third of the voters present are in favor thereof, they shall choose, by major vote, one auditor of accounts, all of whom shall be sworn. Treasurers or collectors of towns having more than 1500 inhabitants shall not be selectmen or assessors." *Maine Rev. Stat.* (1883), p. 79, § 12.

A person not a citizen of the *United States* may be a selectman, and his official acts bind the town. *Justice's Opinion*, 70 Me. 560.

In *Cushing v. Frankfort*, 57 Me. 541, acts of *de facto* selectmen were held binding, although their election was invalid through a defect in the return of the warrant of the town meeting.

As to the requisites of evidence of a town officer's appointment and qualifications, see *Abbott v. Hermon*, 7 Me.

118; *Fossett v. Bearce*, 29 Me. 523; *Bennett v. Treat*, 41 Me. 226.

In *Massachusetts*, at the annual town meeting, are elected a town clerk, selectmen, assessors, overseers of the poor, treasurer, highway surveyors, "constables, who shall also be collectors of taxes unless other persons are specially chosen collectors," field drivers, fence-viewers, "and all other usual town officers." *Massachusetts Pub. Stat.* (1882), p. 235, § 78.

Under statutory authority to appoint a police officer to hold during the pleasure of the selectmen, their appointment of such officer, "to continue till the next annual town meeting," was held valid. *Com. v. Higgins*, 4 Gray (Mass.) 34.

The appointment of a town collector *pro tempore* merely by a writing signed with the names of all by one selectman, in the absence of the others, was held not to satisfy the statute requiring a writing "under their hands." *Phelon v. Granville*, 140 Mass. 386.

In *Michigan*, are chosen annually a supervisor, a township clerk, a treasurer, a school inspector, a commissioner of highways, and justices of the peace and constables, not exceeding four. *Michigan Gen. Stat.* (1882), § 677. Such commissioner may fill a vacancy in the office of overseer of highways, § 731. The township board may fill a vacancy in the office of treasurer, § 730, or of assessor or supervisor, § 825. The supervisor is, *virtute officii* assessor, § 733. He is also law agent of the township, § 737. The township clerk is the sealer of weights and measures, § 1557. The librarian of the township library is appointed by the board of school inspectors. *Michigan Gen. Stat.* (1890), § 5140.

A village charter, in making the president of a village *ex officio* a member of the county board of supervisors, does not contravene *Michigan Const.*, arts. 10 and 11; for the two positions are different, and he is not thereby made a supervisor. *Atty. Gen'l v. Preston*, 56 Mich. 177.

In *Minnesota*, are elected annually three town supervisors, a town clerk, a treasurer, an assessor, and, for each road district, an overseer of highways. Justices and constables are elected biennially. *Minnesota Gen. Stat.* (1891), §§ 1126, 1132. The justices of the peace may fill vacancies, § 1128. On failure in the office of town assessor, the county auditor may appoint, § 1130.

The filling of a vacancy in a town

office, although by a majority of the board of justices and supervisors, is invalid, unless each member had notice of the meeting. *State v. Guiney*, 26 Minn. 313.

In *Mississippi*, "The officers of every municipality shall be a mayor, aldermen, a marshal, a tax collector, a treasurer, a clerk, and a street commissioner." In a town, there are five aldermen. The marshal is the tax collector, and he may be the street commissioner. The officers, other than the mayor, aldermen and marshal, are elected by the mayor and aldermen, § 2798.

In *Missouri*, are biennially elected one trustee, *ex officio* treasurer, one collector, one clerk, *ex officio* assessor, one constable, two members of the board of directors, two justices of the peace, and as many road overseers as there are districts in the township. *Missouri Rev. Stat.* (1889), § 8441.

In *Nebraska*, a town clerk, treasurer, three judges, and two clerks of election, an assessor, and an overseer of highways for each road district, are elected annually, and, with slight exception, two justices of the peace and two constables biennially. The township supervisor is elected "each odd numbered year in the odd numbered townships, and each even numbered year in the even numbered townships." *Nebraska Consol. Stat.* (1891), § 1588. As to the duty of the county clerk to fill vacancies, see *State v. Forney*, 21 Neb. 223.

Upon a vacancy in the office of township supervisor, not filled by appointment as prescribed in *Nebraska Comp. Stat.*, ch. 26, § 103, it may be filled by election at a special town meeting properly convened. *State v. Taylor*, 26 Neb. 580.

In *New Hampshire*, there are annually elected a town clerk, selectmen, assessors, treasurer, auditor, collector, agent, overseer of the poor, health officer, constables, highway surveyors, fence-viewers, lumber surveyors, measurers of wood and bark, fireward, pound-keeper, etc. *New Hampshire Pub. Stat.* (1891), ch. 43, § 25.

A collector's acceptance of the office of selectman, is not such recognition of that of collector as relieves him of the disability of incompatible offices within *New Hampshire Pub. Stat.* (1891), p. 155, § 34. *Atty. Gen'l v. Marston* (N. H. 1892), 22 Atl. Rep. 560.

In *New Jersey*, there are elected at the annual township meeting, a clerk, assessors, collectors, "three or more

judicious freeholders of good character to hear and finally determine all appeals relative to unjust cases of taxation, two freeholders commonly called chosen freeholders," highway surveyors, overseers of the poor, constables, highway overseers, and pound-keepers; also "five judicious freeholders," as a township committee to audit accounts of the township officers, superintend expenditures, etc. *New Jersey Revision* (1877), p. 1195, § 12.

In *New Mexico*, the board of trustees ("*fidei comisarios*") "provide by ordinance for the election of a treasurer and such subordinate officers as they may deem necessary for the good government of the corporation," prescribe their duties, and fix their compensation. *New Mexico Comp. L.* (1884), 1689.

In *New York*, at the annual town meeting, there are chosen a supervisor, town clerk, assessor, collector, overseers of the poor, commissioners of highways, and not more than five constables. *Bird. New York Rev. Stat.* (1890), p. 3077, § 17. A school commissioner cannot act as town clerk, p. 542, § 26. Nor can an excise commissioner, p. 1058, § 52. The supervisors and two justices may appoint special constables to serve three days or less. *New York Sess. Laws* (1892), p. 510.

As to the election of town officers, see *New York Laws* (1892), ch. 569, § 12 *et seq.* (Am. G. L., ch. 20). As to their qualification, § 50 *et seq.*

The *New York Act* of 1892, ch. 401, §§ 2 and 3, is construed as to the election of excise commissioners in *People v. Lahr*, 71 Hun (N. Y.) 271.

In the absence of contrary statutory provision, the general law will control the time of election of village officers, if no special law provides therefor. *State v. Cornwall*, 35 Minn. 176.

In *North Carolina*, the town commissioners annually elect a constable and "such other officers and agents as are necessary to enforce their by-laws, keep their records, and conduct their affairs." *North Carolina Code* (1883), § 3800. Also quadrennially, to serve as assessors, "one justice of the peace and two discreet freeholders." *Sess. Laws* (1885), p. 296.

As to when a duly elected town officer is not indictable for refusing to accept the office, see *State v. McEntyre*, 3 Ired. (N. Car.) 171.

As to when the court will allow amendment, or take judicial notice of what persons were designated as trus-

2. Powers and Duties.—The powers of municipal officers in general have already been considered.¹ In some states, the duties of the town clerk and of the treasurer are left to be prescribed by the governing board; in others, the duties of these and other town officers depend on the statutory town system of the given state.²

tees or directors in laying off lots, see *Hertford v. Winslow*, 71 N. Car. 150.

In *Ohio*, on failure of the electors to appoint a treasurer and trustees, the county auditor may appoint the same. *Ohio Rev. Stat.* (1890), § 1371.

In *Pennsylvania*, are annually elected a township assessor, supervisors, treasurer, auditors, and clerk. *Bright. Purd. Pennsylvania Dig. L.* (1885), p. 1637. Also constables annually, p. 315. The court of quarter sessions may fill vacancies, p. 1638, § 4. Overseers of the poor are elected biennially, § 12. The collector is appointed by the supervisors and overseers, p. 1593, § 74.

The requirement (*Pennsylvania Laws* (1862), p. 142), that the voters of Hempfield township "elect six supervisors of roads, and each district be entitled to have one elected therein," means that each has its supervisor elected by the whole township. *In re Martz*, 110 Pa. St. 502.

In *Rhode Island*, there are elected annually a town clerk, council, treasurer, sergeant, assessors, a collector, pound-keeper, constables, overseer of the poor, and fence-viewers; also highway surveyors and justices of the peace. Certain special officers may be elected at the meeting, if required, or in some instances by the council, *e. g.*, auctioneer, superintendent of chimneys, woodcorder, sealer, etc. *Rhode Island Pub. Stat.* (1882), p. 109.

Where a town ordinance required the election of as many highway surveyors as there were districts, and the town elected a single surveyor for three districts, the council's assignment of him to one of them and appointment of other surveyors for the two other districts, was held to be *ultra vires* and void. *State v. Gorman*, 13 R. I. 318.

As to the legal effect of custom and general acquiescence, upon the election of town officers, see *State v. Andrews*, 15 R. I. 394; *State v. Briggs*, 15 R. I. 425.

In *South Carolina*, if the town corporators fail to appoint the road officers required by the act of incorporation, the county commissioners appoint them. *South Carolina Gen. Stat.* (1882), § 1076.

In *Tennessee*, the aldermen of any municipality annually elect a recorder, a treasurer, and a constable. *Tennessee Code* (1884), § 1638. The validity of an officer's election may be inquired into collaterally. *Lawrence v. Ingersoll*, 88 Tenn. 52.

In *Vermont*, "Women twenty-one years of age may be elected or appointed to the office of town superintendent of schools or town clerk of a town, if they have resided in such town one year not preceding such election." *Vermont Rev. Laws* (1880), § 2659.

A village charter's requirement that a clerk and trustees be elected by ballot, was held not to be complied with by appointing a nominating committee and accepting its report. *State v. Harris*, 52 Vt. 216.

Where the charter of a village requires its trustees to be elected annually on a certain day, and a majority then wrongfully adjourn without day, the minority can lawfully reorganize the meeting and their election of trustees will be valid. *Stone v. Small*, 54 Vt. 498.

In *Virginia*, each town elects annually a mayor and six councilmen. *Virginia Code* (1887), § 1027. The council appoints the collector, § 1038.

In *Washington*, the town clerk is *ex officio* assessor, and the marshal is *ex officio* tax and license collector. The police justice is appointed by the council. *Washington Gen. Stat.* (1891), § 662.

In *Wyoming*, the council, elected annually, appoints a marshal, who is *ex officio* fire warden and street commissioner, a clerk, who is *ex officio* assessor, and a treasurer. All officers must be qualified electors and residents of the town, and no person is eligible who is a defaulter thereto. *Wyoming Sess. Laws* (1888), ch. 43.

1. See PUBLIC OFFICERS, vol. 19, p. 552. See also, *supra*, this title, *Governing Bodies*; also *Powers and Privileges*.

2. In *Alabama*, thereon, see *Alabama Code* (1886), § 1500, pl. 8. The intendant has the jurisdiction of a justice of the peace, § 1501. The marshal may arrest, without a warrant, persons

breaking the peace or violating any of the town ordinances, § 1502.

As to powers of municipal officers, see *Fox v. McDonald* (Ala. 1893), 13 So. Rep. 416.

In *Arizona*, each of the three town trustees must give bond in \$5,000 for the faithful performance of his duties. *Arizona* Rev. Stat. (1887), § 154.

In *Arkansas*, the mayor has all the powers of a justice of the peace, and must keep a docket, etc. The marshal is the principal ministerial officer of the town, and has the power of a sheriff, with jurisdiction co-extensive with the county. *Arkansas* Dig. Stat. (1884) 796.

Under a statute giving a town mayor the general powers of a justice of the peace, he may take an affidavit for appeal. *Robinson v. Benton County*, 49 Ark. 49.

In *California*, as to the respective duties of the district road overseers and the county board, as to streets and highways, see *California* Pol. Code (1885), §§ 2618, 2643-5. As to those of township assessors, see § 4109, note. As to those officers of the six classes of municipal corporations respectively, see *California* Act of 1883; *California* Pol. Code App., p. 737 *et seq.*

In *Colorado*, the mayor presides at all meetings of the town trustees, but has no vote, save upon a tie. *Colorado* Annot. Stat. (1891), § 4511.

In *Connecticut*, the town officers, other than the board of selectmen already mentioned, are assessors, boards of relief, sealers of weights and measures, hay-wards, pound-keepers, public weighers, and measurers of wood. *Connecticut* Gen. Stat. (1888), § 117 *et seq.*

The duty of the town committee of encroachments in removing a nuisance from a highway, is judicial, and cannot be lawfully performed by a single member acting without the others' notification or convening. *Martin v. Lemon*, 26 Conn. 192, citing *Damon v. Granby*, 2 Pick. (Mass.) 345.

As to the powers and duties of the board of selectmen in *Connecticut*, see *supra*, this title, *Governing Bodies*.

In the *Dakotas*, as to the duties of the township clerk, see *Dakota* Comp. L. (1887), § 777; of the treasurer, § 783.

In *Florida*, as to the duties of the mayor and of the collector of the town, see *Florida* Dig. L. (1881), p. 252.

In *Georgia*, the mayor is the chief executive officer of the town. *Georgia*

Code (1882), § 792. The marshal is tax collector, § 790.

In *Illinois*, the town supervisor, town clerk, and justices of the peace, constitute a board of auditors to examine the accounts of the supervisor, overseer of the poor, and commissioner of highways; also to certify to the county clerk the amount of demands, etc., for purposes of taxation. *Illinois* Rev. Stat. (1891), p. 1507, § 118, *et seq.* The supervisor, the assessor, and the clerk constitute a board of health, p. 1509.

A town supervisor may employ an attorney in behalf of the town. *Bruce v. Dickey*, 116 Ill. 527.

In *Indiana*, the town marshal has the ordinary duties of a constable. *Indiana* Rev. Stat. (1888), §§ 3326, 7326. Also those of road supervisor, § 5090. The township trustee is *ex officio* inspector of elections, overseer of the poor and fence-viewer, § 5994. The town clerk must attend all the meetings of the trustees. *Byer v. Newcastle*, 124 Ind. 86. The trustees' power under § 448 to sell bonds for school buildings may be exercised through a broker. *Reed v. Orleans*, 1 Ind. App. 25. Further, as to the power of the board to issue and sell the bonds, see *Williams v. Albion*, 58 Ind. 329. As to the duty of a township trustee to make statements to the county board, see § 6001; *Murphy v. Oren*, 121 Ind. 59; *Bunnell v. White County*, 124 Ind. 2. As to his power to incur debt, see *State v. Hawes*, 112 Ind. 323; *Jefferson School Tp. v. Litton*, 116 Ind. 471. As to duties in election of county superintendent, under § 4424, see *State v. Dillon*, 125 Ind. 65. As to the trustees' powers in the case of joint-graded schools, see *Hanover School Tp. v. Gant*, 125 Ind. 557. As to their power to build and locate schoolhouses, see *Braden v. McNutt*, 114 Ind. 214.

The marshal may, without a warrant, arrest one within his view violating a town ordinance. *Scircle v. Neeves*, 47 Ind. 289.

Under *Indiana* Stat. of 1852, township trustees, in contracting for the building of a bridge, cannot bind the township to vote a tax. *Houston v. Clay County*, 18 Ind. 396. The right of *de facto* township trustees to exercise their office, cannot be questioned collaterally. *Redden v. Covington*, 29 Ind. 118. Further, as to the powers of township trustees in *Indiana*, see *Phillips v. East*, 16 Ind. 254; *Fayette County v. Chitwood*, 8 Ind. 504.

An agreement by town trustees to

refund a license, if the act requiring payment be declared invalid, was held to be binding in *Columbia v. Authes*, 84 Ind. 31.

A township trustee cannot recover a sum paid for which he failed to receive credit through his negligent keeping of accounts of vouchers. *Butt v. Jennings School Tp.*, 81 Ind. 69.

Where A and B were the town trustees, a contract by A with B to sell to the town for a cemetery, land owned by A and C, was held to be voidable at the election of the vendee. It was immaterial that A vacated his seat, and declined to act pending the negotiation. *Pratt v. Luther*, 45 Ind. 250.

A contract describing the trustee of a civil township as acting for "the township," imports the civil township; he can incur no liability for the benefit of property of the school township. *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184.

Under *Indiana* Act of 1891, p. 286, § 236, the township trustee is the proper custodian of the dog fund. *Florer v. State*, 133 Ind. 453. A town trustee may employ a broker to sell bonds issued under *Indiana* Rev. Stat. (1881), § 4488. *Reed v. Orleans*, 1 Ind. App. 25.

In the absence of fraud or collusion, the determination of the town trustee as to the necessities of poor persons is conclusive: he may employ a physician, although the county board has employed another. *Perry County v. Lomax*, 5 Ind. App. 567. The fact that a sick non-resident has been received into a house from charitable motives, does not preclude the township trustee from acting under the statute as to relief of one without money or friends. *Howard County v. Jennings*, 104 Ind. 108. If a county physician refuses to treat an urgently needy person, the township trustee may employ another; and his declarations concerning payment are competent. *Washburn v. Shelby County*, 104 Ind. 321.

In *Iowa*, "a marshal shall be appointed by the trustees, and shall be the principal ministerial officer of the corporation, and shall have the same power that constables have by law, co-extensive with the county for offenses committed within the limits of the corporation." McClain's *Iowa Code* (1888), § 702.

Township trustees cannot borrow money for highway improvements, nor make such improvements in one district a charge upon another. *Cass County Bank v. Conrad*, 81 Iowa 482.

Township trustees, after purchasing land for a cemetery and finding it unfit therefor, may sell it with a restriction that it shall not be used for a private or public cemetery. *Bushnell v. Whitlock*, 77 Iowa 285.

Township trustees cannot lawfully buy highway tools on credit and in advance of a tax levy therefor. *Wells v. Grubb*, 58 Iowa 384; *Hanks v. North*, 58 Iowa 396.

A district township board of directors are bound to designate the proper fund out of which a judgment against the township is to be paid; also to direct the order to be drawn. *Coon v. Providence*, 52 Iowa 287.

A township board of health cannot delegate its power to employ a physician. *Young v. Blackhawk County*, 66 Iowa 460.

In *Kentucky*, trustees' entry on lots, held adversely, gives no title. *Young v. Kimberland*, 2 Litt. (Ky.) 223. To give title to succeeding trustees, there must be words of succession. *Falmouth v. Horter*, 4 Litt. (Ky.) 119. One offering a deed must show that it was by a majority of the trustees. *Owings v. Iles*, 3 T. B. Mon. (Ky.) 286.

Further, as to powers of town trustees, title, etc., see *Morrison v. McMillan*, 4 Litt. (Ky.) 210; 14 Am. Dec. 115; *Mason v. Mulholm*, 6 Dana (Ky.) 140; *Lee v. Flemingsburg*, 7 Dana (Ky.) 28; *Guffield v. Bowling Green*, 6 B. Mon. (Ky.) 224; *Wickliffe v. Bascom*, 7 B. Mon. (Ky.) 681.

In *Louisiana*, representative officers of a local jurisdiction invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. *Police Jury v. Britton*, 15 Wall. (U. S.) 566. This decision overrules *Rogers v. Burlington*, 3 Wall. (U. S.) 654, and *Mitchell v. Burlington*, 4 Wall. (U. S.) 270; *Brenham v. German American Bank*, 144 U. S. 173, 549.

In *Louisiana*, as to when the police board has absolute and discretionary power, free from the control of the mayor, see *Fitzpatrick v. Gaster* (La. 1893), 14 So. Rep. 304.

In *Maine*, highway surveyors may repair sudden injuries, remove snow, and remove fences to prevent drifting;

also remove obstructions, and plant trees. *Maine* Rev. Stat. (1883), pp. 253, 254, 258. As to the duties of the treasurer as collector of taxes, see pp. 134, 138.

Only upon express authorization by vote, can the treasurer of a town convey real estate in its behalf; and a note given in payment of the void conveyance is void. *Monson v. Tripp*, 81 Me. 24.

In conveyance of land reserved for public uses, the town treasurer and the trustees thereof, must comply strictly with the statute; otherwise his conveyance cannot be ratified by their subsequent acts. *Argyle v. Dwinel*, 29 Me. 29.

The maxim, *salus populi suprema lex*, was applied to sustain the constitutionality of a statute empowering town officers to isolate an infected person. *Haverty v. Bass*, 66 Me. 71.

As to the powers and duties of selectmen in *Maine*, see *supra*, this title, *Governing Bodies*.

In *Massachusetts*, a town treasurer, under *Massachusetts* Stat. (1875), ch. 209, has no right, *virtute officii*, to give a new note of the town in renewal of an old note. *Abbott v. North Andover*, 145 Mass. 484. A committee chosen by a town to erect a building, is not a board, but an agent, and may act by agreement of its members separately. *Shea v. Milford*, 145 Mass. 528. An invalid executory agreement by the overseers of the poor, for services to the town, cannot, after change of membership of the board, be ratified by members acting individually. *Reed v. Lancaster*, 152 Mass. 500.

Authority in a town treasurer to borrow money on the credit of the town, cannot be established by proof of long practice of such borrowing and of subsequent votes of acceptance. *Benoit v. Conway*, 10 Allen (Mass.) 528. Compare *Dickinson v. Conway*, 12 Allen (Mass.) 487.

As to the power of a building committee to change specifications and bind the town for extra work beyond the appropriation based on their report, see *Shea v. Milford*, 145 Mass. 528.

A town clerk may amend a record made by him when in office under a former election. *Welles v. Battelle*, 11 Mass. 477. Otherwise, when he is no longer in office. *Hartwell v. Littleton*, 13 Pick. (Mass.) 229.

As to the duty of the town clerk, under *Massachusetts* Pub. Stat., ch. 100, § 13, in requiring the bonds of a license

to sell intoxicating liquor, see *Howes v. Maxwell*, 157 Mass. 333.

As to the powers and duties of the selectmen in *Massachusetts*, see *infra*, this title, *Governing Bodies*.

In *Michigan*, the jurisdiction of the township drain commissioner extends to drains that lie wholly within his township. *Michigan* Gen. Stat. (1890), §§ 1740a-7. But see *Tinsman v. Monroe County Judge*, 82 Mich. 562. As to the duties of the highway commissioner in laying out a road, return to the township clerk, etc., see *Cowing v. Ripley*, 76 Mich. 651. As to his duty in chancery proceedings under the statute for encroachments upon highways, see *Lebanon Tp. v. Burch*, 78 Mich. 641.

Town officers cannot, by acquiescence, transfer local duties from local officers to commissioners appointed by the governor. So held as to a township's street improvement under *Michigan* Act of 1871, No. 414. *Hubbard v. Springwells Tp.*, 25 Mich. 153.

A township clerk has no authority *ex officio* to sign the names of the highway commissioners to an order on the township treasurer. *Just v. Wise Tp.*, 42 Mich. 573.

A town clerk's entry is not conclusive evidence of a new town treasurer's receipt of money from his predecessor; an intentional acceptance must be shown. *Rice v. Sidney*, 44 Mich. 37; 38 Am. Rep. 227.

A contract through the board of health, was held to render the township primarily liable to a physician for his services in attending one confined by scarlet fever. *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

In *Minnesota*, the town supervisors are, *virtute officii*, fence-viewers. *Minnesota* Gen. Stat. (1891), § 1135. They also constitute a town board of audit, § 1140. As to the powers of town insurance companies, see § 3095.

As to the care of highways, the supervisors are mere agents of the town. *Woodruff v. Glendale*, 23 Minn. 537; 26 Minn. 78; *Hutchinson Tp. v. Filk*, 44 Minn. 536. *Mandamus* will not lie to compel them to make a particular improvement upon a town highway, unless the duty be plain and imperative. *State v. Somerset*, 44 Minn. 549.

In *Mississippi*, the mayor and aldermen appoint a fire marshal, who may be the mayor or town marshal, with power to keep from the vicinity of any fire all suspicious persons lurking near, and to compel bystanders to aid in ex-

tinguishing the fire or preserving property in danger therefrom, or preventing goods from being purloined. *Mississippi Code* (1892), § 2967. The sixteenth section in every township being reserved for the support of schools, "the board of supervisors shall annually appoint three trustees for each township in their respective counties, having school lands or funds, or which ought to have such lands or funds; and the trustees shall recommend to the boards of supervisors the lawful purposes for which the available school funds of their townships ought to be appropriated, and the same shall be appropriated accordingly," § 4153.

In *Missouri*, the board of directors audit all accounts of township officers for services as such, except the assessor; audit all other accounts legally presented to them against the township; levy all taxes for township road and bridge purposes; and estimate expenses, etc. *Missouri Rev. Stat.* (1889), § 8473 *et seq.*

In *Nebraska*, the town supervisor is *ex officio* overseer of the poor. He must attend the meetings of the county board of supervisors. *Nebraska Consol. Stat.* (1891), § 981. Thus he is *ex officio* a member of the county board. *State v. Taylor*, 26 Neb. 580.

In *New Hampshire*, as to the duties of the town clerk, treasurer, auditor, collector, constables, agent, overseer of the poor, etc., see *New Hampshire Stat.* (1891), ch. 43. As to the powers and duties of the board of selectmen in *New Hampshire*, see *supra*, this title, *Governing Bodies*.

An ex-town clerk may be allowed to amend a record made by him when clerk. *Gibson v. Bailey*, 9 N. H. 168.

In *New Jersey*, as to the duties and jurisdiction of the township boards of chosen freeholders in opening by-roads, see *Perrine v. Farr*, 22 N. J. L. 356; *Stevens v. Allen*, 29 N. J. L. 68, 509.

Under *New Jersey Laws* (1888), p. 366, the township committee may contract with a water company for a supply of water, and levy a tax to pay therefor; and this, though the supply is not to be carried to every part of the township. *State v. Summit Tp.*, 52 N. J. L. 483.

A borrowing or an expending for purposes of the township, by members of its committee, will render it liable, unless ratified at a regular meeting. *Musgrove v. Kennell*, 23 N. J. Eq. 75.

In *New Jersey*, a township committee is the proper body to issue bonds

authorized by a statute, although having no general authority to act. *Middleton v. Mullica Tp.*, 112 U. S. 433.

Further, as to the power of municipal officers, see *McDonald v. Newark* (N. J. 1893), 26 Atl. Rep. 82.

In *New Mexico*, the town marshal is the principal ministerial officer, and has, coextensive with the county, the power that constables have by law. *New Mexico Comp. Laws* (1884), § 1690.

In *New York*, as to the duties of town officers, see *New York Laws* (1892), ch. 569, §§ 80, 83, 104.

The joint action of a majority of the qualified members of any town or county board is sufficient. *Bird. New York Rev. Stat.*, p. 27, § 87. This was the rule at common law. As to its application to an act of one of two overseers of the poor, see *Downing v. Ruger*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223.

The successor of a deceased overseer of the poor has control of a suit begun by him, without being substituted as plaintiff. *Bellinger v. Birge*, 54 Hun (N. Y.) 511.

An action may be brought by a supervisor as such, to recover a balance in his predecessor's hands, certified by the town auditors, but not paid to plaintiff on demand. *Gleason v. Youmans*, 9 Abb. N. Cas. (N. Y.) 107. As to the proper party to sue or be sued, see the case of an overseer of the poor, *People v. Board of Auditors*, 74 N. Y. 310; 10 Hun (N. Y.) 551; of commissioners of highways, *Galen v. Clyde*, etc., *Plank Road Co.*, 27 Barb. (N. Y.) 543; of supervisors, *Gailor v. Herrick*, 42 Barb. (N. Y.) 79. Where there is no town treasurer, the town supervisor is the "chief fiscal officer" to whom to present claims for interest on town bonds, within *New York Code Civ. Proc.*, § 3245. *Stanton v. Taylor*, 19 N. Y. Supp. 43; 64 Hun (N. Y.) 633. Compare *Gage v. Hornellsville*, 106 N. Y. 667.

A town supervisor can maintain an action against officials that by fraud have involved the town in debt; *e. g.*, railroad commissioners who have fraudulently issued town bonds. *Mitchell v. Strough*, 35 Hun (N. Y.) 83.

A resolve of a town meeting, directing the town supervisor "as supervisor" to bring an action to restrain commissioners from disposing of town bonds, was held not to authorize a suit in the name of the town. *Lyons v. Cole*, 3 Thomp & C. (N. Y.) 435.

As to the power of town supervisors to borrow money for road and bridge

purposes, see *People v. Tompkins*, 64 N. Y. 53.

A town supervisor, directed to pay interest on town bonds, and receiving from the county treasurer the money therefor, acts as the town agent and cannot question the authority of his principal; he has no discretion upon the question of their legality. *Ross v. Curtiss*, 31 N. Y. 606.

A town supervisor's authority under statute must be pursued strictly. So held as to one's agreement under *New York Laws* (1865), ch. 41, to pay a recruiting agent. *Powers v. Shephard*, 49 Barb. (N. Y.) 418.

The jurisdiction of town supervisors to audit accounts against the town, being concurrent with that of the auditors, they cannot allow accounts, after they have been rejected by the latter on their merits, though they may allow claims presented in proper form which have been rejected by the auditors because not itemized. *McCrea v. Chahoon*, 54 Hun (N. Y.) 577.

Town auditors cannot allow a claim rejected by the prior board. *Osterhoudt v. Rigney*, 98 N. Y. 222; *Osterhoudt v. Hyland*, 27 Hun (N. Y.) 167.

Town auditors must pass upon each item separately; they cannot, without modifying any item, deduct from the amount of the claim a gross sum. *People v. Board of Auditors*, 20 Hun (N. Y.) 150.

Village trustees may authorize the erection of a soldiers' monument in a public street without consent of the owner of the fee. *Tompkins v. Hodgson*, 4 Thomp. & C. (N. Y.) 435.

Charter provision that village trustees "have the sole control and management of the streets," was held to import the duty to keep the sidewalks in repair. *Koch v. Edgewater*, 18 Hun (N. Y.) 407.

A village board, under its power to make a contract, can insert therein a provision that a certain sum shall be deemed liquidated damages. And, under such provision, such damages can be recovered in the party's suit for work and materials, although furnished under a resolution adjudged invalid. *Parr v. Greenbush*, 42 Hun (N. Y.) 232.

As to the authority of village trustees to employ counsel, and the attorney's power to bind in getting commissioners appointed to appraise upon a change of street grade, see *Collins v. Saratoga Springs*, 70 Hun (N. Y.) 583.

In *North Carolina*, the mayor of a

town has the jurisdiction of a justice of the peace. *North Carolina Code* (1883), § 3818.

Without the sanction of the county commissioners, township trustees cannot make a valid contract to build a bridge. *Paine v. Caldwell*, 65 N. Car. 488. The discretionary power of town commissioners to acquire and dispose of public buildings "for the use" of the town, was held conclusive. *Schaver v. Salisbury*, 68 N. Car. 291.

Town commissioners are held to be empowered to bring ejectment to recover land granted by the legislature for town commissioners. *Bath v. Boyd*, 1 Ired. (N. Car.) 194.

In *Ohio*, the trustees of an original surveyed township are a body corporate with power to contract, sue and be sued, and manage the ministerial and school land sections. *Ohio Rev. Stat.* (1890), §§ 1368, 1404. If a statute provides for assessors and highway supervisors over a city which forms part of a township, the like officers of the township have no authority within the city. *State v. Ward*, 17 Ohio St. 543.

Under authority to provide a town hall, township trustees need not acquire an entire building or the ground. *New London Tp. v. Miner*, 26 Ohio St. 452.

In *Pennsylvania*, a township supervisor may maintain a bill in equity to enjoin a public nuisance on a highway. *Nelson v. Ehret*, 4 Kulp (Pa.) 337.

A burgess cannot, without express authority, impose fines for violation of borough ordinances. *Com. v. Thompson*, 110 Pa. St. 297.

Under a charter giving the mayor of a town the powers of a justice of the peace, he may issue an attachment returnable before himself, and it may be served by a constable as well as by the town marshal. *Bain v. Mitchell*, 82 Ala. 304.

The duties of township auditors are purely statutory; the supervisor cannot impose on them the countersigning of township obligations. *Com. v. Upper Darby Auditors*, 2 Pa. Dist. Ct. Rep. 89.

Acts of municipal officers, under a statute, are not invalidated by its being declared void. *King v. Philadelphia Co.*, 154 Pa. St. 160.

As to the proper authorization of the solicitor to bring suit in behalf of the municipality, see *Lebanon v. Lebanon*, etc., St. R. Co., 1 Pa. Dist. Ct. Rep. 563. Further, as to the powers of municipal

3. Liabilities—*a.* TO PERSONS.—Town officers properly exercising lawful discretion within the scope of their employment, are not liable to persons for injury or damages incurred in consequence of their official acts.¹

officers, see *Com. v. Crogan*, 155 Pa. St. 448.

In *Rhode Island*, as to the powers of town councils, etc., see *supra*, this title, *Governing Bodies*.

In *Tennessee*, the recorder of a municipality has the powers of a justice of the peace, in all cases of violation of the criminal laws or of the ordinances. *Tennessee Code* (1884), § 1614.

In *Texas*, the marshal has the powers of a constable, as well as those prescribed by the ordinances. *Texas Rev. Civ. Stat.* (1889), art. 534.

Within the *Vermont* statutory requirement as to the town clerk's duties, a suitable index is such a one as will enable a man understanding the plan on which it is made up, and having ordinarily fair business capacity, to find the record he is in search of. *Smith v. Royalton*, 53 Vt. 604.

The fact that commissioners appointed by the town to subscribe railroad stock, incorporated into the contract conditions beyond the statutory instrument of assent, and that it was not repudiated by the town, was held not to render them agents of any other party than the town. *Danville v. Montpelier, etc., R. Co.*, 43 Vt. 144.

The town agent to prosecute and defend suits has no general authority to settle them. He is personally liable to a party acting on the faith of a promise made by him in such compromise. *Clay v. Wright*, 44 Vt. 538.

As to the powers and duties of the board of selectmen in *Vermont*, see *supra*, this title, *Governing Bodies*.

In *Virginia*, the sergeant has the power of a constable within the corporate limits and one mile beyond them. *Virginia Code* (1887), § 1034. "The mayor, as chief magistrate of the town, shall take care that the by-laws and ordinances are faithfully executed. He and the other members of the council shall each be clothed with all the powers and authority of a justice in civil matters within the corporate limits of the town, and in criminal matters, within said limits and one mile beyond the same." *Virginia Code* (1887), § 1033. Councilmen are inhibited from having any contract with or claim against the town; if any, it is void, and if such

claim has been paid, the money is recoverable back with interest. §§ 823, 1036. Acts of councilmen of a new town, appointed by the legislature to serve until their successors are elected, were held to be binding, although one of them participated therein after moving beyond the corporate limits. *Roche v. Jones*, 87 Va. 484.

In *Wisconsin*, the town supervisors belonging to the two most numerous political parties, are inspectors of election. *Wisconsin Sess. Laws* (1891), p. 654. The town clerk is the sealer of weights, measures, scales and beams. *Wisconsin Annot. Stat.* (1889), § 1662.

The duty of immediate diligence justifies town officers in repairing on Sunday a highway defect, if occurring on Saturday and very dangerous; otherwise not. *Alexander v. Oshkosh*, 33 Wis. 277.

As to the power of village trustees as health officers, to contract for the erection of a crematory for the consumption of garbage, and the effect of a patent thereon under the statutory requirement of competition of bidders, see *Kilvington v. Superior*, 83 Wis. 222.

1. See **PUBLIC OFFICERS**, vol. 19, p. 490; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Highway Com'rs v. Ely*, 54 Mich. 173.

In *Arkansas*, town officers are not liable to persons injured by the passage of an illegal ordinance. *Trammell v. Russellville*, 34 Ark. 105.

In *Connecticut*, a town clerk receiving a deed for record and entering upon it "received for record," but suffering it to go out of his hands unrecorded, is liable to any person prejudiced thereby. *Welles v. Hutchinson*, 2 Root (Conn.) 85.

Selectmen are liable to one over whom they unjustly appoint an overseer. *Johnson v. Stanley*, 1 Root (Conn.) 245; *Waters v. Waterman*, 2 Root (Conn.) 214.

A landowner may maintain an action against a selectman under whose direction to cut away sufficient brush to make a highway passable, a laborer has cut down trees unnecessarily. *Ely v. Parsons*, 55 Conn. 83.

In *Iowa*, the rule that, in absence of fraud or malice, a judicial officer is not

liable for an erroneous application of the law, has been applied to the *quasi* judicial act of township trustees in refusing to issue to a railway company a certificate of compliance with the conditions upon which an aid tax was voted. *Muscatine West R. Co. v. Horton*, 38 Iowa 33.

Township trustees are held not to be liable to the payee of an *ultra vires* order. *Willett v. Young*, 82 Iowa 292.

Township trustees who had exceeded their authority in purchasing a road grader, were held not to be personally liable upon an order to the clerk signed by them to pay therefor. *Willett v. Young*, 82 Iowa 293.

In *Maine*, selectmen repairing a bridge have been held not to be liable for a trespass by a teamster employed by the town therein. *Bachelor v. Pinkham*, 68 Me. 253.

A statute making a town liable for all illegal doings and defaults of a pound-keeper, does not necessarily exempt him from being also liable. *Rounds v. Mansfield*, 38 Me. 586.

The chairman of a board of selectmen, to whom M., another member, had, for a legitimate purpose, delivered a town order signed by M. in blank, issued it to F., who loaned him money thereon, relying on his sole assurance of the town's need and authorization of the board to borrow. In F.'s action against M. for a false warranty, it was held that M., not knowing of such disposition and false representations, was not liable. *Fuller v. Mower*, 81 Me. 380.

In *Massachusetts*, an abutter was held not to be entitled to recover of an officer acting in the scope of his authority under a town vote involving change of grade of a highway. *Proctor v. Stone*, 158 Mass. 564.

Three men were held individually liable upon their offer of a reward for the arrest and conviction of a murderer; notwithstanding the official designation after their names, "selectmen," etc. The addition did not make their collective signatures mean the town and nothing else. *Brown v. Bradlee*, 156 Mass. 28.

Selectmen were held liable for a personal injury from failure to provide proper support for the sides of a public sewer. *Breen v. Field*, 157 Mass. 277.

A town committee has been held not to be personally liable for inadvertently pointing out to a road contractor an erroneous location of his section. *Nickerson v. Dyer*, 105 Mass. 320.

In *Michigan*, township supervisors cannot be held liable for an error in the honest exercise of their discretion. *Wall v. Trumbull*, 16 Mich. 228.

A *bona fide* contract by village trustees for building bridge abutments, was held not to bind them personally for payment. *Lyon v. Irish*, 58 Mich. 518.

In *New Hampshire*, although the statute was unconstitutional, and the vote illegal under which an assessment was made, the selectmen, if acting in good faith, are not liable to a taxpayer. *Edes v. Boardman*, 58 N. H. 580.

A suit cannot be maintained against the selectmen by a pauper to recover an excessive sum, in good faith named by them, and received back from him, to enable him to vote. Nor can the town's right to retain it be tried in such suit. *Brown v. Marden*, 61 N. H. 15.

In *New York*, a ministerial officer charged with an absolute and certain duty—*e. g.*, a town supervisor to lay before the board of commissioners a reassessment of damages from laying out a highway—is liable to a person having a special interest therein, for refusal to perform; and this, though he did so through an honest belief that the statute was unconstitutional. *Clark v. Miller*, 54 N. Y. 528. Compare *Olmsted v. Dennis*, 77 N. Y. 378; *New York* cases stated *supra*, this title, *Duties and Liabilities—In General*.

Village trustees are not liable to a property owner for failure of a public work—*e. g.*, a sewer—to benefit him as anticipated. *Garratt v. Canandaigua*, 135 N. Y. 437.

Town officers were held liable to a bond-holder for their non-payment of interest as required by statute; the money having been collected and in their hands. *Murdoch v. Aikin*, 29 Barb. (N. Y.) 59.

An act of village trustees injuring the value of property—*e. g.*, altering the grade of a street—will be enjoined. *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262.

A village was held liable for an injury from the unskillful building of a bridge by its trustees, acting as highway commissioners. *Conrad v. Ithaca*, 16 N. Y. 158.

Mandamus lies to compel town officers to perform a statutory duty—*e. g.*, the issuance of a bounty certificate to a volunteer. *People v. Martin*, 58 Barb. (N. Y.) 286.

b. TO THE TOWN.—In certain states, some officers are required to give bond for faithful performance of duty.¹ Official responsibilities in any given state depend upon its statutory system of town government.²

A town highway commissioner was held not to be bound to keep in repair a bridge within the limits of an Indian reservation, within the town, and not to be liable to damages from a defect thereof, though he had funds sufficient to make the repairs. *Bishop v. Barton*, 2 Hun (N. Y.) 436.

Town highway commissioners, to exonerate themselves from liability for a personal injury from a defect, must show not only that they had not sufficient funds, but also had properly applied therefor. *Warren v. Clement*, 24 Hun (N. Y.) 472.

A taxpayer, on being refused protection by the village officers, from a threatened injury—*e. g.*, an obstruction by a railroad company proceeding to erect a permanent structure—may bring suit and make the officers co-defendants with the trespasser. *Overton v. Olean*, 37 Hun (N. Y.) 47.

In *Pennsylvania*, the rule of non-liability of municipal officers for acts done in the honest exercise of their discretion, has been applied to the case of building by the supervisors of adjoining townships, of a causeway (instead of a bridge) across the boundary stream, to the damage of a mill-owner. *Yealy v. Fink*, 43 Pa. St. 212.

In *Tennessee*, neither against a town nor, *à fortiori*, against its mayor and aldermen, will an action lie for permitting a regularly licensed liquor-seller to so manage his business that an adjoining residence is annoyed by violent, obscene and disorderly conduct of the frequenters of the licensee's saloon or grocery. *McCrowell v. Bristol*, 5 Lea (Tenn.) 685, citing *Dill. on Mun. Corp.*, §§ 308, 754, 773.

In *Vermont*, town trustees were held not to be liable to a person injured by the frightening of his horse, at a stone crusher operated in a highway in course of their official duties. *Bates v. Horner*, 65 Vt. 471.

Selectmen were held not personally liable on enlistment contracts, merely for having transcended their authority in offering soldiers bounties. *Leet v. Shedd*, 42 Vt. 277.

Under the *Vermont* statute (*Vermont Rev. L.*, § 2671), making the office of selectman compulsory, and a refusal to

serve, penal, their duties are *quasi* judicial, and they are not personally liable for an injury sustained through a defect in a highway. *Daniels v. Hathaway*, 65 Vt. 247.

As to the requisites of recovery in an action against a town clerk for failure to keep a suitable index, see *Hunter v. West Windsor*, 24 Vt. 327; *Lyman v. Edgerton*, 29 Vt. 305; *Smith v. Royalton*, 53 Vt. 604.

In *Wisconsin*, town officers refraining from needless injury, are not liable for errors of judgment in locating or constructing a ditch. *Smith v. Gould*, 61 Wis. 31. But as to compensation to a riparian proprietor for a "taking," by the cutting away of his land, compare *Smith v. Gould*, 59 Wis. 631.

1. *E. g.*, *California* Pol. Code (1885), § 950.

2. See PUBLIC OFFICERS, vol. 19, p. 562a.

In *Connecticut*, one employed by the selectmen under direct authority from the town to assist them in disbursements to paupers, is an "agent" of the town, within *Connecticut* Gen. Stat., § 1583, punishing misappropriations, false entries, or procurement of fraudulent claims. *State v. Clerkin*, 58 Conn. 98.

In *Florida*, a taxpayer may sue to enjoin the mayor of a town against misappropriating the corporate funds. *Peck v. Spencer*, 26 Fla. 23.

In *Georgia*, any municipal officer misappropriating funds from their specific object "shall be guilty of malpractice in office." *Georgia* Code (1872), § 1672, c.

In *Illinois*, a town's remedy on the official bond does not exclude its direct suit against the treasurer of the commissioners of highways to recover money which he refuses to pay over to his successor. *Blanchard v. La Salle*, 99 Ill. 278.

Sureties of a re-elected town supervisor, are held liable for town funds in his hands at the end of his preceding term. *Morley v. Metamora*, 78 Ill. 394; 20 Am. Rep. 266.

As to the requisites of indictment of a town officer for withholding the records from the county clerk, on discontinuance of the township system, see *Baysinger v. People*, 115 Ill. 419.

In *Indiana*, if a township trustee pays money after the specific fund is exhausted, he is entitled to be reimbursed, and is liable for no more than nominal damages; and this, though indebted to some of the funds, provided that on settlement of all accounts, he is a *bona fide* creditor of the township. *Constructing Indiana* Rev. Stat. (1888), §§ 5999, 6001, *Murphy v. Oren*, 121 Ind. 59. In an action on his bond, he must set off against the shortage in one fund, overpayments on account of another, so far as the shortage was occasioned thereby. *State v. Finney*, 125 Ind. 427; *Finney v. State*, 126 Ind. 577. In case of a deficit of school money, he can hold the town for advances made to school teachers from his own money. *Kiefer v. Troy County School Tp.*, 102 Ind. 279. As to the requisites for recovery, under § 6008, b, from the trustee for school supplies, see *State v. Hawes*, 112 Ind. 323; *Jefferson School Tp. v. Litton*, 116 Ind. 467. If he loans the money and takes a note payable to himself, the township cannot sue thereon. *Rowley v. Fair*, 104 Ind. 189.

In *Indiana*, a township trustee must account for money officially received, though lost without his fault; *e. g.*, stolen from the safe. *Morbeck v. State*, 28 Ind. 86. The legal title to the money is in himself; he is not a mere bailee. *Rock v. Stinger*, 36 Ind. 346, *citing* the case of a town collector in *Massachusetts*, *Colerain v. Bell*, 9 Met. (Mass.) 499. So, also, where he deposits in a solvent bank that becomes insolvent. *Inglis v. State*, 61 Ind. 212. The funds cannot be followed in the hands of third parties, as in the case of ordinary trustees. *Linville v. Leininger*, 72 Ind. 491. His liability to the township is exactly that of a banker for money deposited on general account. *Bocard v. Stevens*, 79 Ind. 270. He is liable until actual payment of the money to his successor, notwithstanding a receipt given therefor. *Madison Tp. v. Dunkle*, 114 Ind. 262.

A town trustee's assignment of his claim for services and failure to pay it, was held to be no breach of his official bond. *State v. Keifer*, 120 Ind. 113.

A township trustee is held not to be liable on his bond for the defective construction of a bridge, where, by the action of the county commissioners, he has reimbursed the road fund therefor. *State v. Vogel*, 117 Ind. 188.

A township trustee is liable for a conversion if he applies money belong-

ing to one fund to pay a claim against another fund. *Robinson v. State*, 60 Ind. 26.

Where a township trustee, having in good faith made a contract rendering him officially liable to pay certain amounts, paid them in goods, or by giving credit on his store account with consent of parties, it was held that his retaining a corresponding amount of the township funds was not a conversion, and did not render him liable on his official bond. *State v. Parker*, 33 Ind. 285.

A township may maintain against its former trustee an action to recover the excess for which his successor had erroneously receipted to him. *State v. Haynes*, 79 Ind. 294.

The sureties of a township trustee are liable for his delinquencies occurring while he was holding over until his successor be qualified. *State v. Berg*, 50 Ind. 496.

As to the requisites of procedure in an action on the bond of a township trustee, see *Hawthorn v. State*, 48 Ind. 464.

The use of town funds by a treasurer, was held not to be a breach of his bond; but only a failure to account. *Harvey v. State*, 94 Ind. 159.

In *Iowa*, a road supervisor was held liable on his official bond for having expended for bridge materials a fund set apart by the township trustees for another purpose. *Wells v. Stomback*, 59 Iowa 376.

In *Kansas*, a township was held estopped by its knowledge that its treasurer kept its funds in a certain bank which afterwards suspended. *Rose v. Douglass Tp.* (Kan. 1893), 34 Pac. Rep. 1046.

As to the duty of an outgoing township treasurer to pay funds over to his successor, and the statutory limitation of recovery, see *El Dorado Tp. v. Gordon*, 50 Kan. 307.

In *Maine*, town officers are not liable for failure to erect guide-posts, if the town has not raised any money therefor. *Studley v. Geyer*, 72 Me. 286.

The fact that a town treasurer's failure to pay orders was owing to the destruction of his house and town funds therein, by fire, was held not to exonerate him from liability on his official bond. *Monticello v. Lowell*, 70 Me. 437.

An inadvertently erroneous certificate by the selectmen that a defaulting town treasurer's accounts are correct, will not release his sureties, though

known to them, while he has enough assets to cover the deficit, and though he afterwards dies insolvent. *Farmington v. Stanley*, 60 Me. 472.

As to the tax collector's duty in appropriation between the annual assessment and liability upon his town bond, see *Orne v. Pearson*, 61 Me. 552; *Porter v. Stanley*, 47 Me. 515; 74 Am. Dec. 501.

In *Massachusetts*, a town treasurer is not liable, and a collector is not accountable to the town for taxes illegally assessed and not by him received. *Adams v. Farnsworth*, 15 Gray (Mass.) 423.

In *Mississippi*, the mayor of a town is not liable for a *bona fide* error as to his jurisdiction of a criminal case; nor would the marshal therein be liable for false imprisonment. *Bell v. McKinney*, 63 Miss. 187.

In *Montana*, a failure of a town or county officer to perform his duty, is a misdemeanor punishable by fine and imprisonment. *Montana Comp. Stat.* (1887), p. 889, § 927.

In *Nebraska*, the town treasurer must give bond in \$5,000, or double the amount of money that may come into his hands, to be fixed by the town board. *Nebraska Consol. Stat.* (1891), § 979. The town officers make oath faithfully to perform, etc., § 975.

In *New Hampshire*, the liability upon a town treasurer's bond is not discharged by his note, accepted by his successor as full payment, with assent of the selectmen. *Henniker v. Wyman*, 58 N. H. 528.

In *New Jersey*, *mandamus* lies to compel a township collector to pay over the balance to his successor, on the proper order. *State v. Disbrow*, 42 N. J. L. 141.

The sureties of a township collector are held not to be exonerated by the fact that the moneys were collected before the date of the bond. *Conover v. Middletown*, 42 N. J. L. 382.

In *New York*, as to the procedure under the law of 1887, ch. 372, to enforce the lien of a town collector's bond, against the property of the sureties, see *Crisfield v. Murdock*, 127 N. Y. 315.

The "unlawful and corrupt expenditures" by village officers, for which, under *New York Laws* (1879), ch. 307, a summary investigation may be had, do not embrace those resulting from errors of judgment with no pretense of corruption; *e. g.*, employing old and lazy

laborers, making useless and expensive gutters, etc. *Matter of East Syracuse*, 20 Abb. N. Cas. (N. Y.) 131.

One who as president of a railway company, received a town's bonds for its stock, and sold them to *bona fide* purchasers, knowing them to be invalid, was held to be not liable therefor to the town, although he was also its supervisor. *Farnham v. Benedict*, 39 Hun (N. Y.) 22.

The remedy under *New York Laws* of 1866, ch. 534, against delinquent town supervisors, extends to cases arising before its enactment. *Guilford v. Cooley*, 58 N. Y. 116. A supervisor, who is also a member of a town committee for procuring enlistments on the town quota, is held to be accountable for money received and disbursed by him, raised upon town bonds. *Guilford v. Cooley*, 58 N. Y. 116.

If a town supervisor as "trustee of the gospel and school lot" improperly invests and loses any of the funds, his successor may maintain an action for account and recovery. *Taylor v. Gurnee*, 26 Hun (N. Y.) 624.

A town supervisor's sureties are not liable for money whereof he has become a mere voluntary custodian, or which, without authority of law, is ordered by the board to be paid to him; *e. g.*, by a misdirection in the collector's tax warrant. *People v. Pennock*, 60 N. Y. 421.

As to requisites of indictment of town auditors for "official misconduct," see *People v. Castleton*, 44 How. Pr. (N. Y.) 238.

As to the requisites of allegation and proof in an action by a taxpayer, under *New York Laws* (1887), § 673, to prevent waste or injury to the town from wrong doings of officers, see *McCrea v. Chahoon*, 54 Hun (N. Y.) 577.

In *North Carolina*, every person who, on being appointed town constable, commissioner, mayor, or assessor, refuses to qualify, shall forfeit \$25. *North Carolina Code* (1883), § 3812. The town constable gives bond to the state enforceable by the commissioner, § 3809.

As to the extent of liability of town commissioners to indictment for failure to keep township roads in repair, see *State v. Halifax*, 4 Dev. (N. Car.) 345.

In *Ohio*, one appointed trustee or treasurer of a civil township, and refusing to qualify, forfeits not less than \$5 nor more than \$50. *Ohio Rev. Stat.* (1890), § 1375. Other officers, \$2, § 1449.

In *Pennsylvania*, one elected to a

4. **Compensation.**—In some states, the compensation of certain officers, as, for instance, collectors of town taxes, fence-viewers, field drivers, inspectors, lockup keepers, and pound keepers consists of fees prescribed by statute. In the absence of statute, the principles governing the compensation of municipal officers in general apply.¹

township office other than that of constable, and refusing to serve, shall forfeit \$20; except as to service more than three years in twelve. Bright. *Purd. Pennsylvania* Dig. L. (1885), p. 1638, § 6.

Township supervisors are liable to indictment for neglect to lay out or repair a public road. But they are only bound to reasonable care and promptness. *Com. v. Cassatt*, 3 Montg. Co. Rep. (Pa.) 19.

A town treasurer is chargeable with a loan to the town contracted with himself. He cannot have credit for disbursement to a bond held by himself unofficially. Only town councils can authorize payment out of the treasury. *Todd v. Patterson*, 55 Pa. St. 498.

In the absence of statutory provision therefor, no appeal lies to the supreme court to review a settlement of township officers' accounts. *Thomas v. Upper Merion Tp.*, 148 Pa. St. 116.

In *Vermont*, a liquor agent who, in excess of the limit, purchased liquors with the money of the town and sold them without consent of the selectmen, was held to be liable to the town for the proceeds; the maxim, *in pari delicto*, etc., did not apply. *Topsham v. Rogers*, 42 Vt. 189.

In *Wisconsin*, a town treasurer is liable to the town for moneys appropriated by the county, although unlawfully, and received by him, although expended by him only for the town's use, if without its direction. *Remington v. Ward*, 78 Wis. 539. As to the requisites, in an action on a town treasurer's bond, of evidence on the question of election of his successor, and of neglect to pay over moneys, see *La Pointe v. O'Malley*, 46 Wis. 35.

The liability of the sureties of a town treasurer is not affected by want of a formal approval of his bond, by the chairman of the town board. *Omro v. Kalme*, 39 Wis. 468.

As to the formal requisites of the bond of a town treasurer, see *Platteville v. Hooper*, 63 Wis. 381.

1. See PUBLIC OFFICERS, vol. 19, p. 555; *Connecticut* Gen. Stat. (1888), §

3735 *et seq.*; *Massachusetts* Pub. Stat. (1882), pp. 120 *et seq.*, 230, 275, 368 *et seq.*; *New Hampshire* Pub. Stat. (1891), pp. 193, 346, 379.

In *Alabama*, of the salaries of officers, \$25 per month is exempt from garnishment. *Alabama* Code (1886), § 2512.

In *Arkansas*, the town council prescribes the compensation of the town officers. *Arkansas* Dig. Stat. (1884), § 796. No officer's emoluments shall be increased or diminished during his term, § 926.

In *California*, as to the compensation of officers of the six classes of the municipal corporations respectively, see *California* Act of 1883; *California* Pol. Code App. (1883), p. 737 *et seq.*

A promise to pay a municipal officer an extra compensation for meritorious services, was held not to be binding. *Heslep v. Sacramento*, 2 Cal. 580.

In *Colorado*, in towns and cities of not more than 5000 inhabitants, neither the mayor, aldermen, or trustees can receive any compensation unless a majority of the legal voters vote in favor thereof; any ordinance therefor is void. *Colorado* Annot. Stat. (1891), § 4537.

In the *Dakotas*, "The trustees, clerk, assessor, treasurer, marshal, and justice of the peace shall respectively receive for their services, such compensation as the board of trustees in their by-laws may decide." Other town officers receive a "just and reasonable compensation." *Dakota* Comp. Laws (1887), § 1069.

In *Georgia*, for a very detailed specification of the fees of justices and constables, see *Georgia* Code (1882), §§ 3699, 3700. The town council fixes the compensation of the mayor, recorder, and marshal; and it is not to be increased or diminished during the term. *Georgia* Code (1882), § 793. "The general assembly shall not grant or authorize extra compensation to any public officer, agent, or contractor, after the service has been rendered, or the contract entered into," § 5202. *Georgia* Const., art. 8, § 16, pl. 2.

A town marshal *de facto* was held entitled to compensation only for the time he actually served. *Miller v. Seney*, 81 Ga. 489.

In *Illinois*, under the town organization law, the clerk, the supervisor, or the justice of the peace, remains in office until his successor is qualified, even though his resignation had been accepted; and accordingly he remains responsible as member of the board of auditors. *Badger v. U. S.*, 93 U. S. 599.

The president and town trustees hold office till their successors are elected, even though they neglect to give the statutory notice. *Mandamus* lies to compel the notification. *People v. Fairbury*, 51 Ill. 149.

In *Indiana*, a township trustee is entitled to a compensation of only two dollars per day; and this, though on the same day he may have performed two classes of service. *Montgomery County v. Bromley*, 108 Ind. 158; *Posey County v. Templeton*, 116 Ind. 369.

In *Indiana*, the fact that on a tie vote for the election of township trustees, the incumbent (who was one of the candidates), refused to comply with the statute in case of a tie, was held not to create a vacancy. *State v. McMullen*, 46 Ind. 307.

In *Iowa*, in the absence of statutory provision, the mayor of an incorporated town cannot recover from the county for services as a magistrate where the prosecution fails. *Howland v. Wright County*, 82 Iowa 164.

A resolution assuming to supersede an audience as to the compensation of the city attorney, was held invalid. *Ryce v. Osage* (Iowa, 1893), 55 N. W. Rep. 532.

In *Maine*, a town clerk is entitled to compensation for recording a birth occurring before his election, but coming to his knowledge thereafter. Otherwise as to his supplying, without the town's direction, a previous record destroyed by fire. *Lake v. Ellsworth*, 40 Me. 343.

A substitute schoolhouse janitor holding himself ready for service, was held entitled to draw his salary from the municipality, whether actually at work or not. *Davis v. Fall River*, 155 Mass. 96.

A school agent's election, and the rendition of service, was held not to imply a promise of the town to pay him; no statute providing therefor. *Talbot v. East Machias*, 76 Me. 415.

One who was selectman, town agent,

and overseer of the poor, secured a pension for a pauper, and in pursuance of a previous agreement with her, appropriated it to settle the town's claim for her support. She afterwards recovered it from him by suit. It was held that he was not entitled to compensation from the town for the expenses therein incurred by him. *White v. Levant*, 77 Me. 396.

Where no statute has prescribed any compensation for a town officer, he can recover none without a town vote therefor. *White v. Levant*, 78 Me. 568.

As to when *mandamus* is a municipal officer's proper remedy to recover his salary, etc., see *Baker v. Johnson*, 41 Me. 15; *French v. Cowan*, 79 Me. 426.

In *Massachusetts*, a selectman cannot maintain an action against a town for official services for which no compensation has been provided, either by statute, vote, or express contract; evidence of customary payment by towns for such services is immaterial. *Farnsworth v. Melrose*, 122 Mass. 268.

A town vote determining what would be a reasonable compensation for certain officers of the fire department, was held to import a contract to pay the same. *Parks v. Waltham*, 120 Mass. 160.

Under *Massachusetts* Gen. Stat., ch. 24, the vote of a town having a duly established fire department, to pay members of a private organization, not engine men, under § 14 or § 15, for services rendered to the town as engine men for the preceding year, was held to be *ultra vires* and void. *Greenough v. Wakefield*, 127 Mass. 275.

In *Michigan*, silence of a village charter as to compensating a board of water commissioners, was held to indicate that their services were expected to be voluntary; notwithstanding a provision that officers receive such compensation as the council shall prescribe. *Perry v. Cheboygan*, 55 Mich. 250.

In *Missouri*, the township clerk is paid fixed fees. The other officers each receive \$1.50 *per diem* for their services. *Missouri* Rev. Stat. (1889), § 8484.

As to when, in a statute, the words, "reasonable compensation," import that the compensation is to be fixed by the court in which the condemnation proceeding is pending, see *Green v. St. Louis*, 106 Mo. 454.

In *Nevada*, the compensation of the chief engineer of the fire department must not exceed \$150 per month; that of his assistant, \$125, and that of each

employé therein, \$100. *Nevada Gen. Stat.* (1885), § 2024.

Under a statute that policemen "shall receive such compensation as shall be voted by the town," none can be recovered without a vote fixing the rate. *Sampson v. Rochester*, 60 N. H. 477.

In *New Hampshire*, a selectman's acceptance of the office, and serving without objecting to the sum voted as compensation, was held to be a contract at that price. *Rindge v. Lamb*, 58 N. H. 278.

In *New Jersey*, each member of the township committee receives \$2 per day, and the clerk \$3. *New Jersey Revision* (1877), p. 1200, § 37.

The *New York Act* of 1880, that "the compensation or salary of any officer shall be fixed before his appointment," does not require a fixing before each new appointment. *People v. Crissey*, 91 N. Y. 616.

As to the allowance of a highway commissioner's claim against the town, *mandamus* will not lie to compel the board of auditors to decide in a particular way. *People v. Barnes*, 114 N. Y. 317.

The facts of an attorney's rendition of services to a town, and of a resolution of the board of auditors to pay for similar services, were held not conclusive of an undertaking of the town to audit and allow his claim therefor. *People v. Wood* (Supreme Ct.), 12 N. Y. Supp. 436.

Overseers of the poor are not precluded from audit and allowance for supplies procured on their credit, merely by their failure to follow the statutory procedure. *Osterhoudt v. Rigney*, 98 N. Y. 222.

As to the right of suspension of an officer—*e. g.*, an aqueduct inspector—without pay, "owing to lack of work," see *Kelly v. New York*, 70 Hun (N. Y.) 208; *Donnell v. New York*, 68 Hun (N. Y.) 55.

In *North Carolina*, as to what is a reasonable town ordinance regulating the compensation of a cotton weigher, see *State v. Tyson*, 111 N. Car. 687.

In *Ohio*, a trustee or a supervisor receives \$1.50 per day of actual service. The township treasurer has two per centum of the money received, kept and paid out. *Ohio Rev. Stat.* (1890), §§ 1530-3.

In *Oklahoma*, as to the compensation of municipal officers, see *Blackburn v. Oklahoma*, 10 Okl. 292.

In *Pennsylvania*, each township

auditor receives "the sum of one dollar per day for each day necessarily employed in the duties of their office." *Bright. Purd. Pennsylvania Dig. L.* (1883), p. 1641, § 34. The treasurer receives a percentage, settled by the supervisors, with approbation of the auditors, § 25. The supervisors determine the town clerk's compensation, § 27.

As to the unchangeableness of the salary of a municipal officer when once fixed, even though under an unconstitutional act, see *Devers v. York*, 156 Pa. St. 359.

Under *Vermont Rev. L.*, § 2728, a town officer—*e. g.*, a lister—can recover only such pay as is fixed by statute, or by vote of the town. The case is not affected by the precedent of allowance in a former year. *Barnes v. Bakersfield*, 57 Vt. 375.

A town officer has no legal claim for his services, except by express vote or by a usage to pay that office—*e. g.*, school committee. *Boyden v. Brookline*, 8 Vt. 285.

A first constable and *ex officio* collector is not entitled to fees for taxes previously collected by the town treasurer, except under an existing agreement; a subsequent promise to pay them is without consideration. *Woodward v. Rutland*, 61 Vt. 316.

A highway surveyor cannot recover from the town an amount expended by him in excess of a tax committed to him. *Cloud v. Norwich*, 57 Vt. 448.

In *Washington*, "The mayor and members of the council shall receive no compensation whatever. The clerk, treasurer, marshal and police justice shall severally receive, at stated times, a compensation to be fixed by ordinance by the council, which compensation shall not be increased or diminished after their election or during their several terms of office." *Washington Gen. Stat.* (1891), § 666. And see *State v. Carson*, 6 Wash. 250.

In *West Virginia*, the mayor, recorder, assessor, and road superintendent receive each a compensation to be fixed by the council, and not to be increased or diminished during the term. *West Virginia Code* (1891), p. 431, § 42.

In *Wisconsin*, the general town officers receive \$2 per day for actual service, and in only one official capacity. *Wisconsin Annot. Stat.* (1889), § 850. The assessors receive what the town board allows them, not exceeding \$3 per day, § 851.

5. **Termination.**—The principles governing the power to remove municipal officers, and the effect of removal, as laid down elsewhere in this work,¹ apply to towns, in the absence of any statutory provision to the contrary. In general, the appointing power is also the removing power. In many states, the statutes define what shall constitute vacation of an office.²

VIII. DISCONTINUANCE.—Ordinarily, the general principles as to

1. See PUBLIC OFFICERS, vol. 19, p. 562a.

2. In *Alabama*, an office "is vacated by the death of the incumbent; by his resignation, except in such cases as are excepted by law; by his ceasing to be a resident of the state or of the division . . . for which he was elected; by the decision of a competent tribunal declaring his election or appointment void, or his office vacant; by an act of the general assembly abridging his term of office, when the same is not fixed by the constitution; in such other cases as are, or may be, declared by law." *Alabama Code* (1886), § 308.

In *Arkansas*, the mayor or any other town officer may be removed by the concurrent vote of five councilmen. *Arkansas Dig. Stat.* (1884), § 799.

In *California*, as to tenure, etc., in the six classes of municipal corporations, see the Act of 1883, *California Pol. Code*, p. 737 *et seq.*

In *Colorado*, when the tenure of a municipal office is at the pleasure of the appointing body, the power to remove may be exercised without notice or hearing; otherwise as to removal from any office — *e. g.*, of alderman — which is of the essence of the corporation. So held, as to a council's removal of a police magistrate. *Carter v. Durango*, 16 Colo. 534, citing 1 Dill. on Mun. Corp., § 250; *Hudson v. Denver*, 12 Colo. 157.

In *Georgia*, gambling by the marshal is not "malpractice" and ground for his removal. *Macon v. Shaw*, 16 Ga. 172. A marshal removed by the mayor and council for a cause not specified in the charter, may recover of them the damages necessarily resulting from his amotion, namely, his salary and perquisites. *Shaw v. Macon*, 19 Ga. 468. A marshal's failure to prosecute for an offense committed in his presence, is ground for his removal. *Shaw v. Macon*, 21 Ga. 281. One employed by the firemasters at will, cannot recover for his discharge. *Parks v. Atlanta*, 76 Ga. 828.

In *Illinois*, as to what constitutes a vacancy in the office of town super-

visor, see *Oregon v. Jennings*, 119 U. S. 74.

One is not relieved from the duties of a municipal office, until his resignation is accepted by competent authority. *People v. Williams*, 145 Ill. 573.

In *Indiana*, a marshal's failure to give bond within the ten days' requirement of the town charter, was held not to vacate the office. *State v. Porter*, 7 Ind. 204.

In *Kansas*, in the absence of statutory declaration, the office of township treasurer is not vacated by his removing "across the line" into another township, without resignation. *Salamanca Tp. v. Wilson*, 109 U. S. 627. When the legislature abolishes a municipal township, the officers must go. *In re Hinkle*, 31 Kan. 112.

In *Maine*, as to the construction of the *Maine Const.*, art. 9, § 6—tenure of all officers "not otherwise provided for,"—see Opinion of Justices, 72 Me. 549.

In *Massachusetts*, a breach of a regulation forbidding a municipal officer to solicit political contributions, was held to be good cause for his removal. *McAuliffe v. New Bedford*, 155 Mass. 216.

In *Michigan*, there is no inherent power in a governing body to remove, even for cause, an appointive officer. Such power is not imported by a statutory requirement that an officer upon his resignation or "removal," shall deliver to his successor the books, etc.; express provision is necessary. *Speed v. Detroit Council*, 97 Mich. 198. Compare *Speed v. Detroit Council* (Mich. 1893), 56 N. W. Rep. 570.

In *Minnesota*, if the president of the council is not an "officer" of the municipality, within the charter or state constitution, he is removable at the will of the council that elected him. *State v. Kilchli* (Minn. 1893), 54 N. W. Rep. 1069.

"Sufficient cause," in a municipal charter's provision for removal of officers, has been held to mean legal cause.

the dissolution of municipal corporations, apply to towns.¹ In many states, the procedure for disincorporation of towns is prescribed by statute.² And in general, the corporate existence of

State *v.* Duluth (Minn. 1893), 55 N. W. Rep. 118.

In *Missouri*, under a municipal charter authorizing the removal of an appointed officer, if the general welfare demands it, such removal may be by ordinance. State *v.* Walbridge (Mo. 1893), 24 S. W. Rep. 457.

In *Nebraska*, an express charter provision for the removal of municipal officers, was held to dominate a general provision. State *v.* Smith, 35 Neb. 131.

In *New Hampshire*, a town officer's neglect to take the oath of office does not, *ipso facto*, vacate the office. Glidden *v.* Towle, 31 N. H. 147.

In *New Mexico*, "by the concurrent vote of four members of the board of trustees ('*fidei comisarios*') the mayor, recorder, or any member of said board; or any other officer of the corporation, may be removed from office," on written charges, hearing, etc. Also, cessation of residence within the town is a ground for removal. *New Mexico Comp. L.* (1884) 1691.

In *New York*, although by the act of incorporation, village trustees may hold over till others are elected, they will be ousted if they neglect to notify of an election. People *v.* Bartlett, 6 Wend. (N. Y.) 422.

A municipal council may remove its president, though there is no rule prescribing the procedure. Armitage *v.* Fisher (Supreme Ct.), 26 N. Y. Supp. 364.

In *Ohio*, the offices of township trustee, treasurer, and clerk, are abolished by merger with a municipality. *Ohio Rev. Stat.* (1890), § 1623.

In *Pennsylvania*, a *per diem* compensation to the high constable of a borough as lamplighter, was held not to import an office that could not be discontinued by the council. Bigley *v.* Bellevue, 158 Pa. St. 495.

The *Pennsylvania* Act of 1889, P. L. 298, was held to repeal, by implication, the acts of 1834 and 1837; and the office of assistant assessors in townships no longer exists. Assistant Assessors' Case, 1 Pa. Dist. Ct. Rep. 142.

As to when officers under a void town incorporation may be ousted by *quo warranto*, see *Harness v. State*, 76 Tex. 566.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1198. See also PUBLIC OFFICERS, vol. 19, p. 562a.

A municipal charter is not a contract; it is subject to repeal at the pleasure of the legislature. Probasco *v.* Moundsville, 11 W. Va. 501; Montgomery *v.* Shoemaker, 51 Ala. 114. This, however, has reference to the municipality's governmental relation to the state; in its private or proprietary rights, it is entitled to constitutional protection. New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79.

2. In the territories, a distinction is to be drawn as to plats; the Act of Congress of 1886, regulating territorial legislation, inhibiting laws vacating town plats. See 24 U. S. Stat. at L., p. 170, § 1, pl. 4.

In *Alabama*, a town charter cannot, in a collateral proceeding, be declared forfeited by non-user. Harris *v.* Nesbit, 24 Ala. 398. Non-user of the corporate powers does not, *ipso facto*, work a dissolution. *Ex p.* Moore, 62 Ala. 71.

In *Arizona*, the board of county supervisors may disincorporate any city, village, or township, after petition, notice, and vote therefor by a majority of its qualified electors. *Arizona Rev. Stat.* (1887), § 148 *et seq.* The dissolution shall affect no previous contract, § 166.

In *Arkansas*, as to surrender and repeal of charters of towns and cities, see *Arkansas Dig. Stat.* (1884), § 926 *et seq.*

In *California*, as to change, reincorporation, etc., of towns and cities, see Act of 1883, *California Pol. Code*, p. 738, § 5.

In *Colorado*, the corporate existence is not affected by a change in the time of holding the annual election. A mistake therein raises no presumption of fraud on the part of the town authorities. People *v.* Keeling, 4 Colo. 129.

In *Idaho*, any attempt of town trustees to disincorporate a town, is void. *Idaho Rev. Stat.*, § 2230, gives no authorization therefor. People *v.* Bancroft, 2 Idaho 1077.

In *Illinois*, township organization of a county may be discontinued on application of one-fifth of the legal voters to the county board, election, etc. *Illinois Rev. Stat.* (1891), p. 1489.

In *Indiana*, a town corporation may

towns is subject to the legislative control of the state creating them.¹

TOXICOLOGY.—(See ABORTION, vol. 1, p. 28; DRUGGIST, vol. 6, p. 31; HOMICIDE, vol. 9, p. 548; MEDICAL JURISPRUDENCE, vol. 15, p. 248; POISONS AND POISONING, vol. 18, p. 736.)

be dissolved on application of one-third of the legal voters, presented to the town trustees, election, etc. *Indiana* Rev. Stat. (1888), § 3318.

Not only the original proprietors, but their grantees, may vacate a town plat. *McGrew v. Lettsville*, 71 Iowa 150.

In *Mississippi*, "If in any case the census shows that a municipality hereafter created contains less than one hundred souls, the governor shall issue his proclamation abolishing the same." *Mississippi* Code (1892), § 2919. But he is not compelled to do so where he believes the returns to be fraudulent, § 2920.

In *Nevada*, the county board may, on petition of the majority of the legal voters, disincorporate a city or town. *Nevada* Gen. Stat. (1885), § 2079.

In *New Mexico*, as to the procedure for disincorporation, see *New Mexico* Comp. L. (1884), § 1699.

In *North Carolina*, on repeal of a town charter, moneys collected and in hand may be controlled by the courts. *Lilly v. Taylor*, 88 N. Car. 489.

In *Oregon*, as to the vacation of the plat of a town that fails to improve, see *Oregon* Annot. L. (1892), § 4178 *et seq.*

In *Tennessee*, a municipality cannot be dissolved by *quo warranto* proceedings. The charter may be repealed by a direct act of the legislature. *State v. Waggoner*, 88 Tenn. 290.

If, after a town organized under the general law has accepted a special charter and been organized thereunder, this charter be repealed, the town is no longer an incorporated municipality. *Burk v. State*, 5 Lea (Tenn.) 349.

A suit pending against the old municipality at the time of repeal of its charter and reincorporation under a new name, may be revised against the new corporation. *O'Connor v. Memphis*, 6 Lea (Tenn.) 730.

In *Texas*, the incorporation of a town or village may be abolished on petition of fifty voters to the county judge, and a vote therefor of two-thirds of the voters of the town. *Texas* Rev. Civil Stat., art. 541. As to the effect of a void incorporation, see *Ewing v. Dallas County*, 83 Tex. 663.

In *Utah*, a town may be disincorpor-

ated on petition of three-fourths of the taxpayers, directed to the town board of trustees, notice, election, etc. *Utah* Sess. L. (1890), p. 81.

In *West Virginia*, a town charter is repealable at the will of the legislature. *Probasco v. Moundsville*, 11 W. Va. 501.

In *Wisconsin*, as to the county board's vacating a town plat, see *Wisconsin* Annot. Stat. (1889), § 670. As to the proceedings of the circuit court therein, see § 2265. As to the requisites of the notice, see *State v. Milwaukee County*, 58 Wis. 4.

1. *Mount Pleasant v. Beckwith*, 100 U. S. 514. In this case, involving the effect of *Wisconsin* Statutes of 1856 and 1857, changing the boundaries of Mount Pleasant, Caledonia, and Racine, a majority of the court held that when a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities, and severally liable for a proportionate share of all its then subsisting legal debts, and vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon; legislation is not necessary to create a legal obligation against the new town or to make the apportionment of the debt. Accordingly, the remedy of the creditors of the extinguished corporation is in equity against the corporations succeeding to its property and powers. Upon this case, and *Beckwith v. Racine*, 7 Biss. (U. S.) 142, it has been remarked (in Dill. on Mun. Corp. (4th ed.) 254), that "There is no intimation in later decisions of the supreme court that they are, in any respect, inconsistent with this judgment. . . . But it seems difficult to the author to reconcile all of the reasoning by which the different judgments are supported." Compare *Meriwether v. Garrett*, 102 U. S. 472; *Amy v. Watertown*, 130 U. S. 301; this case (at p. 319), *distinguishing* *Broughton v. Pensacola*, 93 U. S. 266, and *Mobile v. Watson*, 116 U. S. 289, where an old municipality, by its new name, was held liable for the old debts.

TRACKS.—(See RAILROADS, vol. 19, p. 775; STREET RAILWAYS, vol. 24, p. 937; TAXATION, vol. 25, p. 495; TAXATION (CORPORATE), vol. 25, p. 651.)

TRADE.—(See also BUSINESS, vol. 2, p. 700; FOREIGN, vol. 8, p. 281; PAY, vol. 18, p. 144; MARRIED WOMEN, vol. 14, p. 669; TAXATION, vol. 25, p. 479.)

The word trade in its most restricted sense is confined to the business of buying and selling in commerce or exchange.¹ In exemption laws, it is generally confined to the occupation of a mechanic.² But it is generally used in a broader sense, as equivalent to any occupation, employment, or business, whether manual or mercantile.³

1. Webster's Dict.

2. *Enscoe v. Dunn*, 44 Conn. 93; Seeley v. Gwillim, 40 Conn. 109.

In *Atwood v. DeForrest*, 19 Conn. 513, in reference to the word as used in such a statute, it was said: "By the word 'trade,' as used in this statute, we suppose is meant the business of a mechanic, strictly speaking; as the business of a carpenter, blacksmith, silversmith, printer, or the like; and that it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer."

In *Whitcomb v. Reid*, 31 Miss. 569, the term was defined to denote the business or occupation which a person has learned and which he carries on for procuring subsistence or employment, particularly mechanical employments, as distinguished from the liberal arts and learned professions, and from agriculture. And it was held that dentistry was not a trade.

So in *Massachusetts*, the law exempting tools, implements, etc., necessary for carrying on a trade or business, has been held to be intended for the protection of mechanics, artisans and handicraftsmen, and others whose manual labor and skill afford means of earning their livelihood. *Wallace v. Bartlett*, 108 Mass. 53. It has been accordingly applied to tailors, shoemakers, milliners, fiddlers, and carriage makers. *Dowling v. Clark*, 1 Allen (Mass.) 282; *Daniels v. Hayward*, 5 Allen (Mass.) 43; *Rayner v. Whicher*, 6 Allen (Mass.) 292; *Woods v. Keyes*, 14 Allen (Mass.) 236; *Goddard v. Chaffee*, 2 Allen (Mass.) 395; *Eager v. Taylor*, 9 Allen (Mass.) 156. But has been held not to include those merely engaged in the business of buying and selling merchandise; nor to exempt weights and measures, horses and car-

riages, and other articles used by them in their trade. *Wilson v. Elliot*, 7 Gray (Mass.) 69; *Gibson v. Gibbs*, 9 Gray (Mass.) 62; *Reed v. Neale*, 10 Gray (Mass.) 242.

In *Speak v. Powell*, L. R., 9 Exch. 25, it was held that the business of a traveling circus was not a trade, and carriages belonging to a circus were not such as were used for the conveyance of goods or merchandise in the course of trade, so as to be within a statute exempting such.

3. *In re Pinkney*, 47 Kan. 89; *May v. Sloan*, 101 U. S. 231.

In *The Schooner Nymph*, 1 Sumn. (U. S.) 517, in interpreting the word as used in the statute, declaring that "If any vessel or ship shall be employed in any other trade than that for which she is licensed, she shall be forfeited," Story, J., said: "The word 'trade' is often, and indeed, generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit or gain or livelihood, not in the liberal arts or the learned professions, it is constantly called a 'trade.'" In this case it was held that codfishery was a trade.

In this extended sense the word is understood in the *Boat Eliza*, 2 Gall. (U. S.) 4, and in *U. S. v. Brig Eliza*, 7 Cranch (U. S.) 113. In both of these cases, the vessels were employed in the transportation of merchandise on freight or for hire, and were held to be within the operation of the statute. See also *Two Friends*, 1 Gall. (U. S.) 118.

In *Bank of India v. Wilson*, 3 Exch. Div. 108, it was held that the business of a telegraph company was a trade within the meaning of a statute exempting premises occupied for purposes of

TRADE, BOARD OF; PRODUCE EXCHANGE, ETC.

TRADE, BOARD OF; PRODUCE EXCHANGE, ETC.—In the *United States*, a board of trade is an association of business men established in most large cities for the furtherance of commercial interests, the enactment of rules for the regulation of trade, and the consideration of legislation affecting banking, insurance, railroads, customs, etc.; a chamber of commerce.¹ These associations are variously known as boards of trade, chambers of commerce, commercial exchanges, cotton exchanges, corn exchanges, etc., and differ from the stock exchange in no legally essential matter except that they are usually incorporated,²

trade. Kelly, C. B., said: "Undoubtedly, if we are to take the terms of the purposes of trade as relating only to the business of buying and selling, no one can say there is any buying or selling in carrying on the business of a telegraph company. It was never the intention of the legislature to so limit the meaning of the word 'trade.' It is not only the literal meaning of the word that is to be regarded. In literature of all description, both prose and verse, we find that the word 'trade' is often used in a much more extensive signification, and may indicate merely the operation or occupation of buying and selling."

On a covenant by a lessee not to use premises for the purposes of trade or business, it was held that the lessee could restrain the use of the premises as a home for working girls, even though it appeared that no profits were made; the payments made by the inmates being insufficient to pay the working expenses of the home. *Rolls v. Miller*, 25 Ch. Div. 206. But see *Wetherell v. Bird*, 2 Ad. & El. 161; 29 E. C. L. 57, where it was held that such a lease was not forfeited by using the premises as a private lunatic asylum; the word trade in the covenant being applicable only to a business conducted by buying and selling.

Trade and Commerce.—The words "trade" and "commerce" are not synonymous; the latter relates to dealing with foreign nations; the former to dealing between members of the same community. *People v. Fisher*, 14 Wend. (N. Y.) 15.

The Trade of Merchandise.—Any person engaged in business; the purchase of articles to be sold again either in the same or an improved shape, must be regarded as using the trade of merchandise. *Wakman v. Hoyt*, 5 Law Rep. 309. See also *Spring v. Gray*, 6 Pet. (U. S.) 151.

The taking of goods by one purchaser on agreement to account to the merchant, is not a trade of merchandise between merchant and merchant, within the *New York Statute of Limitations*. *Murray v. Coster*, 20 Johns. (N. Y.) 576.

In a Will.—In *Dandridge v. Washington*, 2 Pet. (U. S.) 370, the word "trade," as used in a will, was held to denote one of the mechanical arts, and the intention that it was applicable to one of the learned professions was not allowed.

Trade Price.—The measure of damages for breach of a contract to pay a thousand dollars in goods at the regular trade price, is a sum which bears the same proportion to the thousand dollars that the market price on the goods does to the regular trade price. *Meserve v. Ammidon*, 109 Mass. 415.

1. *Century Dict.*, tit. "Trade."

"In Great Britain the board of trade is a committee of the privy council which has, to a large extent, the supervision of British commerce and industry. At its head are the president of the board of trade, who is usually a member of the cabinet, the parliamentary secretary, formerly vice-president, the permanent secretary, and six assistant secretaries, at the head of six departments, the commercial, harbor, finance, railway, marine, and fisheries. Attached to the board of trade are also the bankruptcy and emigration departments, the patent office, etc. A committee for trade and the plantations existed for a short time in the reign of Charles II. The council of trade was again instituted in the reign of Wm. III., but discontinued in 1782. In 1786, the board of trade was organized and its functions were subsequently greatly extended." *Century Dict.*, tit. "Trade."

2. **Chicago Board of Trade.**—In *Stock Exchange v. Board of Trade*, 127 Ill. 156, the court said: "The objects of

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whereas stock exchanges are generally and more frequently unincorporated.¹

From this difference in organization arise certain other distinguishing features. For example, the members of an incorporated board of trade are not individually liable for the debts of the association,² while the members of a stock exchange may be so liable.³ The board of trade may sue and be sued as any other corporation, but the members of a stock exchange become parties to actions as individuals, or the association as a body becomes a party under some statutory provision.⁴ A corporation has inherent power to suspend or expel its members for certain offenses, but the unincorporated association probably has not this power in the same degree.⁵ The members of the corporation who are wrongfully expelled may seek the assistance of a court of law by a writ of *mandamus*; but members of the unincorporated association must under such circumstances look to a court of equity for their relief.⁶ The stock exchange, it seems, has absolute control of the matter of furnishing to the public information of the business transacted on its floor; but it has been held that an incorporated board of trade may not discriminate against individuals when once it has undertaken to furnish quotations to the public.⁷ The legal character of seats is the same in both associations.⁸ There

the board of trade of the city of Chicago are to maintain a commercial exchange and to promote uniformity in the customs and usages of merchants, to inculcate principles of justice and equity in trade, to facilitate the speedy adjustment of business disputes, to acquire and disseminate valuable commercial and economical information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits. The association existed some years prior to the 18th day of February, 1859, as a mere voluntary and unincorporated society of persons engaged in the grain, produce, and commission business, and at that date it was incorporated by a special act of the general assembly of the State of *Illinois* and was given power and authority to do and carry on business such as is usual in the management of boards of trade or chambers of commerce, and the specific powers enumerated in the act of incorporation." See also *Barclay v. Smith*, 107 Ill. 349; *Weaver v. Fisher*, 110 Ill. 146.

The Chicago Live Stock Exchange is also a corporation, but not for pecuniary profit. *American Live Stock Com. Co. v. Chicago Livestock Exchange*, 143 Ill. 210.

The St. Louis Merchants' Exchange is a corporation. *Albers v. St. Louis Merchants' Exchange*, 39 Mo. App. 583; *Warren v. St. Louis Merchants' Exchange*, 52 Mo. App. 157.

The New York Produce Exchange is incorporated. *Hurst v. New York Produce Exchange*, 100 N. Y. 605.

The Milwaukee Chamber of Commerce is a corporation. *State v. Milwaukee Chamber of Commerce*, 20 Wis. 63; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

The Toronto Corn Exchange is a corporation. *Cannon v. Toronto Corn Exchange*, 5 Ont. App. 268.

1. See STOCK EXCHANGE, vol. 23, p. 749.

2. See CORPORATIONS, vol. 4, p. 184; STOCKHOLDERS, vol. 23, p. 776.

3. See STOCK EXCHANGE, vol. 23, p. 753.

4. See STOCK EXCHANGE, vol. 23, p. 758.

5. See STOCK EXCHANGE, vol. 23, p. 759, where the cases are to be found.

6. See STOCK EXCHANGE, vol. 23, p. 764, where the distinction is examined upon authority.

7. See STOCK EXCHANGE, vol. 23, p. 765, and note.

8. See STOCK EXCHANGE, vol. 23, p. 754.

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appears to be no difference in the power of the two associations to make and enforce rules for the transaction of business on their respective floors.¹

The law respecting the rights and duties of commission merchants and brokers who transact business as members of such associations, their relations to each other and to customers whom they represent, and the validity of contracts which they make, may be found in other titles of this work.²

TRADE COMBINATIONS AND CORPORATE TRUSTS.—(See also **CONTRACTS**, vol. 3, p. 823; **CORPORATIONS**, vol. 4, p. 184; **RAILROADS**, vol. 19, p. 775; **RAILROAD POOLS**, vol. 19, p. 691; **ULTRA VIRES**.)

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1. **DEFINITION.**—The word "trust," as applied to combinations of business corporations, is of very recent origin. Such a trust has been defined as "an organization of persons or corporations formed mainly for the purpose of regulating the supply and price of commodities."³

II. CLASSIFICATION OF TRUSTS.—These trusts have assumed four principal forms:⁴ (1) A co-partnership of corporations in the

1. See **STOCK EXCHANGE**, vol. 23, p. 767.

2. See **COMMISSION MERCHANTS**, vol. 3, p. 317; **BROKERS**, vol. 2, p. 571; **STOCK-BROKERS**, vol. 23, p. 699; **CONTRACT**, vol. 3, p. 823; **AGENCY**, vol. 1, p. 331.

For the validity of contracts made through members of the board, see **GAMBLING CONTRACTS**, vol. 8, p. 1004 *et seq.*; **STOCK-BROKERS**, vol. 23, pp. 723, 737; **ILLEGAL CONTRACTS**, vol. 9, p. 895; **ILLEGAL SALES**, vol. 9, p. 927; **CONTRACT**, vol. 3, p. 873.

3. Black's Law Dict., *sub nom.* "Trusts." Many other definitions of trusts have been given by recent legal writers. Thus, in Cook's *Stock, Stockholders, and Corporation Law* (2d ed.), § 503a, it is said: "The word 'trust' was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees and to receive

therefor trust certificates from the trustees. But the word 'trust' has a wider and more popular use. It is used to designate any combination of producers for the purpose of controlling prices and suppressing competition."

"A trust may be defined as a more or less intimate combination of business corporations or manufacturers for supposed mutual advantage." Henry Wood in *The Forum*, vol. 5, p. 585.

A trust has also been defined as "essentially an agreement among producers and vendors of a certain sort of merchantable commodity for their mutual protection and profit in business." Charles F. Beach in *The Forum*, vol. 8, p. 61.

4. "Car trusts" have sometimes been classed among the trusts herein referred to. But as these organizations are simply associations or partnerships which lease and make railroad cars, without attempting to regulate the

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form of a joint-stock company;¹ (2) a corporation that owns the stock of other corporations;² and (3) a corporation, association or individual that buys or leases the property of other corporations and persons engaged in the same line of business;³ (4) organizations created for the purpose of regulating and controlling the private enterprises of their members.⁴

supply or price of such cars, they do not come within the definition above given. See *Ricker v. American L. & T. Co.*, 140 Mass. 346; 12 Am. & Eng. Corp. Cas. 1. The same reasoning excludes also combinations of a majority of the stockholders in a single corporation to unite their stock under one management, so as to control the corporation.

1. The Sugar Refineries Company of *New York*, popularly known as the "Sugar Trust," was a trust of this kind. It consisted of a combination of all the sugar refiners in the State of *New York*, and was created by a written instrument, which is quoted in full in the case of *People v. North River Sugar Refining Co.*, 121 N. Y. 585; 18 Am. St. Rep. 483. This instrument, which was executed by the stockholders of the respective corporations, provided that all the stock of said corporations should be transferred to trustees, who were to issue in exchange for such stock what are known as "trust certificates." These trustees controlled the management of all the corporations, took all their profits and put them into a common fund, to be distributed among the holders of the "trust certificates."

In speaking of a similar organization, the American Cattle Trust, Judge Hallett, of *Colorado*, said: "The stock was transferred to the trust, not for the purposes of being sold, but to give control of the corporations, to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporations. In other words, the purpose of the association was not to buy and sell corporations in open market, but to manage and control them." *Gould v. Head*, 38 Fed. Rep. 886.

Another example of this kind of trust is the Standard Oil Trust, whose articles of agreement are given in full in the case of *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1. See also *Rice v. Rockefeller*, 134 N. Y. 174.

Still another example of this kind of trusts was the Distillers' and Cattle Feeders' Trust, although it was subse-

quently incorporated under the laws of *Illinois*. See *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656. See also *Gould v. Head*, 38 Fed. Rep. 886, where it appeared that the American Cattle Trust was a voluntary association holding the stock of various corporations as trustee, without power to sell or alienate the same.

The fact that these trusts are in the form of joint-stock companies does not render them any the less copartnerships, since joint-stock companies are in effect only copartnerships having some of the qualities of corporations, or, in other words, partnerships with transferable shares. *Phillips v. Blatchford*, 137 Mass. 510; *Taft v. Ward*, 106 Mass. 518. See JOINT-STOCK COMPANIES, vol. 11, p. 1036.

2. Such a trust was the Chicago Gas Trust Company, whose certificate of incorporation stated that one of the objects for which the company was incorporated was "to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights and franchises of any gas works or gas company or companies." See *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319.

For the nature and history of the transactions of the *Crédit Mobilier of America*, see *Crédit Mobilier v. Com.*, 67 Pa. St. 233; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569.

3. Such as the Diamond Match Company. See *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256. And the National Harrow Company. See *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224.

See *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, where it appears that the unlawful end was sought to be accomplished by means of unauthorized leases of corporate property. See also *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46.

4. See *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215, where it appears that the defendant corporation, without

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III. LEGALITY OF TRUSTS—1. Of Co-partnership Trusts.—The co-partnership form of trust is clearly illegal.¹ A corporation has no right to become a member of a partnership, because each member of a co-partnership may bind the firm by any act of his within the scope of the partnership business,² while the affairs of a corporation must be managed and controlled by its directors and officers.³ This power cannot be delegated to such an outside party as a "trust."⁴

dealing in fuel itself, sought to control the fuel trade of St. Paul and vicinity by enforcing obedience to its by-laws by its members who were dealers in fuel.

For other examples of this class of associations, see *More v. Bennett*, 140 Ill. 69, wherein the Chicago Law Stenographers' Association was held to be an illegal combination; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, where it appears that five coal companies of *Pennsylvania* entered into an illegal combination in restraint of trade, and appointed a committee to manage the affairs of all the parties to the combination. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, and *Vulcan Powder Co. v. California Vigor Powder Co.* (Cal. 1892), 31 Pac. Rep. 583, reveal a similar combination among powder companies. See also *Nester v. Continental Brewing Co.*, 2 Pa. Dist. Ct. Rep. 177, for a similar combination among brewers; and *Judd v. Harrington* (C. Pl.), 19 N. Y. Supp. 406, for such a combination among butchers and sheep brokers.

1. This point was expressly decided in the following cases: *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483; *Mallory v. Hanau Oil Works*, 86 Tenn. 598; 20 Am. & Eng. Corp. Cas. 478; *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

2. See **PARTNERSHIP—Powers and Rights of Partners**, vol. 17, p. 987.

3. See **OFFICERS (PRIVATE CORPORATIONS)**, vol. 17, p. 81.

So strictly has this rule been applied by the courts, that it has been held that where certain powers are by statute conferred upon the directors, such powers cannot be exercised even by the stockholders, though the directors are merely the representatives of the stockholders. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 575.

And in the recent case of *Small v.*

Minneapolis Electro-Matrix Co., 45 Minn. 264, the court, by Dickinson, J., said: "In the absence of express provisions to the contrary, it is to be considered as the law concerning business corporations that their affairs are to be managed in the interest of their stockholders, and by directors or agents appointed by them."

4. In *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483, the court, by Finch, J., speaking of a corporation which had joined the sugar trust, said: "It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state the gift of corporate life, only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. It is a violation of law for corporations to enter into a partnership. The vital characteristics of the corporations are of necessity drowned in the paramount authority of the partnership."

In *Mallory v. Hanau Oil Works*, 86 Tenn. 602; 20 Am. & Eng. Corp. Cas. 478, the court, by Lurton, J., said: "A careful examination of this agreement discloses every material element to a contract of partnership. . . . Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as one of the new association. . . . The power to enter into a partnership is not expressly or impliedly conferred by our act of 1875, under which the Hanau Oil Works is incorporated. Neither is such authority within the implied powers of cor-

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porations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation or one owing duties to the public, such as a common carrier. In a partnership, each member binds the firm, when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal and each capable of binding the society by his acts."

In *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1, the court, by Minshall, J., said: "That the nature of the agreement is such as to preclude the defendant from becoming a party to it, is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have 'the affairs' of the several companies managed in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformably to the purpose for which it was created by the laws of its state. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled

and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our state, and void."

A contrary rule seems to prevail in *Canada*. In the case of *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant Ch. (Ont.) 540, it was held that a combination exactly like the Sugar Trust, except that it affected salt instead of sugar, was legal.

The general doctrine that corporations cannot become members of partnerships, is laid down in the following cases: *Marine Bank v. Ogden*, 29 Ill. 248; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582; 71 Am. Dec. 681; *New York, etc., Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412.

In *Allen v. Woonsocket Co.*, 11 R. I. 288, it was held that a corporation, all of whose stock was held by one man and which had been created by special act of the legislature, which did not specify what business the corporation might carry on, might form with an individual a copartnership at will, since such a partnership may be terminated at any time at the pleasure of either party, though the court admitted that, if the partnership had been for a definite period, it might well be argued that the corporation had no right to make such a contract.

And in the case of *Butler v. American Toy Co.*, 46 Conn. 136, it was held by a divided court that, while a corporation cannot enter into a partnership unless authorized to do so by its charter, the particular corporation then before the court was impliedly authorized by the act which created it to enter into the partnership in question.

As to the power of railroad corporations to enter into traffic arrangements with one another, see *RAILROADS*, vol. 19, p. 775.

The formation of an association by several railway companies for the regulation of rates, where each company maintains its autonomy, and elects its own officers, and delegates no authority to the association to manage its

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2. Of Stockholding Corporations.—A trust in the form of a stockholding corporation has also been held illegal,¹ and the American decisions are nearly unanimous to the effect that in the absence of express legislative permission, a corporation cannot purchase and hold stock in other corporations.²

routine business, is not against public policy, and such contract does not amount to a transfer of the franchises and corporate powers of the companies. *U. S. v. Trans-Missouri Freight Assoc.*, 53 Fed. Rep. 440. But the pooling of earnings is prohibited by the Interstate Commerce Act. Act of Feb. 4, 1887. And in *Hooker v. Vandewater*, 4 Den. (N. Y.) 349, it was held that an agreement by steamboat companies to pool their earnings was illegal and void.

In *England*, an association of ship-owners for the purpose of regulating the proportion of the business of the association each should do, and the freights to be demanded, was not illegal, although a rebate was given to all shippers who shipped exclusively with them, and their agents were prohibited, on pain of dismissal, from acting in the interest of competing shipowners. *Mogul Steam Ship Co. v. McGregor* (1862), App. Cas. 25, affirming 23 Q. B. Div. 598.

1. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319. In this case the court, by Magruder, J., said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but it is in contravention of the spirit, if not the letter, of the constitution. That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly, results from the very nature

of the power itself. If the privilege of purchasing and holding all the shares of the stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was, that any number of corporations might be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view—that is to say, for the purpose of purchasing and holding a majority of the shares of the stock of the gas companies in Chicago, there being only four of such companies—what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence, to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago, is to grant to it a privilege which is exclusive in its character. It is making use of the general incorporation law to secure a special privilege, immunity or franchise; it is obtaining a special charter under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose.'"

2. *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44; 26 Am. & Eng. Corp. Cas. 55; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; 28 Am. Rep. 9; *Central R. Co. v. Collins*, 40 Ga. 582; *Franklin Bank v. Commercial Bank*, 36 Ohio St.

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A different rule, however, prevails in *England*, where trading corporations are allowed to buy stock in other companies.¹

3. Of Monopolistic Trusts.—This third class of trusts is not illegal, except when it affects the production and sale of some article that is either a necessity of life or is of such general use that the public is interested in its production.² In that case such a trust is illegal for two reasons, first, because it creates a monopoly and is therefore in restraint of trade,³ and secondly, because corporations already in the field have no right to sell out or lease to it.⁴

354; 38 Am. Rep. 594; *Milbank v. New York, etc., R. Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 20; *Talmage v. Pell*, 7 N. Y. 328; *Mechanics', etc., Mut. Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Berry v. Yates*, 24 Barb. (N. Y.) 200; *Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105; *Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *State v. Butler*, 86 Tenn. 614; *Buckeye Marble, etc., Co. v. Harvey*, 92 Tenn. 115; *Pierson v. McCurdy*, 33 Hun (N. Y.) 520; *New Orleans, etc., S. S. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90. *Contra*, *Booth v. Robinson*, 55 Md. 433; *National Bank v. Texas Invest. Co.*, 74 Tex. 421; 27 Am. & Eng. Corp. Cas. 358.

1. *In re* *Barned's Banking Co.*, L. R., 3 Ch. 161; *In re Asiatic Banking Co.*, L. R., 4 Ch. 252.

2. The decisions do not furnish any general rule for determining what are and what are not articles of necessity, within the meaning of this rule. The following articles have been held to be of such general importance that an attempt to control their production is illegal: coal, *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 568; 23 Am. Rep. 190; gas, *Gibbs v. Consolidated Gas Co.*, 130 U. S. 408; 25 Am. & Eng. Corp. Cas. 369; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319; *Chicago Gas-Light, etc., Co. v. People's Gas-Light, etc., Co.*, 121 Ill. 530; 16 Am. & Eng. Corp. Cas. 577; 2 Am. St. Rep. 124; matches, *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256; lumber, *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; cotton bagging, *India Bagging Assoc. v. Kock*, 14 La. Ann. 164; butter, *Chapin v. Brown*, 83 Iowa 156; grain, *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; salt, *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Clancey v.*

Onondaga Fine Salt Co., 62 Barb. (N. Y.) 395; alcohol, *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656; candles, *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 32 Am. & Eng. Corp. Cas. 165; milk, *Chicago Milk Shippers' Assoc. v. Ford* (Ill. Circuit Ct.), 4 Nat. Corp. Rep. 300; preserves, *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; cloth, *Hilton v. Eckersley*, 6 El. & Bl. 47; grain-bags, *Pacific Factory Co. v. Adler*, 90 Cal. 110; and harrows, *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224.

The following articles do not seem to be within the rule in question: washing machines, *Dolph v. Troy Laundry Machine Co.*, 28 Fed. Rep. 553; curtain fixtures, *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; and sewing machines, *Bi-Spool Sewing Machine Co. v. Acme Mfg. Co.*, 15 Mass. 404.

3. It was for this reason that the supreme court of *Michigan* declared the *Diamond Match Company* an illegal organization. *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256. It is to be remembered, however, that this conclusion was announced in a case to which the match company was not a party. See, too, *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; and *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215. As to the illegality of contracts in restraint of trade, see *CONTRACT*, vol. 3, p. 882.

4. *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656. See *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264; and *People v. American Sugar Ref. Co.* (Cal. Super. Ct. 1890), 7 Ry. & Corp. L. J. 83.

The rule is that a corporation in whose business the public is interested has no right to transfer all its property to another corporation, in the absence of express legislative permission. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 309; *Fietsam v. Hay*, 122

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These objections may also apply to trusts of the first and second classes.¹

4. By Governing Committees.—It is the object of this class of combinations to restrict competition in business and enhance prices by controlling the private enterprises of their members, whether corporations, co-partnerships, or individuals, by means of governing boards or committees authorized to enforce their rules and regulations by fines and forfeitures. These combinations are illegal as in restraint of trade and against public policy.²

IV. EFFECTS OF FORMING A TRUST—1. **Rights of the State.**—An illegal incorporated trust is subject to forfeiture of its charter at

Ill. 293; 22 Am. & Eng. Corp. Cas. 559; 3 Am. St. Rep. 492; *Chicago Gas Light, etc., Co. v. People's Gas Light, etc., Co.*, 121 Ill. 530; 16 Am. & Eng. Corp. Cas. 577; 2 Am. St. Rep. 124. See *CORPORATIONS*, vol. 4, p. 272.

In *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656, the court, by Maxwell, J., said: "A corporation can exercise no powers except such as are granted to it by the charter under which it exists. It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business. The fact that the corporation has authority to put an end to its existence by a vote of a majority of its stockholders, in which event it may proceed to settle up its affairs, dispose of its property, and divide its capital stock, and surrender its charter to the state, does not authorize it to terminate its existence by a sale and disposal of all its property and rights."

But a private manufacturing company, when public interests are not involved—that is, where a sale would not create monopoly in regard to an article of necessity—may sell all its property to another corporation. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 404; 66 Am. Dec. 490; *Bi-Spool Sewing Machine Co. v. Acme Mfg. Co.*, 153 Mass. 404; *Ardesco Oil Co. v. North American Oil, etc., Co.*, 66 Pa. St. 375; *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448.

In *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 489, a lease by one railroad company to another of its franchises and property for the purpose of creating a monopoly of the trade in anthracite coal, was held illegal and

void, and an agreement between two coal companies looking toward a monopoly was enjoined although both were corporations created under the laws of another jurisdiction. It appeared, however, that one of the coal companies was controlled by the resident railroad company, the stockholders of the latter owning and controlling the majority of the stock of the former. The court brushed aside the artificial personalities of the corporations, considering their members as the real movers in the transaction.

1. Thus, the fact that they created monopolies was given as a reason for declaring the New York Sugar Trust illegal. *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; for dissolving the Chicago Gas Trust, *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319, and for the judgment ousting the Standard Oil Company from the exercise of a franchise not conferred upon it by its charter, *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

2. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; *Vulcan Powder Co. v. California Vigorit Powder Co.* (Cal. 1892), 31 Pac. Rep. 583; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Nester v. Continental Brewing Co.*, 2 Pa. Dist. Ct. Rep. 177; *Judd v. Harrington (C. Pl.)*, 19 N. Y. Supp. 406; *Moore v. Bennett*, 140 Ill. 69; *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215. In the last case, the fuel exchange, which was an incorporated body, organized for the purpose of controlling the fuel trade in St. Paul and vicinity, was enjoined from enforcing a penalty, which it might otherwise have done without the assistance of a court, as the money had been deposited as a condition precedent to membership.

TRADE COMBINATIONS AND CORPORATE TRUSTS.

the suit of the state,¹ and so are the corporations that enter into such a trust.² And the formation of an unincorporated trust may be enjoined at the suit of the state.³

2. Rights of the Dissenting Stockholders.—The formation of such a trust may be enjoined at the suit of stockholders who hold a minority of the capital stock of the corporations constituting the trust.⁴

3. Rights of the Members of the Trust.—Neither a corporation which is a member of a trust combination, nor its receiver, can recover by suit its share of the profits of the business or money due it from the trust, since such a suit would be an attempt to enforce an illegal agreement;⁵ but it may rescind the trust agreement and obtain restitution of its property, even after the agreement has been partly executed.⁶ Such corporation, however, is as to third persons, estopped from asserting the invalidity of the trust.⁷

4. Rights of the Certificate Holders.—Even though the trust is illegal, its certificates represent property, and the rights of the certificate holders to their property will be respected by the courts.⁸ Such certificates are transferable, like certificates of stock.⁹

1. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 29 Am. & Eng. Corp. Cas. 257; 17 Am. St. Rep. 319.

2. *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 483; *State v. Nebraska Distilling Co.*, 29 Neb. 700; 29 Am. & Eng. Corp. Cas. 656; *People v. American Sugar Ref. Co.* (Cal. Super. Ct. 1890), 7 Ry. & Corp. L. J. 83.

But proceedings to declare the forfeiture must be begun within the time named by the Statute of Limitations. *State v. Standard Oil Co.*, 49 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1.

3. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448; 19 Abb. N. Cas. 459. See also *State v. Standard Oil Co.*, 46 Ohio St. 137; 36 Am. & Eng. Corp. Cas. 1, wherein a corporation was ousted, by judgment of the court, from the exercise of a franchise not conferred upon it by law.

4. *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264; *Central R. Co. v. Collins*, 40 Ga. 582.

5. *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.) 387; *Clancey v. Onondaga Fine Salt Co.*, 62 Barb. (N. Y.) 395; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46.

A court of equity will not appoint a receiver over property in litigation where the effect of such appointment

would be to assist an illegal trust in carrying out the objects of its organization. *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510.

6. *Mallory v. Hanau Oil Works*, 86 Tenn. 598; 20 Am. & Eng. Corp. Cas. 478; and if it violates the trust agreement, a court of equity will give the trust no relief. *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; *Strait v. National Harrow Co.* (Supreme Ct.), 18 N. Y. Supp. 224. See *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510.

7. *Pittsburg Carbon Co. v. McMillin*, 53 Hun (N. Y.) 67; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 479.

8. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448.

Thus, where an unincorporated trust association has been declared illegal, the certificate holders are entitled to have the property and business placed in the hands of a receiver, *Cameron v. Havemeyer* (Supreme Ct.), 12 N. Y. Supp. 126; and the profits of the business belong to them. *Gray v. Oxnard Bros. Co.*, 59 Hun (N. Y.) 387.

9. *Cameron v. Havemeyer* (Supreme Ct.), 12 N. Y. Supp. 126; *Bean v. American L. & T. Co.*, 122 N. Y. 622. And private persons will not be en-

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5. Rights of the Trustees.—The trustees control the trust property as legal owners and not as the agents of the certificate holders.¹ Their powers are limited by the provisions of the instrument creating the trust.²

6. Rights of Third Persons.—Contracts between individuals in furtherance of the objects and purposes of an illegal trust are not enforceable, being affected by the illegality of the trust contract itself.³ But the illegality of the trust combination is no defense to an action brought by one who is a creditor of the trust.⁴

V. STATUTORY PROHIBITIONS OF TRUSTS.—In 1890, Congress passed an act which declares illegal every contract or combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations; also every attempt to monopolize any part of such trade or commerce; and every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the territories or in the *District of Columbia*.⁵ Laws prohibiting the

joined from buying and selling these certificates on the mere ground that the trust is illegal. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448.

It has been held that where trust certificates are expressly made transferable on the books of the trust upon condition that the holder and each transferrer shall be subject to all the provisions of the trust agreement, a court of equity will compel the trustees to transfer such a certificate on the books of the trust and issue a new one in the name of the transferee. *Rice v. Rockefeller*, 134 N. Y. 174, reversing 56 Hun (N. Y.) 516.

1. *Smith v. Anderson*, 15 Ch. Div. 247.

2. Thus, where the trust agreement gives the trustees power to acquire, hold and dispose of the title to the shares of stock, which form the subject of the trust, they may sell such stock to third persons. *Gould v. Head*, 41 Fed. Rep. 240. But where the trust agreement merely provides that the shares of stock shall be transferred to the trustees, to be held by them and their successors for the purposes set out in the trust agreement, the trustees have no right to sell or pledge such shares of stock. *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354.

3. *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256; *Chapin v. Brown*, 83 Iowa 156. But see *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464.

4. *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 479.

The receiver of a trust, since he repre-

sents its creditors as well as its certificate holders, may sue to recover debts due to the trust. *Pittsburg Carbon Co. v. McMillin*, 53 Hun (N. Y.) 67; 119 N. Y. 46.

5. 26 U. S. St. at Large, p. 209, ch. 647. The act also imposes a punishment by fine and imprisonment for any violation of its provisions, and declares that property in transit under a contract forbidden by the act shall be forfeited. It also authorizes any person injured in his property or business by any violation of the act to sue and recover treble damages therefor.

In *U. S. v. Jellico Mountain Coal, etc., Co.*, 46 Fed. Rep. 432, the court refused to declare this act unconstitutional, and held that an agreement between coal mining companies operating chiefly in *Kentucky*, and coal dealers doing business in *Tennessee*, creating a coal exchange to advance the interests of the coal trade and to fix the price of coal, and forbidding its members to buy coal from or sell coal to any coal dealers or miners who were not members of the exchange, constituted a violation of said act.

In *Bishop v. American Preservers' Co.*, 51 Fed. Rep. 272, it was held that this statute did not give a member of a trust a right to sue the trust for damages suffered by him through suits brought against him by the trust, where it was not shown whether or not the trust had a right to bring the suits, since the trust, although an illegal organization, might have a right to sue.

Under this act, it must be alleged in

formation of trusts have also been recently enacted by several of the states.¹

TRADE FIXTURES.—(See **FIXTURES**, vol. 8, p. 61.)

the indictment that the defendant monopolized or conspired to monopolize. It is not sufficient to allege the doing of certain acts with the intent to monopolize. *U. S. v. Greenhut*, 50 Fed. Rep. 469.

It is not sufficient to follow simply the language of the statute, as it does not fully, directly, and clearly set forth all the elements necessary to constitute the offense. *In re Greene*, 52 Fed. Rep. 104.

1. The *Nebraska* Act, approved March 29th, 1889, declares it unlawful for any person, partnership, company, association, or corporation to enter into any contract or combination whereby a common price shall be fixed for any article or product, or whereby the manufacture or sale thereof shall be limited or interfered with, or whereby the profits of the manufacture or sale of any product shall be made a common fund to be divided among the parties to the combination. *Nebraska* Sess. Laws (1889), p. 516.

The *New York* Act, approved June 7th, 1890, declares that no stock corporation shall combine with any other corporation for the prevention of competition. *New York* Sess. Laws (1890), p. 1069.

The *Illinois* Act, approved June 11th, 1891, declares that any corporation, partnership or individual which shall create or enter into any pool, trust, agreement, combination, confederation, or understanding to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, shall be adjudged guilty of conspiracy to defraud. It also forbids corporations issuing or owning trust certificates or entering into any trust agreement. *Illinois* Sess. Laws (1891), p. 206.

Under this act, it has been held by the circuit court of Cook county, *Illinois*, that a corporation whose stockholders were all either producers or shippers of milk, whose by-laws provided that shares of its stock could not be transferred to any one who was not, or did not expect soon to become, a producer or shipper of milk, and whose business was to receive milk from its stockholders, sell the same for them

and fix the price at which it should be sold, was an illegal combination. *Chicago Milk Shippers' Assoc. v. Ford*, 4 Nat. Corp. Rep. 300.

The *Kansas* Act, approved March 2d, 1891, prohibits combinations to prevent competition among persons engaged in buying or selling live stock. *Kansas* Sess. Laws (1891), p. 294, ch. 158.

The *Louisiana* Act, approved July 5th, 1890, declares illegal all contracts, trust combinations or conspiracies in restraint of trade or commerce, and makes it a misdemeanor to monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce within the state. *Louisiana* Acts (1890), p. 90, No. 86.

It has been held that this statute requires, for the complete commission of the offense thereby created, no ulterior motive, such as an intent to defraud, and that to compass any of the acts mentioned in the statute by any means and with no other motive than to compass them, constitutes a violation of the statute. *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; 32 Am. & Eng. Corp. Cas. 510. It was also held in the same case that the creation of a corporation which had secured the control and pooled the business of thirty-five of the leading bakeries in twelve different states of the west and south, and which was evidently seeking to control still other bakeries, constituted an attempt to monopolize trade.

The *South Dakota* Act, approved March 7th, 1890, makes criminal all trusts and combinations tending to prevent a free, fair and full competition in the production, manufacture or sale of any article of domestic growth, use or manufacture, or to advance the price thereof beyond the reasonable cost of production. *South Dakota* Laws (1890), p. 323, ch. 154.

The *Iowa* Act, approved May 6th, 1890, makes it a misdemeanor for any corporation, partnership, individual or association to become a party to any trust or agreement to regulate the price of any article or merchandise, or to issue or own trust certificates, or to become a member of any combination to limit or fix the price or lessen the production of

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any article of commerce. *Iowa Acts* (1890), p. 41, ch. 28.

Statutes prohibiting pools, trusts or combinations to regulate or control prices, have also been enacted in other states. See *Alabama Acts* (1890-91), p. 438, ch. 202; *Missouri Laws* (1889), p. 97, and *Missouri Laws* (1891), p. 186; *New Mexico Laws* (1891), p. 27, ch. 10, and *Tennessee Acts* (1891), p. 428, ch. 218; *California Stat.* (1893), ch. 19, § 4; *Kentucky Acts* (1890), ch. 1621; *Maine Laws* (1889), ch. 266, § 1; *Michigan Acts* (1889), ch. 225; *Minnesota Laws* (1891), ch. 10; *Mississippi Laws* (1890), ch. 36, § 1; *North Carolina Laws* (1889), ch. 374.

The *Missouri* "anti-trust act" of 1889 required the officers of corpora-

tions to inform the secretary of state, under oath, whether their corporations had violated the provisions of said act. In the case of *State v. Simmons Hardware Co.*, 109 Mo. 118, it was held that this provision of the act was unconstitutional, as being in conflict with the declaration of the *Missouri* constitution that "No person shall be compelled to testify against himself in a criminal case," since the act pronounced a penalty against the officers of any corporation that violated the act.

Authorities.—Cook on Trusts; Spelling on Trusts and Monopolies. The *Railway and Corporation Law Journal*, vol. 7, p. 236, gives a list of magazines and newspaper articles on the subject of trust combinations.

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I. DEFINITION.—A trade-mark is a name, sign, symbol, or device employed by a person, firm, or corporation for the purpose of indicating to their customers, that the goods upon which the name or mark appears are made or sold by him, them, or it, or to indicate the business he, they, or it conducts, or the place where said business is carried on.

A manufacturer or publisher may adopt a trade-mark to indicate the origin, ownership, character, and quality of the goods or publications which he makes or issues.

A merchant also may adopt a trade-mark to denote his skill in the selection of the goods that he sells, and to give to them his guarantee of their character and quality.

A business house, hotel, or theater may adopt a trade-mark name, to indicate its location and identity.

A public carrier, whether person, firm, or corporation, may adopt a trade-mark to indicate its identity, and to guide its patrons in dealing with it.¹

1. Slater on Trade-Marks 232.

"A trade-mark, properly so called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority, or that he carries on business at a particular place." Lord Cranworth in *Leather Cloth Co. v. American Leather Cloth Co.*, 35 L. J. Ch. 61. See also Kerr on Injunctions, p. 356.

In *Shaw Stocking Co. v. Mack*, 101 P. & S.; 12 Fed. Rep. 707, Coxe, J., said: "Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is twofold: First, to protect the party using it from competition with inferior articles; and second, to protect the public from imposition. There is hardly a limit to the devices that may be thus employed; the whole material universe is open to the enterprising merchant or manufacturer. Anything which can serve to distinguish one man's productions from those of another may be used. The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. The trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, and figures may be used. Why not numerals united? What consistency is there in allowing it in a combination of letters, but denying it in a combination of figures?"

In *Thornton v. Crowley*, 76 P. & S.; 47 N. Y. Super. Ct. 527, Freeman, J.,

said: "The court, upon proof of infringement, will liberally protect him, not because he has any property in the word or words, or the combination, but upon the principle that defendant's imitation constitutes a fraud upon one who has established a trade and a reputation. Plaintiff's prior and exclusive right to the use having been established, the test is whether the imitation is calculated to deceive purchasers. Upon the question of tendency to deceive, it may not be necessary to show that a person giving ordinary attention, or any attention, is likely to be misled. Perhaps it is sufficient that the careless and unwary may be misled. Upon this point the authorities are not uniform. But before the court can be called upon to apply any test at all, plaintiff's prior and exclusive right must be clearly established." In *Skinner v. Oakes*, 77 P. & S.; 10 Mo. App. 45, Thompson, J., used the following language: "The courts have proceeded upon the twofold principle, that the public have a right to know that goods which bear the signature or mark of a particular manufacturer or vendor are in fact the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods has a right to any advantage which may accrue to him from the public knowing that fact." Congress, etc., *Spring Co. v. Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; Glen, etc., *Mfg. Co. v. Hall*, 61 N. Y. 229; 19 Am. Rep. 278. See *Ex p. Frieberg*, 87 P. & S.; 20 Pat. Off. Gaz. 1164, in

which Marble, Commissioner, said: "A trade-mark is an arbitrary character or characters without special meaning, adopted by persons, firms, or corporations, for the purpose of identifying the goods manufactured by them or of which they have the sale."

In *Marshall v. Pinkham*, 82 P. & S.; 52 Wis. 572; 38 Am. Rep. 756, Cassoday, J., gave as part of the opinion: "It seems to be the office of a trade-mark to point out the true source, origin or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities." *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395; *Gillott v. Esterbrook*, 48 N. Y. 374; 8 Am. Rep. 553; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 509; *Fetridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385; *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452; *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270.

In *Insurance Oil Tank Co. v. Scott*, 79 P. & S.; 33 La. Ann. 946; 39 Am. Rep. 286, Fenner, J., said: "The sole question involved is plaintiff's right to protection in the exclusive use of its trade-mark. A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement."

In *Larrabee v. Lewis*, 89 P. & S.; 67 Ga. 562; 44 Am. Rep. 735, Crawford, J., said: "A trade-mark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry or enterprise. Upton's Law of Trade-Marks 99. The trade-mark must designate and distinguish the owner's production from the general manufacture of the same article, and cannot consist of a word belonging to the general public describing truly a known product."

In *Potter v. McPherson*, 62 P. & S.; 21 Hun (N. Y.) 559, Daniels, J., speaking upon the subject, said: "Upon that subject, the law protects manufacturers and dealers in the use of words, phrases, or other devices employed by them to

distinguish their commodities from those of other dealers, when they are such as to indicate the origin or ownership of the article to which they are applied. *Farina v. Silverlock*, 39 Eng. L. & Eq. 514, where the exclusive right to use the term 'Eau de Cologne' was maintained; *Seixo v. Provezende*, L. R., 1 Ch. App. 192; *Colman v. Crump*, 70 N. Y. 573, where the use of a device of a bull's head was sustained as a trade-mark; *McLean v. Fleming*, 96 U. S. 245, which they are right to use the name of 'Dr. McLean's Liver Pills' to be one which should be protected; *Newman v. Alvord*, 49 Barb. (N. Y.) 588. The principle sustained by these and other cases has been so far extended as to include other devices adopted for the purpose of distinguishing one person's business and the commodities in which he may deal, from those of others. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278. And it has also been applied to the protection of the rights of the publisher in the title to newspapers, books and pamphlets. In *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371, its application to the publication of a competing newspaper was considered, and the injunction denied only because the title of the defendant's paper was so clearly distinguishable from that of the plaintiff as not to be calculated to mislead or deceive the public. A similar point was considered in the case of *Clement v. Maddick*, 1 Giff. 98, where the defendant was prevented, by means of an injunction, from selling a publication bearing substantially the same title as one made by the plaintiff. In *Mack v. Petter*, L. R., 14 Eq. 431, the same principle also was applied. There the title of the plaintiff's book was that of 'Birthday Scriptural Text Books,' while the defendant published his work under the title of 'Children's Birthday Text Books,' and the latter was held to be so clearly an appropriation of the title previously applied to the publication of the plaintiff's work, as to be the proper subject of restraint, by means of an injunction. The same point was considered in *Bradbury v. Dickens*, 27 Beav. 53, where it was held that the title of 'Household Words' given to a magazine was property, and for that reason the subject of a sale, under an order of the court of chancery."

In *Hegeman v. Hegeman*, 53 P. & S.; 8 Daly (N. Y.) 1, Daly, C. J., said:

"A trade-mark may consist in a name, or in a symbol or device used to indicate the nature, quality or identity of an article of commerce, whether it consists of an article that anyone is at liberty to fabricate, compound or vend, or which originated with, or the exclusive right to manufacture or vend which is under the protection of a patent, or otherwise in the person or proprietor by whom the trade-mark was devised. It may exist where the name of the article and of the proprietor are so blended together that the right to the use of the name is indispensable to the use of the trade-mark, or may consist of the name alone of the manufacturer or proprietor, or may exist where the article fabricated is so made or shaped that the peculiar form of it is designed to, and does, serve as a trade-mark, as in the case of a sewing machine, the iron framework of which was so constructed as to represent and form the two initial letters of the proprietor's name." See *Shaver v. Shaver*, 65 P. & S.; 54 Iowa 208; 37 Am. Rep. 194, where Beck, J., said: "A trade-mark is a name, sign, symbol, mark, brand, or device of any kind, used to designate the goods manufactured or sold, or the place of business of the manufacturer or dealer in such goods."

In *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589; 73 P. & S., Rapallo, J., said: "Trade-marks are of two kinds. They may consist of pictures or symbols, or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in."

In *Royal Baking Powder Co. v. Jenkins*, 50 P. & S. (1880), Daniels, J., in the special term of the *New York* supreme court, delivered the opinion of the court, saying: "Independently of any statutory law, and under well-settled principles of common law, persons engaged in the manufacture of articles of trade have the right to distinguish them by artificial devices from all other similar articles manufactured and sold. And when that has been done and a business created for such articles as so distinguished, no other person or persons are at liberty to either adopt that device or one so closely resembling it as to deceive persons dealing in the same class of articles,

and thereby induce the conviction that, in purchasing the simulated articles, they are in fact purchasing those of the first manufacturer and dealer; in other words, one person has no right, by simulating the trade devices of another, to take away his customers, or undermine his business. While the law justifies and encourages manly competition, it will not tolerate, but, on the other hand, will restrain and prevent, the use of artifices by which dealers may be deprived of well-earned advantages lawfully secured by fair dealing and honest trading. These principles appear to be now settled, both in *England* and the *United States*, and they are well sustained by authority." Congress, etc., *Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; *Colman v. Crump*, 70 N. Y. 573; *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22; *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173.

In *Godillot v. Hazard*, 24 P. & S.; 44 N. Y. Super. Ct. 427, Monell, C. J., said: "A trade-mark may consist of anything, marks, forms, symbols, which designate the true origin or ownership of the article. It cannot consist of anything which merely denotes the name or quality."

In *Amoskeag Mfg. Co. v. Trainer*, 39 P. & S.; 101 U. S. 51, Clifford, J., said: "Words or devices, or even a name, in certain cases, may be adopted as a trade-mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point to the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322." And again in the same case, the same judge said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture, of a symbol or device not in actual use, to designate articles of the same kind or class." In the same case, Field, J., said: "Everyone is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which

will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation, or by restraining others from applying it to their goods and compelling them to account for profits made on a sale of goods marked with it."

In *Godillot v. Hazard*, 24 P. & S.; 44 N. Y. Super. Ct. 427, Monell, C. J., said: "It has now come to be well settled, that the adoption of any words or device not already in use, and not denoting the name or quality of the article, will constitute a trade-mark; and they so far become property that the courts will protect the owner against any usurpation or interference; and for the well-grounded reason that a person who, by his skill and industry, has acquired a good reputation for the commodity he manufactures or sells, ought to be allowed to reap the fruits of it." And see *Williams v. Johnson*, 2 Bosw. (N. Y.) 1. See also *Leidersdorf v. Flint*, 20 P. & S.; 8 Biss. (U. S.) 327, where Dyer, J., said: "A trade-mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity." (*McLean v. Fleming*, 96 U. S. 245; *Upton's Law of Trade-Marks*, 9; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 604; 42 Am. Dec. 114; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281). . . . But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business, and that, having appropriated to

himself a particular label, or sign, or trade-mark, indicating that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good-will of his customers or of the patrons of his trade or business, by sailing under his flag without his authority or consent." See also *Hall v. Barrows*, 4 De G. J. & S. 158; *Schneider v. Williams*, 44 Pat. Off. Gaz. 1400; *McAndrews v. Bassett*, 4 De G. J. & S. 386; *Maxwell v. Hogg*, L. R., 2 Ch. App. 314; *Lawson v. Bank of London*, 18 C. B. 84.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Within a month subsequent to the death of the senior partner of the firm, his executors sold and conveyed all the interest of the decedent in the business to the surviving partner and complainant, whereby they, under the firm name of 'Fleming Brothers,' acquired not only the title to the receipt and the right to make the pills, but also the right to use the labels and trade-marks used by the former owners. Possessed of the whole interest, they (the firm, Fleming Brothers) prosecuted the business, with some changes in the individual partners, until July 1st, 1865, when the present complainant sold out his whole interest to his brother, John Fleming, who, as sole proprietor of what the firm owned, continued the business until the 2d of November, 1870, when he died, leaving a last will and testament. . . . In such cases, the question is not whether the complainant was the original inventor or proprietor of the article made by him, and on which he puts his trade-mark, nor whether the article made and sold under his trade-mark by the respondent is equal to his own in value or quality; but the court proceeds on the ground that the complainant has a valuable interest in the good-will of his trade or business, and, having adopted a particular label, sign, or trade-mark, indicating to his customers that the article bearing it is made or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using such labels, signs, or trade-mark without his knowledge or consent. *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281. Everywhere, courts of justice pro-

II. HISTORY.—The law of trade-marks is of recent growth. One hundred and fifty years ago it may be said to have been non-existent, but to-day it is defined and elaborated by statute and judicial decision.¹

III. WHAT MAY CONSTITUTE A TRADE-MARK—1. Arbitrary Words.—A trade-mark may consist of a word which is arbitrary in its selection and meaning; which does not, by its usual meaning, necessarily denote the character, quality, materials, or grade of the goods on which it is used, but by application to a class of

ceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority. Decided cases to that effect are quite numerous, and it is doubtless correct to say that a person may have a right in his own name as a trade-mark as against a trader or dealer of a different name; but the better opinion is, that such a party is not, in general, entitled to the exclusive use of a name, merely as such, without more. *Millington v. Fox*, 3 Myl. & C. 338; *Dent v. Turpin*, 2 J. & H. 139; *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489. . . . Such a proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trade-mark adopted and applied, by him to the goods, to distinguish them as being of a particular manufacture and quality, even though he is not the manufacturer, and the name of the real manufacturer is used as part of the device. *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Emerson v. Badger*, 101 Mass. 82."

1. In *Blanchard v. Hill*, 2 Atk. 484, *Hardwicke, L.C.*, said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it."

Since the cases of *Singleton v. Bolton*, 3 Doug. 393, decided by Lord Mansfield (1783), and *Hogg v. Kirby*, 8 Ves. 215, decided by Lord Eldon (1803), in which the fundamental principle of the right of a trader to protection in the exclusive use of his trade-

marks was laid down, more than two thousand cases have been decided by the courts of *England* and the *United States*, out of which have grown, without the aid of statute, an elaborate system of law, covering multitudinous questions and establishing principles and rules of law suited to almost every form of piracy which the ingenuity of man can devise.

The trade-mark statutes of the *United States* are of recent origin and limited scope. The first act was passed July 8th, 1870, and provided for the registration of trade-marks in the *United States* Patent Office, and made the registration *prima facie* evidence of ownership. This statute was amended in some minor particulars in 1871, *United States Rev. Stat.*, § 2486. In 1876, an act was passed creating a criminal remedy for the infringement of trade-marks. In 1879, the Supreme Court of the *United States*, in *U. S. v. Stiffens*, 100 U. S. 82, held the act of 1870 unconstitutional and void. It did not decide directly that the act of 1876 was also void, but the circuit court for the District of *Missouri*, in *U. S. v. Koch*, 40 Fed. Rep. 250, held that the act of 1876 fell with the act of 1870. March 3d, 1881, Congress passed what is now the trade-mark statute of the *United States*. It provides for the registration of trade-marks by citizens and aliens, provided the trade-mark offered for registration has been used in commerce with a foreign nation or an Indian tribe.

All common-law rights of a trade-mark owner are expressly reserved by the statute. *United States Rev. Stat.*, § 4946.

In *England*, a trade-mark registration statute was passed in 1875, and it has been amended from time to time in 1887 and 1891. The English law is much more comprehensive and thorough than that of the *United States*. All trade-marks are required to be registered, which gives to the registry a

merchandise may indicate their ownership and origin, and carry with it a guarantee of character and quality.¹

conclusiveness much greater than ours, and after five years' use under registration, the registry is conclusive evidence of title. *Merchandise Marks, Act 23d, Aug. 1887, 50 & 51 Vict., ch. 28; Merchandise Marks, Act 1891, May 11th, 54 Vict., ch. 15.*

1. The phrase "Syrup of Figs," adopted by the manufacturer to designate a medical preparation, composed in part of fig syrup, and which, during a course of trade, has become known to the public by such name, indicates the origin of the preparation, rather than its quality or nature, and constitutes a valid trade-mark. *Beatty, J., said: "The phrase 'Syrup of Figs' is in no sense a generic one. It is not a name of a natural product, or of a class of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural product; hence, indicates rather its origin, than its quality, or even its nature." Improved Fig Syrup Co. v. California Fig Syrup Co., 54 Fed. Rep. 175.*

The word "Star," and the symbol of a star, adopted and used during many years by manufacturers of shirts, waists, underwear, and furnishing goods, to mark and designate their goods, in combination with the words "Star Shirts," and other words describing the articles, so that the goods became well known by such mark, and by the designation of "Star Goods," constitute a valid trade-mark. *Hutchinson v. Blumberg, 51 Fed. Rep. 829.*

The words "Nickel In," used to designate a brand of cigars, being original, arbitrary, and fanciful, and not descriptive of the articles, their grades or quality, are entitled to the protection given to trade-marks. *Schendel v. Silver, 63 Hun (N. Y.) 330.*

In *Waterman v. Shipman, 130 N. Y. 301*, the court held that the word "Ideal," as applied to fountain pens, was not generic or descriptive of the article, its qualities, ingredients, grade,

or characteristics, but was an arbitrary or fanciful name, and therefore a valid trade-mark.

The word "Celluloid," being a new and arbitrary word coined by plaintiff, and applied to goods of its manufacture, is a valid trade-mark, in the use of which, plaintiff is entitled to be protected, though the term has become so generally known as to have been adopted by the public as the common appellative of the article to which it is applied. *Celluloid Mfg. Co. v. Read, 47 Fed. Rep. 712.*

While the words "Warren Hose Supporter," when used alone, may not constitute a valid trade-mark, yet when used in connection with the cut of a hose supporter engaged with a stocking, and placed, as labels, on boxes containing hose supporters, they are sufficiently arbitrary to fairly denote the origin of the goods, and are entitled to protection as a trade-mark. *Frost v. Rindskopf, 42 Fed. Rep. 408.*

A label consisting of the head of an elk, with the word "Elk" printed in large letters upon the face of the label, sufficiently indicates origin and ownership, to be a valid trade-mark, when applied to a box of cigars. *Lichenstein v. Goldsmith, 37 Fed. Rep. 359.*

The word "Valvaline," compounded and used on packages of lubricating oils, by plaintiffs, is a valid trade-mark. *Leonard v. White's Golden Lubricator Co., 38 Fed. Rep. 922.*

The words "Cough Cherries," as applied to a confection, are not descriptive of the qualities of the article, but are sufficiently arbitrary and fanciful to be appropriated as a trade-mark. *Stoughton v. Woodward, 39 Fed. Rep. 902.*

A combination of words ("La Favorita" Flour), made by a firm engaged in mercantile business, from a foreign language, in order to designate merchandise selected by them in the exercise of their best judgment as being a certain standard and of uniformity of quality, may be protected to them and for their use as a trade-mark. *Holt v. Menendez, 128 U. S. 514; also Holt v. Menendez, 23 Fed. Rep. 869.*

Where a word, as "Celluloid," is coined and used as a trade-mark, and stamped on articles manufactured from a certain substance, the fact that such

word subsequently becomes the common appellation of such substance cannot impair the rights acquired in the word, and while others can use it to designate the product, they cannot apply it in any way as a trade-mark. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

Arbitrary terms, such as "Tin Tag," or "Wood Tag," branded upon or given to goods by the manufacturer or seller, to distinguish them, may constitute valid trade-marks, but the person so using them would have no right to the exclusive use of tin or wood as a material to designate the goods. *Lorillard v. Pride*, 28 Fed. Rep. 434.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, *Rapallo, J.*, after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name (as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'), consisting either of a new word, or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, in the opinion by Mr. Justice Bradley, and also in *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, in the opinion by Mr. Justice Shipman.

In *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369, the court held that the word "Electro-Silicon" "was a valid trade-mark. *Brady, J.*, said: "It conclusively appears that neither the words in combination nor singly employed, describe the article which they are intended to designate. It is a substance for polishing, composed of infusorial earth, the proper description of which is not silicon, which exists in small quantities and is not an article of commerce. The words, therefore, are arbitrary and coined for the purpose of distinguishing an article which the plaintiff's predecessor first introduced

into the commerce of the nation of which it has become a part." To the same effect are *Electro-Silicon Co. v. Levy*, 59 How. Pr. (N. Y. Supreme Ct.) 469; *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189; *Lauferty v. Wheeler*, 63 How. Pr. (N. Y. C. Pl.) 488 ("Alderney Mfg. Co.," sustained for oleomargarine).

"Magnetic Balm," being a medicine which does not contain any magnetism or electricity, but an arbitrarily selected word, not expressive of the quality or character of the article, is a valid trade-mark. *Smith v. Sixbury*, 25 Hun (N. Y.) 232.

The word "Snow-Flake," as applied to bread or crackers, is not an arbitrary word, but is a mere description of whiteness, lightness, and purity, and cannot be a valid trade-mark. *Larrabee v. Lewis*, 67 Ga. 561; 44 Am. Rep. 735.

The use of the word "Hoosier," as applied to grain drills, to designate manufactured goods and to distinguish them from other drills, is a valid trade-mark. *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

In *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589, the court held that the word "Pride," as applied to cigars, was an arbitrary word, and not descriptive of the article, and could lawfully be appropriated as a trade-mark.

In *Sheppard v. Stuart*, 13 Phila. (Pa.) 117, "Excelsior," as applied to stoves, was held to be a valid trade-mark, as being an arbitrary word, and indicating the true origin and ownership of the article.

In *Roberts v. Sheldon*, 8 Biss. (U. S.) 398, *Blodge, W. J.*, said: "The word 'Parabola,' it seems to me is, as stated by the complainant, an arbitrary term adopted by him to distinguish his needles from those of other manufacturers, and he had a right to so select and apply it."

In *Williams v. Adams*, 8 Biss. (U. S.), it was held that the word "Yankee," as applied to shaving soap, was a valid trade-mark.

"Sapollo," on a scouring soap, is a valid trade-mark. *Enoch Morgan's Son's Co. v. Schwachhofer*, 55 How. Pr. (N. Y. Supreme Ct.) 37.

In *Ford v. Foster*, L. R., 7 Ch. App. 611, the word "Eureka" as applied to shirts, was held to be a valid trade-mark.

In *Hirst v. Denham*, L. R., 14 Eq. Cas. 542, the plaintiff applied for an injunction to restrain the defendants from

2. Fictitious Names.—A trade-mark may consist of a fictitious

selling, etc., cloth under the names of "Turin," "Sefton," "Leopold," or "Liverpool," and from using the said names for the purpose of describing any cloths sold by them. In granting the injunction, Sir James Bacon, V. C., said: "When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance."

The word "Eureka," first used by complainants in a compounded fertilizer which they called the "Eureka Ammoniated Bone Superphosphate of Lime," and have used for several years, is a trade-mark, in the exclusive use of which they have the right to be protected by the courts. Gilles, J., said: "The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark." *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115.

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, Currier, J., said: "The name 'Charter Oak' with the combined device, in no possible view or application of them, are either descriptive or suggestive of the style, character, or qualities of a cast-iron cooking stove. In their natural significance, import, or symbolism, or in the use made of them prior to the plaintiff's appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark. . . . The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark."

A person who forms a new composition, and invents a new word to charac-

terize it, is entitled to be protected in the exclusive use of such word as his trade-mark, and an injunction will issue to restrain others from appropriating it to designate a similar article. It was accordingly held that the word "Ferro-Phosphorated" Elixir of Calisaya Bark, was a valid trade-mark. *Caswell v. Davis*, 35 How. Pr. (N. Y. C. Pl.) 76.

In *Burnett v. Phalon*, 3 Keyes (N. Y.) 594, the word "Cocaine," as applied to a hair-oil, made from a preparation of cocoa-nut oil, was held to be a valid trade-mark. Davies, C. J., quotes with approval the language of Mr. Justice Duer in *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior reputation as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given."

In *Braham v. Bustard*, 1 H. & M. 447, it was held that the word "Excelsior," as applied to white soft soap, was a valid trade-mark.

In *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156, the court decided that the phrase "Balm of Thousand Flowers," was a valid trade-mark, on the ground that the phrase was extrinsic and not indicative, and also that the defendants had avowedly and designedly adopted and used this name and these symbols of the plaintiff, to interfere with his trade and participate in his gains. The opinion of the court was given by Mr. Justice Hoffman.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144, the court held that the words, "Balm of Thousand Flowers," were not a good trade-mark, on the ground that the phrase had become the distinctive and fanciful name of the

name, as that of a famous person or thing, or some character or thing of fiction or fancy.¹

3. Devices or Symbols.—Devices or symbols are the most usual forms of trade-marks. Any device or symbol may be protected

article, and also that the words were deceptive. The opinion was given by Mr. Justice Duer.

1. Plaintiff, a manufacturer of cotton cloth, stamped it with the words "Roger Williams Long Cloth." It was held, that the name was a valid trade-mark, being that of a dead celebrity. Ames, C. J., said: "We are not aware of any legal restriction upon a manufacturer's choice of a name for his trade-mark, any more than of his choice of a symbol, so that the name be so far peculiar, as applied to manufactured goods, as to be capable of distinguishing, when known in the market, one manufacturer's goods of a certain description from those of another. 'Roger Williams,' though the name of a famous person, long since dead, is, as applied to cotton cloth, a fancy name, as would be so applied, the names of Washington, Green, Perry, or of any other heroes, living or dead." *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452.

Plaintiffs, manufacturers of paper collars, sold them with the word "Bismarck" stamped on them. The court, by Brady, J., said: "There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer." *Messerole v. Tynberg*, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 410; 36 How. Pr. (N. Y. C. Pl.) 14.

In the *United States* Patent Office, *Ex p. Pace*, 15 Pat. Off. Gaz. 909, an application for a trade-mark consisting of the word "Bayard" and the portrait of the *United States* senator of that name, was granted. But a geographical name, although also the name of an historical personage, is not a proper subject for trade-mark registration.

In the *United States* Patent Office, *Ex p. Oliver*, 18 Pat. Off. Gaz. 923, applicants were refused registration of the word "Raleigh" as a trade-mark of manufactured tobacco.

In *McAndrew v. Bassett*, 10 Jur. N. S. 492 and 550; 10 L. T. N. S. 65 and 442, plaintiffs, manufacturers of liquorice, stamped it with the word, "Anatolia." It was held a valid trade-mark, because, by use and occupation, the word had come to indicate ownership

and origin of the manufactured goods in complainant, in addition to the geographical location of the place where the liquorice was grown. *Westbury, L. C.*, said: "I am told that this word 'Anatolia' being, in point of fact, the geographical designation of a whole country, is a word common to all, and that in it, therefore, there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and attains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public." See the comments on this case in the opinion of Strong, J., in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 326.

"The plaintiff, who first applied the word 'Vienna,' to baked bread and other articles, having been engaged in manufacture, in the city of New York, of an article known as 'Vienna Bread,' and which he has for many years past sold with a label thereon containing the words 'Vienna Model Bakery,' can maintain an action restraining the use by other parties of a label in imitation of his own, and in particular, from applying the word 'Vienna' to baked articles." As a mark for bread, it is purely arbitrary, and is in no manner descriptive either of the ingredients or quality of the article. *Fleischman v. Schuckmann*, 62 How. Pr. (N. Y. Supreme Ct.) 92.

In *Edmonds v. Benhow, Seton* (3d ed.) 905; (4th ed.) 238, plaintiff, being the proprietor and publisher of a newspaper, called "The Real John Bull," defendants were enjoined from publishing a newspaper called "The Real John Bull," or "The Old Real John Bull." Examples of this kind are numerous. In *Chappell v. Davidson* (8 De G. M. & G. 1), the words "Minnie Dale," and "Minnie, dear Minnie," as applied to songs, were held to conflict with "Minnie."

as a trade-mark, which is arbitrary in its character and selection, and does not, by its inherent character, necessarily describe the goods upon which it is employed, nor contain any misrepresentation of fact with reference to the goods, their origin, character, qualities, or contents.¹

In *Ingram v. Stiff*, 5 Jur. N. S. 947, "The Daily London Journal" was held to invade "The London Journal."

"The Iron Trade Circular (Rylands)" and "The Iron Trade Circular (edited by Samuel Griffiths)," were held to conflict, in *Corns v. Griffiths*, W. N. 1873, p. 93; *Pemberton* (2d ed.) 309.

But "Punch" and "Punch and Judy" were held not to conflict, in *Bradbury v. Beeton*, 21 L. T. N. S. 323.

In *Gout v. Aleploglu*, 6 Beav. 69, note, plaintiff, long a manufacturer of watches for the Turkish and Levantine market, marked them with his name, a spring, etc., and the Turkish word "Pessendede" (meaning "warranted"). It was held to be a valid trade-mark, and an injunction was granted.

In *Barnett v. Leuchars*, 13 L. T. N. S. 495; 14 W. R. 166, a manufacturer of fireworks called them "Pharaoh's Serpents." This was sustained as a valid trade-mark and an injunction was granted.

Other examples are, "Dave Jones" and "Magnolia," as applied to whisky, *Kidd v. Mills*, 5 Pat. Off. Gaz. 337; "Charter Oak," as applied to stoves, *Filley v. Child*, 16 Blatchf. (U. S.) 376; "Lone Jack," as applied to tobacco, *Carroll v. Ertheiler*, *Cox's Man. of Trade-Mark Cases* 669; 21 Abb. L. Jour. 503. See also *Martha Washington Creamery, etc., Co. v. Martien*, 37 Fed. Rep. 797; 44 Fed. Rep. 473.

1. A label containing a marine picture with a small six-pointed star and the words "Star of Hope," is a valid trade-mark for a brand of tobacco. *In re Dexter*, 2 Ch. Div. 262.

In *Hutchinson v. Blumberg*, 51 Fed. Rep. 829, plaintiffs' device for a trade-mark for underwear consisted of a six-pointed star and the word "Star." Defendant began the use on underwear of a five-pointed star and crescent, the former being the prominent symbol, and the word "Star." It was held that plaintiffs had a valid trade-mark and an injunction was granted against infringement.

The device of a bottle with a panel or depression in the back, is not a

trade-mark. *Hoyt v. Hoyt*, 143 Pa. St. 623.

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, *Thayer, J.*, said: "The next matter to be considered is the charge that defendant uses the device of a book, with the words 'Webster's Dictionary' printed thereon, on its circulars, bill-heads, etc., in imitation of a like practice pursued by the complainants. In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark. When so used by a publisher or bookseller, such a device serves to indicate the kind of business in which a party is engaged, or it is descriptive of the contents of particular packages. Other persons engaged in the same business have the right to advertise their calling, or to describe the contents of packages, by the use of the same device. If a publisher or bookseller can acquire the exclusive right to use the device of a book on letter-heads, bill-heads, wrappers, etc., then a watchmaker might acquire the exclusive right to use the picture of a watch, a shoemaker to use the picture of a shoe, and so on throughout the entire list of occupations in which men are engaged."

In *Harris Drug Co. v. Stucky*, 46 Fed. Rep. 624, where there was a picture of a boy suffering from cramps, with words "Cramp Cure," it was held that the picture constituted a valid trade-mark, but the words were descriptive.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, *Fuller, C. J.*, said: "In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322, it was said by Mr. Justice Strong, speaking for the court: 'That the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer.' This may, in many cases, be done by a name, a mark,

or a device well known, but not previously applied to the same article."

The bronzing of horse-shoe nails cannot constitute a trade-mark. Paxon, C. J., said: "We have never yet carried the doctrine of trade-marks to the extent claimed for it by the plaintiff. We have never hesitated to restrain the imitation of a trade-mark when the facts justified it. We are now asked to go one step further and protect the manufacture of the article itself. This we do not see our way clear to do. The manufacture of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufacturers." Putnam Nail Co. v. Dulaney, 140 Pa. St. 205.

In *Frost v. Rindskopf*, 42 Fed. Rep. 408, it was held that the words "Warren Hose Supporter," with a cut of the garter, constituted a sufficiently arbitrary device to entitle plaintiffs to relief against simulation.

Bronzed horse-shoe nails are probably not a trade-mark. Putnam Nail Co. v. Bennett, 43 Fed. Rep. 800.

In *Re Australian Wine Importers*, 41 Ch. Div. 278, the device of a golden fleece, with words "Pure Old Scotch Whisky," was held a valid trade-mark.

In *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, an elk's head, with the word "Elk" and the initials of the manufacturer, was held to constitute a valid trade-mark.

In *Johnson v. Hitchcock* (Supreme Ct.), 3 N. Y. Supp. 680, a representation of a flag, with stars studding the upper and lower borders in a very effective and striking way, in newspaper advertisements, was held to be sufficiently arbitrary to entitle plaintiff to relief against simulation.

In *Adams v. Heisel*, 31 Fed. Rep. 279, plaintiff was held entitled to a trade-mark in "Sappota Tolu" (a chewing gum), with various bands of color, arbitrarily arranged, but not in the form and size of the box, the sticks, or the arrangement of the latter in the box.

In *Foster v. Blood Balm Co.*, 77 Ga. 216, the following was held a sufficient trade-mark to entitle one to protection. Bleckley, C. J., said: "A device consisting chiefly of a letter of the alphabet nine times repeated, the repetitions being arranged in three vertical columns, separated by lines or bars, so as to form three groups of three B's (B B B), and when applied to the goods, each of three sides of the package presents

to the eye one of these triple combinations of B in conspicuous type. . . . It is not quite certain that, even as a technical trade-mark, nine B's, distributed into groups of three each, arranged in a given order, and placed in colored frames or settings, would not be sufficiently fanciful and arbitrary to be legitimate. There is no possible device or design which does not consist in its elements of something which is common to the whole world when it comes to be represented to the eye."

In *Re James' Trade-Marks*, 33 Ch. Div. 392, a black dome as a trade-mark for black lead was sustained. (Note distinction taken between American and English cases.) Lindley, L. J., said: "As regards the American decisions, I quite concur in the observations made by Lord Justice Cotton. I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pigskin into leather, I do not know why a pig should not be a good trade-mark for tanned pig's hide. I am not inclined to apply to English acts of parliament the American cases which have been cited." The court in this case overruled the decision below by Pearson, J., in which he said: "Curiously enough, though it has not arisen here, the question has been several times before the American courts, whether a man can have as a trade-mark a drawing of the article sold, and they have decided that he cannot, because it is the common property of all the world." See *In re James' Trade-marks*, 31 Ch. Div. 340.

In *Edelston v. Edelston*, 9 Jur. N. S. 479; 7 L. T. N. S. 768, the word "Anchor," used by a wire manufacturer as a trade-mark, was sustained.

In *Re Hudson*, 32 Ch. Div. 311, the following device was held a valid trade-mark: A label with a pattern around it, and then a certain amount of light, and then there is a dark patch in the center on which the name of *Hudson* and the words "Carbolic Acid Soap Powder" are printed, and there are other words around the label.

In *Anheuser-Busch Brewing Assoc. v. Clarke*, 165 P. & S.; 26 Fed. Rep. 410, the design of plaintiffs' label for

beer bottles consisted principally of a very striking diagonal red band. Defendant began to use a like symbol on his labels and an injunction was granted against him.

"It (a trade-mark) may be any symbol or emblem, however unmeaning in itself, as a cross, a bird, a quadruped, a castle, a star, a comet, a sun; or it may, and frequently does, consist of a combination of various objects copied from nature, art, or fancy." § 602. "The moral, religious, or political sensibilities of any people must not be shocked by the perversion of an emblem sacred in their eyes. There is no necessity for so doing, for the objects suitable for use as trade-marks are as infinite in number as the sands of the seashore. We must not blindly follow the loose, random sayings of judges that any emblem may be lawfully employed for this purpose." Browne on Trade-Marks (2d ed.), § 87 (1885).

"The original form of trade-marks was probably the representation of some animal, or other natural object, or mathematical figure, as the hall mark of the lion or leopard's head, the freemasons' square and compasses, or the government broad arrow. . . . Such marks are still frequently employed and this class specially includes them. To this class belong the marks of an anchor, an eagle, a lion, an elephant, a cross, a pyramid, a bell, a hand, a cock, a rising sun, or a triangle. A crest is just as capable of becoming a trade-mark as any other arbitrary device." Sebastian on Trade-Marks (2d ed.) (1884), p. 37. See *Edelston v. Edelston*, 1 De G. J. & S. 185; *Standish v. Whitwell*, 14 W. R. 512; *Henderson v. Jorss*, Dig. 198; *Cartier v. Carlile*, 31 Beav. 292; *Cartier v. Westhead*, Dig. 199; *Cartier v. May*, Dig. 200; *Bass v. Dawber*, 19 L. & S. 626; *Bell v. Bell*, Dig. 514; *Allsopp v. Walker*, Dig. 545; *In re Walkden Aerated Waters Co.*, Dig. 558; *Morse v. Worrell*, 10 Phila. (Pa.) 168; *In re Worthington*, 14 Ch. Div. 8; *Steinthal v. Samson*, Dig. 546.

But as to the validity of the Freemasons' square and compasses as a trade-mark in the *United States*, see *In re Tolle*, 2 Pat. Off. Gaz. 415, and *In re Thomas*, 14 Pat. Off. Gaz. 821. In the former it was held that such a symbol had acquired a well-known special significance and its use would be deceptive. Thacher, Acting Com'r, said: "There can be no doubt that

this device, so commonly worn and employed by Masons, has an established mystic significance, universally recognized as existing; whether comprehended by all or not, is not material to this issue. . . . It will be universally understood, or misunderstood, as having a masonic significance, and therefore as a trade-mark must constantly work deception." In the latter case this view is departed from, holding that the Masons have no monopoly in their symbols.

In *Wilcox, etc., Sewing Mach. Co. v. Gibbons Frame*, 126 P. & S.; 17 Fed. Rep. 623, plaintiffs, manufacturers of a patented sewing machine, the frame of which was made in the shape of the letter G, endeavored, after the expiration of the patent, to establish the exclusive right to the use of this frame as a trade-mark, and brought suit to perpetually enjoin defendants from the use of it. It was held that the frame was a trade-mark inseparably associated with the patent, and after the expiration thereof, the public acquired a right to the whole. Wheeler, J., said: "All the effect which these frames have in representing machines to be those of the orator appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade-mark, would continue the monopoly indefinitely, when under the law it should cease."

In *Lorillard v. Wight*, P. & S. 115; 15 Fed. Rep. 383, plaintiffs, manufacturers of plug tobacco, adopted, as a device, tin tags of various colors, blue and red, with the imprint of their name attached to each plug of tobacco. Defendant used tags of same size, shape, and color. It was held that plaintiffs had not the exclusive right to use tin tags, as they were common to the trade, but that defendant must be enjoined from the sale of tobacco with tags of similar color and size, and similarly marked, though with different names on the tag, so as to avoid the danger that the goods of the defendant might be sold as and for those of the plaintiff, in consequence of being designated by the same names as the plaintiffs, "Red Tag," "Blue Tag," etc.

In *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294, plaintiff prepared and sold a soap for cleaning and polishing, labeled on one side of the package "Sapolio," etc., on the other, "Enoch Morgan's Son's

Sapolio," with a picture representing a human face reflected in a bright pan. The defendants sold similar soap in packages which bore little resemblance to those of the plaintiff save that on one side there was a small figure of a monkey, sitting down, tail in air, and looking at what is apparently a mirror in his hand. Rapallo, J., said: "The mere idea, represented by some figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark."

In *Hegeman v. O'Byrne*, P. & S. 64; 9 Daly (N. Y.) 264, plaintiffs had a registered trade-mark consisting of an "eagle with outstretched wings, perched upon a mortar, in which rested a pestle." Defendants were using on a label a similar mark, the chief difference being in the name. It was held that, although these symbols were in common use among druggists, yet when used on labels and first registered by plaintiffs, they constituted a valid trade-mark and would be protected.

In *Ex p. Straiton*, 60 P. & S.; 18 Pat. Off. Gaz. 923, Marble, Comr., said: "Applicants in this case seek to register as a trade-mark for cigars, 'a waved band or ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar box and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars.' This was registered as a valid trade-mark."

In *Re Rotherham*, 14 Ch. Div. 585, it was held that Arabic and Turkish letters comprising words or names, are valid trade-marks, being to the English subject a "distinctive device."

A triangle, plain, inclosed by an oval with the words "Bass & Co.'s Pale Ale," forms a valid trade-mark. *In re Worthington*, 14 Ch. Div. 8.

In *Orr-Ewing v. Johnston*, 13 Ch. Div. 434; L. R., 7 App. Cas. 219, plaintiffs, being exporters of Turkey red yarn to *India*, had used for their trade-mark a device of which the principal features were two elephants, one in each corner, connected by a banner. Defendants, in introducing their yarn into *India*, had adopted a very similar device of elephants, etc. *India*, it will be noticed, is a country in which the picture of an elephant is very familiar. Cotton, L. J., said: "It is in evidence, and is undisputed, that for many years the plaintiffs' goods were sold by vari-

ous dealers in *India*, by Graham, and afterwards by others, and had been known either as 'Graham's Bhé Hathi' or 'Bhé Hathi' (two elephant) yarns. I refer to this as showing that in the minds of those who were purchasers of these goods the particular parts of the ticket with two elephants so placed, and with the surrounding circumstances, are a distinguishing feature of those labels. For, although there was evidence given on the part of the defendants, and it is admitted that there were numerous other tickets with elephants upon them, in very few instances do we find that any of the goods sold with these tickets have acquired the name of 'Elephant' tickets. . . . And the importance of that name, as I have already said, being attributed to goods sold with the plaintiffs' 'A' ticket, is, in my mind, simply to show how important as a distinctive part of this ticket the elephants of the plaintiffs, as so placed and so connected, were to the minds of the people who dealt in them, both in the markets of Bombay and Aden." It was held that the circumstances indicated fraud, or at least probable damage resulting from the simulation, and entitled the plaintiffs to relief.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Field, J., said: "Every one is at liberty to affix to a product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others. . . . The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. Delaware, etc., *Canal Co. v. Clark*, 13 Wall. (U. S.) 311. . . . A citation is made from the opinion of the superior court of the city of New York in the case of the present complainant against Spear, reported in the 2d of Sandford, that 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their

names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

In *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427, Monell, C. J., said: "A trade-mark may consist of anything, marks, forms, symbols, which designate the true origin or ownership of the article. It cannot consist of anything which merely denotes the name or quality. See *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. . . . The copy of the coat-of-arms of the city of Paris, when in connection or combination with other marks, words or devices, not denoting name or quality, will cover a property in it which will prevent its use in the same connection or combination by another person." See also *Radde v. Norman*, 26 L. T. N. S. 788, where this doctrine is reaffirmed.

In *Harrington v. Libby*, 6 P. & S.; 14 Blatchf. (U. S.) 128, it was held that a decorative tin pail with handle, used to contain collars and sold with them, was not a trade-mark. *Johnson, J.*, said: "The question whether anyone can seize upon such an article and make title to its exclusive use for a special purpose by calling it a trade-mark, must be far from clear in favor of the claimant. The forms and materials of packages to contain articles of merchandise, if such claim should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property."

Query: Can the figure of a pig be a valid trade-mark for "prime leaf lard?" The objection is that it is descriptive and might with equal truth be employed to represent any other products of the pig put up for sale. *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22; *Cox's Man. of Trade-Mark Cases* 425.

A fish is not a valid trade-mark for fishing-lines, because descriptive. *In re Pratt*, *Cox's Man. of Trade-Mark Cases* 527; 10 Pat. Off. Gaz. 866; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, is cited as conclusive.

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392, plaintiffs were using as a trade-mark a combination of a maltese cross, three A's and the words "Old Valley Whisky," the whole branded into the head of a

barrel. The defendants began to use the same general mark, only substituting three X's for the three A's. It was held that the whole device of the plaintiffs constituted a valid trade-mark and entitled them to protection.

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76, plaintiffs, manufacturers of washing powder, sought to have protected from simulation, as a trade-mark, a picture of a washing-room scene with its various phases, etc. *Sanderson, J.*, said: "The plaintiffs claim their entire label as their trade-mark and ask to be protected in the use of it as a whole; but it is clear that the common law gives no countenance to such a claim. Only so much of their label as serves to indicate that they are the manufacturers or vendors of the washing powder can be considered as constituting the legitimate characteristics of a common-law trade-mark. . . . Indeed, it may be doubted whether the picture can be considered as matter of trade-mark." But see *Brown on Trade-marks* (2d ed.), §§ 259, 262.

In *Harrison v. Taylor*, 11 Jur. N. S. 408; 12 L. T. N. S. 339, the plaintiffs were manufacturers of mustard, which they sold with a label affixed, the conspicuous feature of which was the figure of an ox; the defendants sold other mustard with a very similar label, and "ox" trade-mark, but having their own name substituted for that of the plaintiff. An injunction was granted to restrain defendants from infringing rights of plaintiffs by the use of "ox" trade-mark, notwithstanding that a certain class of customers were in the habit of asking for "Harrison" mustard and not "ox" mustard.

In *Knott v. Morgan*, 2 Keen 213, an injunction was granted to restrain defendant from running an omnibus having upon it such names, words, and devices, as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff. Among the devices referred to was a star and garter painted on the side of plaintiffs' omnibuses, as also the peculiarity of the livery and caps of the coachmen. In this case relief was granted, although it did not appear that the plaintiff had an exclusive right to the words in question. In this it goes further than *Stone v. Carlan*, 13 Monthly L. Reg. 360, and *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, where there was an exclusive right to the names of the hotels "Irving Hotel"

4. Numerals.—Numerals, if employed arbitrarily to indicate ownership and origin, and not grade or quality, will be sustained as valid trade-marks. In the *United States*, the question whether a number will be sustained or not, will generally depend upon the proof with reference to the intention of the person using it; if it was adopted as a purely arbitrary figure, without any purpose or intent of using it to indicate quality or grade, it will be sustained, and this will probably be true although by use the number may, to some extent, have come to indicate a particular quality of goods. If, however, the number or letter was originally adopted for the purpose of indicating quality merely, no subsequent acceptance of the mark by the public, as an indication of ownership and origin, can entitle the mark to protection. The English rule differs from this, and seems to be more logical, and in accord with the fundamental principle of trade-mark law, that the honest trader is to be protected in all the benefits of his reputation, and the defendant is not to be permitted to use any symbols, or do any act which would deceive the public and defraud the honest trader out of the benefits of his hard-earned reputation. On this principle, the English courts have held that letters or numbers which, although adopted and used for the purpose of indicating grade or quality, have yet, by use, come to indicate to the trade the origin and ownership of the goods to which they are attached, will be protected as valid trade-marks.¹

and "Revere House," out of which flowed the exclusive right to use the name on coaches, badges, etc.

In *Mitchell v. Henry*, 15 Ch. Div. 181, 188, where the plaintiff's trade-mark was described as a trade-mark applicable to "worsted stuffs," by the following description, "a white selvage on each side of the piece, having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," it was decided that the intermixture of colors constituted a distinctive device entitled to protection, but that in the particular case the defendants were not guilty of infringement.

Where goods of a trader have acquired a specific name from the appearance of a trade-mark, no other trader will be allowed to use a mark which, though different, would cause his goods to be known by the same name. *Seixo v. Provozen*, L. R., 1 Ch. 195; *Edelston v. Edelston*, 1 De G. J. & S. 185; 9 Jur. N. S. 479.

1. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; 31 Fed. Rep. 776, the plaintiff, a manufacturer of sheetings, stamped on one grade the

letters "L L" and claimed a trade-mark therein. It was held that the letters were merely indicative of quality. Fuller, C. J., said: "Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. Rep. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style, or quality, it cannot be upheld as technically a trade-mark."

In *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, the complainant, a manufacturer of buttons and nails, distinguished certain styles which he made, by certain numerals arbitrarily chosen. These were held to be valid trade-marks. The court, by Stiness, J., said: "A person may have different

symbols for different grades of goods, which, in the same way, will indicate both quality and origin with respect to the goods so marked. A manufacturer may adopt such symbols, not simply to mark a style or quality, but *his* style and *his* quality as well. He is entitled to have *his* style and *his* quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained."

In *Avery v. Meikle*, 81 Ky. 73, plaintiffs, manufacturers of plows, stamped their steel series with letters "A O," "B O," etc., and their cast series with "1/2," "1," "2," "3," and "8." Defendants manufactured plows in exact imitation of the plaintiffs, in almost every particular. It was held that the plaintiffs had no exclusive right to such letters or figures, but an injunction was granted on the ground of fraud and unfair competition. The court, by Hargis, C. J., said: "As to the numerals 1/2, '1,' etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both series may have come to indicate to the public the origin and ownership of appellants' plows, as they did not appropriate them by adoption, use, or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose."

In *Humphreys Specific Homeopathic Co. v. Wenz*, 14 Fed. Rep. 250, the plaintiff had for a long period, manufactured and sold a series of homeopathic specific medicines, labeled with a series of numbers running from "1" to "35," each number being applied to a medicine for a particular disease or class of diseases. It appeared that the remedies were frequently purchased by the public by the numbers alone. It was held that the plaintiff could be protected in the use of the serial numbers as applied to "Homeopathic Specifics," and a preliminary injunction was granted.

In *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707, plaintiffs, manufacturers of hosiery, packed them in boxes having labels of various peculiarities attached, the most prominent feature of which was the number "830," long used to designate seamless half-hose of mottled drab color, manufactured by them. Defendants sold hose with similar labels, and using the same number. It was held that the plaintiffs had an ex-

clusive right to the use of the number "830" as applied to mottled drab hose, and an injunction was granted. Cox, D. J., said: "Where the courts have refused protection to alleged trade-marks composed of letters or numerals, it has been because, on the facts of each case, it was determined that the figures or letters were intended solely to indicate quality, etc., and not because figures and letters in arbitrary combination are incapable of being used as trade-marks. It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3, and 4, or the letters A, B, C, and D, to distinguish the first, second, third, and fourth quality of his goods respectively. Why? Because the general signification and common use of these letters and figures are such, that no man is permitted to assign a personal and private meaning to that which has by long usage and universal acceptance acquired a public and generic meaning. It is equally clear, however, that if for a long period of time he had used the same figures in combination, as, '3214,' to distinguish his own goods from those of others, so that the public had come to know them by these numerals, he would be protected. . . . The right to use a trade-mark is one depending upon use, and it appears that complainant had used these numerals long enough to convey to any one versed in the nomenclature of the trade, a precise understanding of what goods were intended when the numerals were used alone, disconnected from any extrinsic information."

In *Ransome v. Graham*, 47 L. T. N. S. 218, plaintiff, a manufacturer of plows, marked his goods with a series of letters, figures, etc., purporting to indicate the manufacturer, and also indicative of quality, the marks being exclusively used by the manufacturer. They were held to be valid trade-marks, and an injunction was granted.

In *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362, plaintiffs used as a trade-mark for hosiery, certain devices with the figures "523" beneath them. It was held that numerals, arbitrarily selected, and used on goods in combination with other devices, to denote the origin of the goods, and not their quality, are a valid trade-mark. The court, by Colt, J., said: "A trade-mark when applied to manufactured articles may well consist of the name and address of the

manufacturer, with the addition of some peculiar device or emblem, some curious forms or figures, so disposed as to attract attention, impress the memory, and advertise more effectually the origin of the article to which it is attached.

... It may be that even numerals or letters of the alphabet can be combined and printed in such unusual and peculiar forms, that the result would be quite sufficient for use as a trade-mark."

In *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. Cas. (N. Y.) 17, plaintiffs used the figures "35" to designate certain kinds of photographic cards of their manufacture, the labels, however, not containing the name of the plaintiffs. It was held, that plaintiffs have a trade-mark in those figures, and are entitled to protection in a court of equity. The court said: "In the case at bar, the labels do not contain the name of the plaintiffs as makers, but the evidence satisfies me, beyond doubt, that the figures '35' were known to and recognized by dealers, when employed as designating *carte de visite* mounts, as referring to the particular kind of card which was manufactured by the plaintiffs."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, complainants used the letters "A. C. A.," applying them to the highest grade of ticking which they manufactured. It was held that the letters denoted quality only and formed no part of a valid trade-mark. The same principle applies to figures. Field, J., said: "Letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation; but are open to use by anyone, like the adjectives of the language." See opinion by Clifford, J., *dissenting*, which seems to state the more logical rule.

In *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258, plaintiff, a manufacturer of rubber goods, claimed an exclusive right to the numbers, "2," "101," and "32," used by him to designate different classes of rubber goods. It was held that the principles of *Gillott v. Esterbrook*, 48 N. Y. 375; 8 Am. Rep. 553, applied; that the numbers were selected arbitrarily, and the plaintiff was entitled to protection in his use of the same. The court said: "The numbers were used to distinguish one pattern or character of goods from other patterns. In this

case, the defendant's labels prove that the numbers were useful in the market to designate these patterns. The numbers were selected arbitrarily, and of themselves expressed no size or quality."

In *Carver v. Bawker*, Lancaster Chanc., Little, V. C.; British and Foreign Journal of Commerce and Trade-Marks 252; Cox's Man. of Trade-Mark Cases 581, plaintiff, a shipper of cotton goods, stamped them, among other things, with the numbers "109," "406," "409," etc., respectively. It was held that the number "109" was in common use and descriptive of quality, and that the other numbers, although not in common use, could not be exclusively appropriated.

In *Kinney v. Allen*, 1 Hughes (U. S.) 106, plaintiff, a manufacturer of cigarettes, placed upon boxes, etc., containing them, the symbol " $\frac{1}{2}$ " printed in large red characters. Defendant sold other cigarettes with a similarly printed " $\frac{1}{2}$ " as a trade-mark. A limited injunction was granted to restrain defendants from using the symbol in that form, but not the symbol itself, on the ground that the symbol was not absolutely arbitrary, it being originally used to indicate that cigarettes stamped with it were composed of two kinds of tobacco in equal proportions.

In *Kinney v. Basch*, 16 Am. L. Reg. N. S. 506, plaintiff used the numerical symbol " $\frac{1}{2}$," with other items, as a trade-mark for cigarettes. Defendants used similar marks, the symbol " $\frac{1}{2}$ " being identical in shape, etc., as that of the plaintiff. An injunction was granted on the ground that, whether or not plaintiff had an exclusive right to the marks in question, defendants had acted with intention to deceive. The court, by Van Brunt, J., said: "If the use of any words, numerals or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols."

In *Dawes v. Davies*, Codd. Dig. of Trade-Marks 260, plaintiff used as a trade-mark for umbrellas, the number "140," in a white oblong placed in the middle of a five-pointed star. Defendants used in the same way the number "142" within a sun-burst. A motion for an injunction was refused, on the ground that no one of ordinary intelli-

gence could mistake the one device for the other.

In *Glen, etc., Mfg. Co. v. Hall*, 6 Lans. (N. Y.) 158; 61 N. Y. 226; 19 Am. Rep. 278, the defendant was the assignee of the owner of a manufacturing establishment known as "Number 10 South Water Street." Plaintiff took a shop near by, and painted the same number on it, and on its bills and signs. It was held by a divided court, that defendant was entitled to relief, and a perpetual injunction was granted against plaintiff to restrain him from using "Number 10" as a part of his trade-mark, or in association with the words "South Water Street." In *Ex p. Dawes*, 1 Pat. Off. Gaz. 27, applicants sought to register the number "140" as a trade-mark for umbrellas. It was held a valid trade-mark within the *United States* statute of 1870. The court said: "It is an arbitrary combination of numerals, having, as used, no other meaning than to distinguish the applicant's goods in the market, and indicate to purchasers that all umbrellas bearing this mark have one and the same origin."

In *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270, plaintiffs, manufacturers of teaspoons, sold them in packages, with labels attached bearing the names of the plaintiffs, certain numbers arbitrarily chosen to indicate different classes of their own spoons, and certain other peculiarities. It was held that these labels constituted legal trade-marks. The court said: "It may be difficult to give to bare numbers the effect of indicating origin or ownership; and it may be still more difficult to show that they were originally designed for that purpose; but if it be once shown that that was the original design, and that they have had that effect, it may not be easy to assign a reason why they should not receive the same protection, as trade-marks, as any other symbol or device."

In *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; 48 N. Y. 374; 8 Am. Rep. 553, the plaintiff made and stamped his pens "Joseph Gillott Extra Fine, 303;" defendants sold other pens with similar stamps, only replacing "Joseph Gillott" by "Esterbrook & Co." An injunction was granted to restrain defendants from using the figures "303." The court said: "These symbols or figures do not of themselves indicate any appropriate name of this pen, nor any mode or process by which it is

manufactured. They do not indicate the quality of the pen, but, connected as they are with the plaintiff's name, they indicate the origin and ownership of the pen, and were intended by him, with the addition of the words 'extra fine,' impressed thereon, also to designate the pattern of this pen as distinguished from other pens of his manufacture represented by other numerals, and also to distinguish it as the pen of his manufacture."

In *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125, plaintiff, a manufacturer of plows, used, among other things, certain combinations of letters and figures to designate the various sizes, forms, etc., of their make. It was held that they denoted quality, and were not valid trade-marks. The court, by Breese, J., said: "The case of *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, is said to be the leading American case on the question of trade-marks, and in that it was held that although, by the long continued use of certain words, letters, marks, or symbols, which do not, of themselves, and were not designed to indicate the origin or ownership of the goods to which they are affixed, the goods so marked, and because so marked, have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used, as denoting the name of the thing, or its general or relative quality, or take from others the right to employ them in the same sense."

In *Gillott v. Kettle*, 3 Duer (N. Y.) 624, plaintiff made and sold pens put up in boxes, marked respectively "303" and "753," the latter denoting the inferior, the former, the superior quality. Defendant removed labels from boxes containing the inferior pens, replacing them with labels, imitated from the plaintiffs, and putting thereon the number "303." An injunction was granted to restrain defendant from so doing.

In *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161, plaintiffs marked their plowshares with the words, "Ransome's Patent," the letters "H. H.," and the number "6," denoting size. The combination "H. H. 6," was held to be a valid trade-mark, and an injunction was granted.

The distinction between the English and American cases concerning numerals as trade-marks, is not very decided. On the whole, the English courts may be said to be more cautious

5. **Letters.**—Letters may be sustained as a valid trade-mark, on the same principle as numerals, where they are arbitrarily selected, or where they stand for the name of the manufacturer or vendor of goods, and are not used, and were not intended to be used, to indicate quality or grade. This rule is subject to the condition that letters are common property and cannot be exclusively appropriated by any one so as to prevent their use in a usual and legitimate way by others, as, for example, to designate the name of another manufacturer of different name, but the same initials. Even this rule is subject to the same qualification which applies to persons of the same name; that a person will not be permitted to so use his own name as to deceive the public and defraud a rival trader.¹

in allowing their use than the American. No case appears to be reported in which they have admitted a numeral standing alone to be a technical trade-mark, although they have upheld their validity when used in connection with other devices, and have interfered to prevent infringement on the ground of unfair competition. *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161.

In *America*, it has been held that a mere numeral, standing without the name of the manufacturer, is entitled to protection. *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. Cas. (N. Y.) 17.

In *England*, by the Patents Act of 1883, numerals can be registered as a part of a new mark, only when combined with some essential particular, while in *America*, a numeral standing alone may be registered. *Ex p. Dawes*, 1 Pat. Off. Gaz. 27.

1. The letters "L L," being used in the trade to denote the quality of cotton sheetings, do not constitute a good trade-mark. Fuller, C. J., said: "Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. Rep. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as tech-

nically a trade-mark." *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

The letters "G. F.," as applied to velvet ribbons, constitute a valid trade-mark. *Geron v. Gartner*, 47 Fed. Rep. 467.

The letters "N. S.," used to designate a manufacture of cigars, are indicative of the origin and ownership, and have been held a valid trade-mark. *Frank v. Sleeper*, 150 Mass. 583.

The letters "L L," used to designate cotton sheetings, being indicative of grade, class and quality in the trade, do not constitute a valid trade-mark. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776.

In *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707, Coxe, J., said: "A careful examination of the authorities cited by the learned counsel for the defendants, leads to the conclusion that where the courts have refused protection to alleged trade-marks composed of letters or numerals, it has been because, on the facts of each case, it was determined that the figures or letters were intended solely to indicate quality, etc., and not because figures and letters in arbitrary combination are incapable of being used as trade-marks. It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3 and 4, or the letters A, B, C and D, to distinguish the first, second, third and fourth quality of his goods, respectively. Why? Because the general signification and common use of these letters and figures are such, that no man is permitted to assign a personal and private meaning to that which has by long usage and universal acceptance acquired a public and generic meaning."

The letters "A. C. A.," being used to

6. Name of Inventor or Maker—*a*. IN GENERAL.—The name of an inventor or maker is the best guaranty of the genuineness of the goods which bear the name, and will, as a general rule, be protected as an exclusive trade-mark, if used in a way which is free from misrepresentation or fraud.

The inventor or first maker of an article, who gives his name to the article of his invention or manufacture, can cause the article to become so associated with his business and manufacture as to cause his name in time to cease to indicate him as the manufacturer of the goods, and his peculiar personal skill and character, and come to mean the goods made at a particular factory; or, if the process of manufacture involves any particular method or care and skill in selection and manipulation, the character and quality of the goods themselves. When this is the case, a proper name which has in this manner become attached to goods may, without

denote the quality of a ticking, are not a valid trade-mark. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55. See also *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

The letters "A. G.," used as a label for Julienne, constitute a valid trade-mark. *Godillot v. Harris*, 81 N. Y. 263.

The letters "IXL," as applied to a general merchandise auction store, do not constitute a valid trade-mark. *Lichenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592.

The letters "M & C," together with a star, all inclosed in a circular ring, used to designate the make of a wine, have been held a valid trade-mark. *Moet v. Pickering*, 6 Ch. Div. 770; Appeal reported in 3 Ch. Div. 372.

The letters "A A A" and a maltese cross stamped on barrels of whisky, constitute a good trade-mark. *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392.

The letters and numerals, "A No. 1," "A X No. 1," "No. 1," "No. 3," and "B No. 1," as applied to plows for the purpose of designating the size, shape and quality of the different plows, are not good trade-marks. *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125.

The letter "K," as a mark for silicas, not indicative of the origin or ownership of the goods, is not a valid trade-mark. *Ferguson v. Davol Mills*, 2 Brews. (Pa.) 314.

In *Bury v. Bedford*, 4 De G. J. & S. 352, the mark in question consisted of the figure of a lion couchant, surmounted by crossed arrows within four initial letters, "J. O. B. S.," with the

spaces formed by the arrows, which were to be read as signifying John Bedford, Oughtinbridge and Sheffield. It was used on steel. It was held to be a valid trade-mark.

The letters "B. B. H.," surmounted by a crown, the letters being initials of the partnership firm, and applied to iron manufactured, constitute a valid trade-mark. *Hall v. Barrows*, 4 De G. J. & S. 150. See also *Barrows v. Pellsall Coal, etc., Co.*, decided Jan. 11th, 1877, per Hall, V. C., and *in re Barrows*, 5 Ch. Div. 364.

The letters "C. B." and a cross, used to designate a brand of cotton for embroidery, have been held a valid trade-mark. *Cartier v. Carlile*, 8 Jur. N. S. 183.

The letters "A. C. A.," being used to denote the quality of tickings, do not constitute a valid trade-mark. *Duer, J.*, said: "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

The letters "J. H.," used as a mark on

incurring the charge of misrepresentation, be used by the successors in business or assigns of the original inventor or maker, and will be protected in their hands; but this rule is subject to the qualification that other persons of the same name cannot be enjoined from employing their own name in an honest and legitimate manner upon goods of their own manufacture or selection, provided that, in doing so, they do not so use their own name as to practice a fraud upon their rival or deceive the public.¹

manufactured steel, constitute a valid trade-mark. *Millington v. Fox*, 3 Myl. & C. 338.

The letters "M. C.," used to designate a brand of tin plates, do not constitute a valid trade-mark. *Motley v. Dawnman*, 3 Myl. & C. 1.

In *Ransome v. Bentall*, 3 L. J. Ch. N. S. 161, the combination "H. H. 6," the numeral 6 being used only to denote the size of plowshares, was held a valid trade-mark.

1. Hohner is a well-known maker of harmonicas in *Württemberg*, most of which are sold under his name in this country. Leiterd made harmonicas in *Saxony*, and put upon them his own name, partly in monogram, with the word "Mach," and the words "Improved Hohner" in larger and plainer letters, and sold them through an agent. An injunction was granted and an accounting ordered. *Hohner v. Gratz*, 52 Fed. Rep. 871.

In *Foster v. Webster Plano Co.* (Supreme Ct.), 13 N. Y. Supp. 338, an action was brought by William Foster as substituted trustee, etc., of the last will and testament of Albert Weber, deceased, whose trade-mark was "Weber, New York," against the defendants, asking for an injunction restraining them from putting on their pianos "Webster, New York." It was held that the defendant's trade-mark was not likely to deceive, and the injunction was refused.

In *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, the defendant declared in his invoices, price lists, etc., that his machines were made on the "Singer System;" he also put on some machines a label with the words "Singer Machines." An injunction was granted as to the label, but refused as to the invoices, price lists, etc., on the ground that they were not calculated to deceive by representing the defendant's machine to have been manufactured by the plaintiffs. See also *Singer Mfg. Co. v. Loog*, 18 Ch. Div. 395;

Singer Mfg. Co. v. Wilson, 3 App. Cas. 376; *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434; *Singer v. Spence*, T. M. Rec. Sept.

In *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756, various members of a family were entitled to manufacture and sell "Old Dr. Marshall's Celebrated Liniment," by permission of their father, the original manufacturer. The wife succeeded to the business of her husband and sold out to one of the sons, who sought to restrain the other children. It was held that the son had no exclusive right as against the others, or their assigns.

In *McLean v. Fleming*, 96 U. S. 245, the court held that Fleming, having acquired the right to manufacture "Dr. McLean's Liver Pills," was entitled to restrain McLean from manufacturing and selling "Dr. McLean's Universal Liver Pills." Clifford, J., said: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled."

Carmichael & Co., being the successors by purchase of *Stillman & Co.*, woolen manufacturers, continued to use "Stillman & Co." as a trade-mark on their goods. *Latimer, Stillman & Co.*, the lessees of a mill formerly used by *Stillman & Co.*, known both as the "Stillman Mill" and as the "Seventh Day Mill," used "Stillman Mills" as a trade-mark. An injunction was refused as to the word "Stillman," on the ground that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended. *Carmichael v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481.

In *Schweitzer v. Atkins*, 19 L. T. N. S. 6, the plaintiff was selling an article

b. PERSONS OF THE SAME NAME.—Every man has an inherent right to use his own name upon his own goods to indicate their origin and ownership, and also to guarantee their character and quality; but the use of a man's name must be strictly confined to this purpose. He must use his name so as to indicate that the goods bearing it are his own goods and not those of another; and where one manufacturer or trader has established an extensive trade for an article of his make or selection, and employed his name as a trade-mark therefor, it behooves other traders having the same name, who subsequently go into competition with him, to so use the name as to avoid so far as possible all danger of deception of the public, or the sale of their goods as and for the goods of the trader who has first used the proper name upon his goods. This is a question of frequent occurrence, and it is believed that the tendency of the courts is to protect the industrious and successful manufacturer or vendor in all the fruits of his labor and industry, and to require that the rival of the same name who follows in his footsteps, shall exercise unusual care in the use of his own name to prevent injury to the one who has first used the name and established its reputation.¹

called "Schweitzer's Cocomatina." The defendant began selling "Otto Schweitzer Atkins & Co.'s Cocomatina." An injunction was granted.

In *Howe v. Howe Machine Co.*, 50 Barb. (N. Y.) 236, it was held that the plaintiff had a right to adopt and appropriate his surname as a trade-mark; and that Elias Howe, Jr., though his surname was the same, had no right to use his own name in such a way as to deceive the public, and deprive the plaintiff of the benefit of the notoriety and market which his machine had gained.

The name of an inventor, discoverer, or manufacturer may be employed as part of a trade-mark, and hence the words, "Dr. J. M. Lindsey's Improved Blood Searcher," have been held to be a valid trade-mark. *Fulton v. Sellers*, 4 Brews. (Pa.) 42.

In *Ainsworth v. Walmsley*, 1 Eq. Cas. 518, Wood, V. C., said: "Is not a man's name as strong an instance of a trade-mark as can be suggested, subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name. But there is no evidence before me that any other person than the plaintiff has ever been heard of as manufacturing Ainsworth's thread; and therefore, 'Ainsworth's Thread' is as good a

mark as 'Anchor Thread,' 'Lion Thread,' or any other which may be described by a particular name."

In *Samuel v. Berger*, 24 Barb. (N. Y.) 163, a watchmaker named Brindle had acquired a reputation as such, and all his watches were stamped with his name. Plaintiff, having acquired the right to stamp the name of "Brindle" on watches of his own make, sought to restrain the defendant from selling watches which he had on hand, manufactured by Brindle and stamped with his name, and which were the genuine articles. The injunction was refused.

Crowley was a manufacturer of steel, and used his name as a trade-mark. Millington, the grandfather of the plaintiff, succeeded to the business and used Crowley's name and his own as trade-marks. The plaintiff had the right to use the trade names, and the defendants having used the plaintiff's trade-marks, an injunction was granted. *Millington v. Fox*, 3 Myl. & C. 338.

1. In *Brown Chemical Company v. Meyer*, 139 U. S. 540, it was held that the plaintiff or corporation organized under the laws of the State of *Maryland*, and the manufacturer of "Brown's Iron Tonic," could not restrain the defendants, successors in business of one Brown, who manufactured "Brown's Iron Tonic," when there was no evidence to show an intention to palm off their preparation as that of the plaintiff,

as they have a perfect right to such use in the absence of such evidence.

In *El Modelos Cigar Mfg. Co. v. Gato*, 25 Fla. 886, the complainant manufactured cigars and marked them with his name, "E. H. Gato." The defendant company had a person in their company, who was the junior member, named "G. H. Gats," and they stamped his name on their boxes of cigars. It was done to palm off their goods as the complainant's, and an injunction was granted.

In *Turton v. Turton*, 42 Ch. Div. 128, the plaintiffs had for many years carried on the business of steel manufacturers under the name of "Thomas Turton & Sons." The defendant, John Turton, had for many years carried on a similar business in the same town, at first as John Turton, then as John Turton & Co. In 1888, he took his two sons into partnership and carried on the same business as "John Turton & Sons." There was no evidence that the defendant imitated the trade-marks or labels of the plaintiffs, or otherwise attempted to deceive the public. It was held that, although there was a probability that the public would be excessively misled by the similarity of the names, the plaintiffs were not entitled to an injunction restraining the defendants from using the name of "John Turton & Sons."

In *Jennings v. Johnson*, 37 Fed. Rep. 364, the plaintiff was entitled to manufacture "Johnson's Anodyne Liniment," which had been manufactured and sold for over fifty years, put up in certain sized bottles, etc., and with also a facsimile of the name of A. Johnson. Defendant's article was called "Johnson's Anodyne Liniment," and appeared in the same sized bottles, etc., but bore the name of "F. E. Johnson." There was evidence of actual deception. The defendant was restrained.

In *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527, the complainant corporation, having procured the right from William Rogers, Sr., who had a great reputation as a silverware manufacturer, to manufacture and stamp his name on silverware, asked for an injunction to restrain the defendant corporation from using the same name, "William Rogers," on their silverware, the defendant corporation having procured the right from William Rogers, Jr., whose reputation was also valuable. An injunction was refused, as the statements were not made with a fraudulent

intent to mislead the public into the belief that the goods so advertised were those of the plaintiff. See also *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

In *Landreth v. Landreth*, 22 Fed. Rep. 41, the complainant sold peas called "Landreth's Extra Early Peas." The defendant sold peas called by the same name, which was done to deceive. An injunction was granted. The court said: "Even admitting that the defendant has the right to use the same words as those which constitute the complainant's label, he has no right to use them in such form or such style of arrangement, as to lead the public to suppose that the (goods) . . . contained in his bags are . . . grown and sold by the complainant."

In *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194, the plaintiff, being a manufacturer of wagons, used as a trade-mark, "Shaver Wagon, Eldora," which was painted on the sides of all his wagons. The defendant having painted the same on his wagons, an injunction was granted against him.

Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle." His executors continued the business. Shortly after his death, a company was formed by other persons under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a one-shilling share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle." James, L. J., said: "I am, therefore, of opinion, that in this case what the defendant company have done has been calculated to deceive, and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had attained the great reputation which Thorley's manufacture appears to have obtained." *Masam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748; 6 Ch. Div. 574. After commenting on *James v. James*, L. R., 13 Eq. Cas. 421, cited *infra*, this note, the judge refuses to be bound by it.

Devlin and others were engaged in

the clothing business and under the name of "Devlin & Co." The defendant was engaged in the same business, and was enjoined from using the sign to deceive. *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173.

In *England v. New York Publishing Co.*, 8 Daly (N. Y.) 375, the plaintiff had his name changed from Henry Carter to Frank Leslie, and published various newspapers under titles of which the words "Frank Leslie's" formed, in each instance, a part. The defendant's name is Frank Leslie and he is a son of the plaintiff. He organized a corporation under the name of the New York Publishing Co., commenced the publication of a paper, entitled "Frank Leslie, Junior's, Sporting and Dramatic Times." An injunction against defendant was refused, because he was entitled to use the name Frank Leslie.

In *Prince Metallic Paint Co. v. Carbon Metallic Paint Co.*, Codd. Dig. of Trade-Marks 209, the plaintiffs were manufacturers of paint and used as a trade-mark "Prince's Metallic Paint." The defendants were brothers, who manufactured and sold a paint marked "Prince Bros. Iron Ore Paint." An injunction was refused; but see opinion of the court of appeals, N. Y. 1893.

In *Gilman v. Hunnewell*, 122 Mass. 139, the plaintiffs, as assignees of John L. Hunnewell, manufactured certain medicines called "Hunnewell's Electric Pills," etc. The defendants, Edwin Hunnewell and another, manufactured similar medicines, called "Hunnewell's Family Pills," etc., etc. There being no proof of fraud on the part of the defendants, or any representation that the medicines made by them were manufactured by the plaintiffs, an injunction was refused.

In *Decker v. Decker*, 52 How. Pr. (N. Y. Supreme Ct.) 218, the plaintiffs were manufacturers of pianofortes, under the firm name of "Decker Bros." The defendants were also manufacturers of pianofortes and called theirs the "Decker" piano. A motion for an injunction by plaintiffs was refused on the ground that the name was not employed by defendants for the purpose of deception, or with a view to mislead the public or injure the plaintiff.

In *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489, the plaintiffs were manufacturers of bells at Troy, New York, and stamped upon them "Meneely's, West Troy, N. Y." The

defendants, Meneely and Kimberly, entered into a partnership under the name of "Meneely & Kimberly" for manufacturing bells at Troy, and stamped upon them "Meneely & Kimberly, Troy, N. Y." An injunction against defendants was refused. Rapallo, J., said: "Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, providing he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the courts will not interfere. A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business."

Lieutenant James had invented a horse blister known as "Lieutenant James' Horse Blister." It was manufactured by himself and he conveyed it to persons in trust for some members of his family. Another person of the name of James, a member of the family, made it after the death of Lieutenant James and sold it under the same name. It was held by the master of the rolls, Lord Romilly, that although that could not be done during the lifetime of Lieutenant James, it could be done after his death. *James v. James*, L. R., 13 Eq. Cas. 421. See the opinion of Lord Justice James in *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748, cited *supra*, this note, where he repudiates the doctrine laid down above.

In *Faber v. Faber*, 49 Barb. (N. Y.) 357, the complainant was the manufacturer of the "A. W. Faber" lead pencil; the defendant, of the "Faber" lead pencil. The relief asked was refused, as each had a perfect right to use his own name in his business, and any injury which the plaintiff had suffered, or might suffer, by such use of the defendant Faber's name merely, must be received as *damnum absque injuria*.

In *Clark v. Clark*, 25 Barb. (N. Y.) 76, the plaintiffs were manufacturers of "Clark's" spool cotton, and on the spools were four concentric circles; the defendant was also the manufacturer of cotton called by his own name, "Clark," and he also used the concentric circles on the end of the spool. It was held

c. FRAUDULENT USE OF A COMPETITOR'S NAME.—Almost any unauthorized use of the name of a rival, will be enjoined. An employé, on leaving a former employer and setting up the same business for himself, will not be permitted to state that he was formerly with his employer, unless authorized to do so, or unless he makes the statement in his publications in such a manner as to avoid all danger of deceiving the public or causing them to fall into the belief, when purchasing from, or employing, him, that they are purchasing from, or employing, his former employer.¹

that the defendant had a perfect right to use his own name, but he should change the concentric circles and the colors.

In *Taylor v. Taylor*, 23 Eng. L. & Eq. 281, the plaintiffs were manufacturers of thread which was marked "Taylor's Persian Thread." The defendant began to mark his thread "Taylor's Persian Thread," and otherwise to imitate the plaintiffs' trade-mark. An injunction was granted.

In *Holloway v. Holloway*, 13 Beav. 209, the plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant, Henry Holloway, commenced selling pills as "H. Holloway's Pills," put in boxes, etc., similar to the plaintiffs', and with a view of passing off his pills as the plaintiffs'. He was restrained by an injunction.

In *Croft v. Day*, 7 Beav. 84, Day, who was the original manufacturer of Day & Martin's Blacking, having died, his executors continued the business. A nephew of Day, named Day, having obtained the authority of one Martin to use his name, sold blacking as of the manufacture of Day & Martin, in bottles, and with labels having a general resemblance to those of the original firm. In granting an injunction against the defendant, Lord Langdale said: "He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

1. *Fullwood v. Fullwood*, 9 Ch. Div. 176. In *Ward v. Ward* (Supreme Ct.), 15 N. Y. Supp. 913, the defendant withdrew from the firm of Marcus Ward & Co., Limited, which was engaged in the

manufacture of linen paper, and established the firm of Wm. H. Ward & Co., engaged in the same business. An action was brought to enjoin defendants from placing the words "Marcus Ward's Son" on their goods, and the expression "Late of the firm of Marcus Ward & Co." on their signs, bill heads, etc. The facts being that defendant was a son of Marcus Ward, and that he was lately a member of the firm named. It was held that plaintiff was not entitled to an injunction.

In *Devee v. Mason*, W. N. 1877, p. 23, the plaintiffs had acquired the right to place the name of "Brand & Co.," on all packets of beef essence. The defendant, one Mason, who had been in the employ of the plaintiff, left and started in business with one Brand, under the name of "Brand & Mason." When proceedings were taken against the defendant he changed the firm name to "Mason & Brand," and shortly afterward Brand refused to stay in the business. It was held that during the continuance of the partnership it was impossible to prohibit entirely the use of the latter's name in business, but not after the retirement of Brand; and defendant, who had an agent in the same street as plaintiff's store, and had over the shop "Agent for Mason & Brand's Essence of Beef," the word agent, being in small letters, and the other being in large letters, was calculated to deceive.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or in any way connected with it. It was accordingly held that the defendant Pottage, who set up a shop only a few doors from the plaintiffs' shop, and printed over the door the words, "S. Pottage, from

Hookham and Pottage," would be restrained as this course was calculated to deceive the public. *Hookham v. Pottage*, 8 Ch. App. 91.

In *Wolfe v. Barnett*, 24 La. Ann. 97, the plaintiff manufactured his gin in *Holland* and called it "Wolfe's Aromatic Schiedam Schnapps." The defendant manufactured and sold an inferior grade of gin and called it by the same name. An injunction was granted. To the same effect is *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204.

In *Stonebraker v. Stonebraker*, 33 Md. 252, the complainant, Henry Stonebraker, was the manufacturer of various medicines and used certain labels and trade-marks, his name, "Stonebraker," prefacing the name of the medicine. The defendants thereupon fraudulently enjoyed the manufacture of medicines and marked their goods with labels and trade-marks similar to the complainant, they having gotten a brother of the complainant, named Dr. A. S. Stonebraker, to go in partnership in order to use his name. An injunction was granted.

In *Lee v. Haley*, 5 Ch. App. 155, the plaintiffs were the proprietors of "The Guinea Coal Company, at No. 22 Pall Mall." The defendant, who had been their manager, set up a rival business under the name of "The Pall Mall Guinea Coal Company." The court said: "It is a fraud on the part of the defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

Robert Scott and Walter Scott carried on business at Nithsdale Mills, Dumfries, and also at Glasshouse Street, in partnership, under the firm name of R. and W. Scott. By agreement of dissolution, neither party was to use the name of the firm except so far as might be necessary in winding up the affairs. R. Scott made over his business at Nithsdale and Glasshouse Street to the defendants, who at their premises at Glasshouse Street, made use of the inscription, "Scott and Nixon, late R. and W. Scott of N." An injunction was granted restraining them from using that inscription, inasmuch as it amounted to the business of the late firm. *Scott v. Scott*, 16 L. T. N. S. 143.

In *Bininger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206, the plaintiff sold gin called "Bininger's Old London Dock

Gin." The defendants appropriated the plaintiff's name, and also a style of bottle and label resembling the plaintiff's. It was held that their so doing was calculated to deceive and mislead the public, and an injunction was granted.

In *Williams v. Osborne*, 13 L. T. N. S. 498, the defendants, Osborne, Bauer and Cheeseman, had all been employed in different capacities by Robert Hendrie in his business of manufacturing perfumery, and after Hendrie's death they established a business of their own under the style of "Osborne, Bauer and Cheeseman," and printed in large letters over the window of the shop, "Osborne, Bauer and Cheeseman, from the late R. Hendrie." The court held that there was no deception, and an injunction was refused.

In *Southern v. Reynolds*, 12 L. T. N. S. 575, the plaintiff was the manufacturer of pipes called "Southern's Broseley Pipes." The defendant procured a person by the name of Southern from Broseley to make pipes, and stamped on his goods "Reynolds' purified clay pipes, made by Southern from Broseley." An injunction was granted to restrain defendant from imitating the trade-mark of the plaintiff.

Peterson and Humphrey were in business in Broadway and failed. Each afterwards went into business on his own account, Humphrey at the former store in Broadway, and Peterson in Canal street. Before the failure there was a broad sign over the door, "Peterson & Humphrey," and also one over the second story of the store. Humphrey having refused to remove the signs, an injunction was applied for. Just before the injunction was applied for, the defendant had painted on the sign above the door, "Humphrey & Co.," and the word "formerly," so as to read "Humphrey & Co., formerly Peterson & Humphrey." An injunction was granted against the use of the sign over the second story, but not against the one over the door. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394.

Shrimpton and Hooper were inventors and manufacturers of needles; and had marked on their packages "Shrimpton and Hooper." Laight, the defendant, was given the privilege by one David Shrimpton Turvey, of using his name; he abridged the name and placed on his packages, "Shrimpton Turvey." An injunction was granted. *Shrimpton v. Laight*, 18 Beav. 164.

d. AGREEMENT BY ONE PERSON TO PERMIT ANOTHER TO USE HIS NAME.—An agreement by one person to permit another person to use his name will be upheld, provided it is made in good faith, and the name is used without fraudulent intention or deception of the public. The usual cases in which this has occurred are those where a manufacturer or vendor has sold out his factory or place of business and his business, and has at the same time sold the right to use his name as a trade-mark upon the goods manufactured. If the contract also specifies that the person selling the right to use his name shall not engage in the same business subsequently and use his name upon his goods, such a contract would be sustained to the extent of enjoining the bearer of the name from using his own name upon goods of the same class of his own manufacture. But the contract would be strictly construed.¹

Where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the court would not restrain his son from selling a similar article under that name, no fraud being proved; but he was restrained from continuing the use of the words, "late of 107, Strand," and from continuing on the sides of his shop door the plate with the words, "Burgess's Fish Sauce Warehouse, late of 107, Strand." *Burgess v. Burgess*, 3 De G. M. & G. 896.

Lundy, Foot & Co. were manufacturers of snuffs, and the defendant, A. Lea, was a workman in their employ. Lea left and started in the same business, placing as a showboard over his door, "A. Lea, late of Lundy, Foot & Co.," and also using labels on his canisters, etc., much resembling the plaintiffs'. An injunction was refused. *Foot v. Lea*, 13 Ir. Eq. 484.

In *Clark v. Freeman*, 11 Beav. 112, the plaintiff, Sir James Clark, was a very eminent physician, practicing in London, and physician in ordinary to Her Majesty. He had devoted especial attention to the treatment of consumptive diseases. The defendant, Freeman, a chemist and druggist in the neighborhood of London, had recently been offering for sale and extensively advertising certain pills, which he called "Sir J. Clark's Consumption Pills." An injunction was refused by the master of the rolls, Lord Langdale.

In *Rogers v. Nowill*, 5 C. B. 109; 57 E. C. L. 111, the plaintiffs were manufacturers of cutlery, and used their name as a trade-mark. The defendants manufactured and sold cutlery with the plaintiff's trade-mark printed on their

goods. It was held that an action on the case would lie against the defendants.

1. *Probasco and Oakes* manufactured and sold candies under the name of "Oakes' Candies." Oakes sold out to Probasco, including in the bill of sale the right to use his name. He then entered the employ of Probasco, and continued therein for several years, superintending the making of the candies, during which time Probasco devised and used a trade-mark consisting of two oak trees, with the words "Oakes' Candies" printed across them. Oakes subsequently quit Probasco's service, and several years later the latter sold the business, together with the right to use the trade-mark. Peter Oakes applied for an injunction, but was refused, as defendants had the right to use the name, having acquired it by legal transfer from their predecessors. *Oakes v. Tonsmierre*, 49 Fed. Rep. 447.

The property of Fish Bros., wagon manufacturers, passed by successive changes until it was known as the Fish Bros. Wagon Company. The Fish brothers remained in the business and became directors and officers of the new company. During all this time the products were advertised under the trade-marks, "Fish Bros.," "Fish Wagons," etc. Several years after the organization of the company, the Fish brothers withdrew therefrom, and set up on their own account, under the firm of Fish Bros. & Co. In an action by the corporation against Fish Bros. & Co., it was held that the plaintiff owned the good-will of the business, including the right to use the Fish trade-marks.

2. CORPORATION NAMES.—Corporations, being artificial legal entities, having no other personality than that created by their organization, the whole identity of the corporation resides in its name. It is that by which it exists. The names of corporations, as a general rule, are peculiar and somewhat arbitrary, and there is no necessity for one corporation adopting the same name as another. To do so, therefore, is generally a strong indication of an intention to defraud the first user of the name, and gives rise to a great danger of deception of the public. The remedy for such a condition of affairs is so easy that the courts will not often hesitate to require a corporation to change its name, if it is too much like that of a rival who complains. This rule, however, is subject to the limitation that even a corporation in its corporate name cannot so monopolize the name of a common article, such as

Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546.

Jones having succeeded to the business of Nathan Winslow, who was in the canning business and used as a trade-mark "Winslow's Green Corn," and other marks, sold his manufacturing establishment, good-will, trade-marks, etc., to the use of which Symonds and another eventually became entitled. Jones subsequently engaged in the same business and commenced using the same trade-mark. He was restrained by injunction. *Symonds v. Jones*, 82 Me. 302.

Where one Le Page sells his right to manufacture and sell "Le Page's Liquid Glue," and then commences a new business and manufactures "Le Page's Improved Liquid Glue," he will be restrained by injunction. *Russia Cement Co. v. Le Page*, 147 Mass. 206. See also *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941.

Frazer was the manufacturer of an axle grease called "Frazer's Axle Grease." He sold his business and the right to use his name to others, who incorporated a company called "The Lubricator Company." Frazer soon after made a new grease and took out a patent on it, and called it "Superior Axle Grease," made by Frazer & Co. An injunction was granted restraining him, etc. *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147.

In *Sawyer v. Kellogg*, 7 Fed. Rep. 720, the complainant was the manufacturer of blueing, and used as a label "Sawyer's Crystal Blue and Safety Box." The defendant, Kellogg, manufactured a similar article and used as a label, "Sawin's Soluble Blue and Pep-

per Box," having hired from a man named Sawin the right to use his name. An injunction was granted.

In *Kidd v. Johnson*, 100 U. S. 617, the appellee, having purchased the trade-mark "S. N. Pike's Magnolia Whiskey," was held entitled to restrain others from using the same.

Three brothers by the name of Rogers became associated with the petitioners in the manufacture of plated spoons and forks, using as their trade-mark "1847, Rogers Bros. A 1." The respondent, Parker, acquired the right from other persons named Rogers, to stamp that name on plated spoons and forks manufactured by himself and them, and stamped the goods so manufactured "C. Rogers Bro. A 1" and "C. Rogers & Bros. A 1." It was held that the petitioners were entitled to an injunction restraining the further use of the respondents' marks, as they were calculated to deceive. *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 114.

Hallett sold the use of his name to Cumston, and Cumston manufactured pianofortes marked "Hallett & Cumston." On Cumston's death, his son continued to manufacture pianofortes with the same mark. Hallett forbade him to use his name, and Cumston's son replied that he had bought from another person named Hallett the right to use his name. It was held that Hallett could not maintain a bill in equity against Cumston's son setting forth these facts, either to restrain the use of "Hallett & Cumston," as an infringement of a trade-mark, or to restrain the use of his name, unless it was shown that the defendant used the name of

Goodyear's India Rubber, as to prevent another company from employing the same words as a part of its name.¹

7. Names of Publications.—The names of publications may be protected as trade-marks,² provided they are to some extent

Hallett with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him. *Hallett v. Cumston*, 110 Mass. 29.

1. In *Koehler v. Sanders*, 122 N. Y. 65, the court held that there could be no exclusive proprietary interest in the use of the words "International Banking Company," which was the firm name of a partnership concern dealing in foreign government bonds, because they were purely descriptive of the business conducted.

In *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, it was held that the words "Goodyear Rubber Company" would not be protected as a corporate name. Field, J., said: "Names which are thus descriptive of a class of goods cannot be exclusively appropriated by anyone. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or sell them."

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, the plaintiff was incorporated in 1871 as the "Celluloid Manufacturing Company." The defendant was incorporated in 1886 by the name of the "Cellonite Manufacturing Company." An injunction was granted against the defendant corporation. Bradley, J., said: "The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainants, is subject to the same rules of law as if it were the name of an unincorporated firm or company." See also *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712.

In *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286, it was held that a corporation, as well as a private individual, is entitled to have its trade-mark, and may sue for its infringement. The words "Insurance Oil" were accordingly held to be a valid trade-mark.

The use of a label, bearing the words

"The Best Brewing Co.," or "The Best Brewing Co.'s Export Beer," may be restrained at the suit of the Philip Best Brewing Company, who uses similar labels. *U. S. v. Roche*, 1 McCrary (U. S.) 385.

"The Rubber Comb and Jewelry Company," although the corporate name of the defendant, is an infringement of the plaintiff's trade-mark, "India Rubber Company," and will be restrained. *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258.

In *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278; 9 Am. Rep. 324, the petitioners were organized under the joint-stock laws of this state, by the name of "Holmes, Booth & Haydens," for the purpose of manufacturing and dealing in brass and other metal goods. Some years afterward a corporation was formed called "The Holmes, Booth & Atwood Mfg. Co.," some of the stockholders of the first having gone into the second. The defendant corporation was restrained from using its name. Carpenter, J., said: "That any name, symbol, or device adopted by an individual, corporation, or business firm, for the purpose of designating the origin and ownership of goods manufactured by them, will be protected as a trade-mark, is well-settled law. The name of a corporation or partnership, accomplishing the same object, will be protected upon the same principle."

The corporate name, "The Oregon Central Railway Company" is a valid trade-mark. *Newby v. Oregon Cent. R. Co.*, Deady (U. S.) 609. Deady, J., saying: "The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. Under the law, the corporate name is a necessary element of the corporation's existence; without it a corporation cannot exist." See *London, etc., Assur. Soc. v. London, etc., L. Ins. Co.*, 11 Jur. 938.

2. In *Munro v. Tousey*, 129 N. Y. 38, Gray, J., said: "The question, then, which we have actually presented, is

whether, by the appropriation and use of the name 'Old Sleuth' to designate his serial publications of detective stories, the plaintiff has acquired a property right in the word 'Sleuth,' which the law will protect against the use of by others in entitling works of fiction. I think we cannot agree with the court below in such a view. There is no proof to support a finding of an intention on the part of the defendant to defraud the plaintiff, or the public, except as it may be inferred by the court from the mere use of the name 'Sleuth.' . . . That the plaintiff would be entitled to the protection of the law against the use by others of the words 'Old Sleuth Library,' as used to describe a series of publications, or against the use of the name 'Old Sleuth, the Detective,' for a work of fiction, may be conceded." It was held, finally, that defendant, the publisher of "New York Detective Library," could not be enjoined at the suit of plaintiff, publisher of "Old Sleuth Library," from selling books containing the word "Sleuth" in their titles.

In *W. J. Johnston Co. v. Electric Age Pub. Co.* (Supreme Ct.), 14 N. Y. Supp. 803, "The Electrical Age," the title of a publication, was held not a sufficient infringement of "The Electrical World" to grant an injunction.

In *Forney v. Engineering News Pub. Co.* (Supreme Ct.), 10 N. Y. Supp. 814; 57 Hun (N. Y.) 588; *Cox's Man. of Trade-Mark Cases* 679, "Engineering News and American Railway Journal" was held to be no infringement of "The Railroad and Engineering Journal," Beach, J., saying: "The principle is that there must be an adaptation of plaintiff's title, either exact or to an extent sufficient to show an appropriation of words producing similitude in the title themselves, or from well-established popular designation."

In *Munro v. Smith*, 55 Hun (N. Y.) 419; 8 N. Y. Supp. 671; *Cox's Man. of Trade-Mark Cases* 711, Van Brunt, P. J., said: "This action was brought to restrain by injunction, the use of a certain picture, as well as the phrase 'Old Sleuth, the Detective,' or the word 'Sleuth.' Upon the trial it was held that the plaintiffs were not entitled to the exclusive use of the name 'Old Sleuth,' and that the defendants were entitled to its use. The court also held that the picture of Old Sleuth upon the first number of the 'Old Sleuth Library,' published by the plaintiff, was a

trade-mark of the plaintiff, and that he had the exclusive right to the use of such picture; and that the acts of the defendants in publishing the said picture constituted an infringement of the plaintiff's trade-mark. . . . The main question presented, then, is: Had the plaintiff a trade-mark in the said picture? . . . We fail to see upon what theory a trade-mark can arise out of the circumstances which are here mentioned. . . . The picture or design which appeared as the frontispiece of the first story published, never was attached to any other book or story, but in all instances was used as a frontispiece for the same book or story, and seems only to have been an illustration of that particular story. It never was used in connection with the subsequent numbers of the said library or any other stories, except, as has already been stated, in pictorial illustrations, in which this same character appeared in connection with different characters, objects and scenes. . . . We cannot see that upon any principle which governs the rights of parties to trade-marks the plaintiff can establish a trade-mark in illustrations in a book or story which he publishes. That must be protected by copyright, if at all."

In *Borthwick v. Evening Post*, 37 Ch. Div. 449, it was held that the "Evening Post," was not a sufficient infringement of "The Morning Post," to entitle plaintiffs to an injunction.

In *Estes v. Leslie*, 29 Fed. Rep. 91; 182 P. & S., it was held that "Chatter Book" was an imitation and infringement of "Chatter Box," both books being gotten up in the same style and both juvenile publications. See also *Estes v. Leslie*, 27 Fed. Rep. 22; *Estes v. Williams*, 21 Fed. Rep. 189; 139 P. & S.; and *Estes v. Worthington*, 31 Fed. Rep. 154.

In *Duniway Pub. Co. v. Northwest Printing, etc., Co.*, 11 Oregon 322, it was held that the title "The Northwest News" was no piracy of the title "The New Northwest." No fraud was alleged. Waldo, J., said: "But in such case (*i. e.*, absence of fraud), the title of the defendant's paper must so closely simulate that of the plaintiff's that an infringement may be declared by the court as matter of law, or else the simulation must be proven as a fact."

In *Potter v. McPherson*, 21 Hun (N. Y.) 559; 62 P. & S., "Independent National System of Penmanship" was held to be an infringement of "Payson,

Dunton, and Scribner's National System of Penmanship." Daniels, J., said: "In order to render it necessary that a publication or imitation of this nature should be restrained, it is sufficient that persons who may desire to purchase the plaintiffs' publication, might very well accept that of the defendants, supposing and believing it to be the same. That the difference might be readily detected by a comparison of one book with the other, is not sufficient to allow the defendants to appropriate and use the plaintiffs' title. If, in its use, persons under ordinary circumstances, desiring to purchase one, would receive the other in its place, believing that they had obtained the work intended to be bought, that will not only justify, but require the court to interfere, for the purpose of preventing the use of the plaintiffs' title."

In *Robinson v. Berry*, 50 Md. 591, Miller, J., said: "A publisher or author has, either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may, like a trader, claim the protection of a court of equity against such a use or imitation of the name, marks, or designation, as is likely, in the opinion of the court, to be a cause of damage to him in respect of that property."

In *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402; *Cox's Man. of Trade-Mark Cases* 503, following *Snowden v. Noah*, *Hopk. Ch.* (N. Y.) 347; 14 Am. Rep. 547, it was held that "The Grocer" was no infringement of "The American Grocer." But see *American Grocer Pub. Co. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398, where Brady, J., said: "The recent determinations of the court of appeals seem to place the right to protection upon the infringement of the proprietary right acquired by the use of a symbol, or figure, or letter, or other form of device or name. . . . And in the more recent case of *Hier v. Abrahams* (82 N. Y. 524), the court said: 'But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it in any style of print, or on any form of label, and its use by another in any form is unlawful.' Speaking of some recent French cases, the judge continued: 'It was held that the title of a journal is property. . . . The

judgment declares that the title of a journal is the exclusive property of its founder, and to give to a new journal the title already belonging to another would be a usurpation of property. . . . In the *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, it was said: 'The name of a newspaper is a trade-mark, as much so, as a label stamped upon a bale of muslin.' See also *Cox's Man. of Trade-Mark Cases* 679."

In *Talcott v. Moore*, 6 Hun (N. Y.) 106; *Cox's Man. of Trade-Mark Cases* 478, it was held that "The Red and White Book" was too dissimilar from "The Title Red Book, New Scenes 1875" to grant an injunction, even when there was an apparent attempt to deceive. Daniels, J., said: "The points of difference are so prominent and striking, as at once to produce the impression that both the medicines and the books are different productions. . . . The rule upon this subject is practically the same as that applied for the protection of trade-marks, where, in order to maintain an action for an injunction, it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived."

In *Stephens v. De Conto*, 4 Abb. Pr. N. S. (N. Y. Super. Ct.) 47; 7 Robt. (N. Y.) 343; *Cox's Man. of Trade-Mark Cases* 295, it was held that "El Cronista" was no infringement of "La Cronica," the one meaning "the chronicler," the other "the chronicle." Monell, J., said: "I do not mean to say that a newspaper proprietor cannot appropriate, and, by long use, acquire a property in a name, which the courts will protect against piracy. . . . But that I understand to be the extent of the rule, and that any mere assimilation of the name—unless it was very clearly calculated to deceive the public—would not be unlawful."

In *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 459, the publishers of the "National Police Gazette" complained of a publication called the "United States Police Gazette," and an injunction was granted. The court, by Brady, J., said: "It may be conceded that the plaintiffs have no exclusive right to the name which they have adopted for their paper; that in the words used by them no person has any exclusive proprietary interest; that they belong to the language of the country, and may be em-

ployed in any way or for any purpose which will not defraud individuals or deceive the public. The courts, in exercising the power which they possess of restraining the use of another's trade-mark, symbol, name or design, do not confine their interference to names, symbols, marks or designs, originating with the person first using them, and intended either to describe a quality assumed to be a distinguishing one of the goods manufactured or the thing created, or to distinguish the particular manufacture from others. The enforcement of the doctrine that trade-marks shall not be simulated, does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them, by inducing or leading to the purchase of one thing for another. . . . There is neither honesty nor honorable competition in adopting, for a similar purpose, a name used by another, if it be employed in such a manner that the public may be imposed upon; and such a result must follow if the simulation be so successful that one article or creation is purchased or accepted for another. . . . The following are cited for illustration : *Craft v. Day*, 7 Beav. 84; *Hogg v. Kirly*, 8 Ves. 214; *Knott v. Morgan*, 2 Keen 219; *Crawsbay v. Thompson*, 4 M. & G. 357; 43 E. C. L. 189; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Lemonie v. Ganton*, 2 E. D. Smith (N. Y.) 343; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Partridge v. Menck*, 2 Sandf. (N. Y.) 622; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1. A newspaper establishment is not excluded from the advantage of these rules. It is a species of property, and the rights which appertain to it, so far as they are private and exclusive, are entitled to the protection of the laws. The title of a newspaper may be a purely original one, and the proprietor, for that reason, entitled to its exclusive use. He may create a word, or combination of words, for the particular designation of his paper, and in that way acquire an exclusive right to the use of the name employed. He may combine, as the plaintiffs have, well-known English words in common use to designate his paper, and its contents may, in many re-

spects, be multiplied by publications in other prints, but the paper will, nevertheless, be original in some, if not in many respects."

In *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; 14 Am. Dec. 547; *Cox's Man. of Trade-Mark Cases* 41, it was held that "The New York National Advocate," was no infringement of "The National Advocate," there being no attempt to deceive.

In *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371; *Cox's Man. of Trade-Mark Cases* 65, "The New Era," was held to be no infringement of "The Domestic Republican New Era."

"The right which exists in the title of a publication is a right of property, *Clement v. Maddick*, 1 Giff. 98; *Kelly v. Hutton*, L. R., 3 Ch. 708; a chattel interest, *Kelly v. Hutton*, capable of assignment, *Longman v. Tripp*, 2 Bos. & P. N. R. 67; *Ex p. Foss*, 2 De G. & J. 230; *Kelly v. Hutton*, L. R., 3 Ch. 708; *Clowes v. Hogg*, W. N. (1870), p. 268; W. N. (1870), p. 40; *Ward v. Beeton*, L. R., 19 Eq. 207; *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; 14 Am. Dec. 547; *R. Cox* 1; by request, *Keene v. Harris*, 17 Ves. 338; *McCormick v. McCubbin*, Ct. Sess. Cas., 1st Ser., I. 541 (new ed. 496); one-half a share could be sold by the executor of the owner thereof, passing in the event of its proprietor's bankruptcy, to his trustee, but incapable of seizure by the sheriff, *Ex p. Foss*, 2 De G. & J. 230; and which, in the event of the dissolution of a partnership between joint proprietors, must be sold for the purpose of the proceeds of the sale being included in the assets of the partnership. *Bradbury v. Dickens*, 27 Beav. 53; *Dayton v. Wilkes*, 17 How. Pr. (N. Y. Super. Ct.) 510; *R. Cox* 224." *Sebastian on Trade-Marks* 266.

"In all such cases the plaintiff must, of course, show that deception is probable, or he cannot succeed in obtaining the relief he seeks." *Sebastian on Trade-Marks* (2d ed.) 245.

In *Walter v. Head*, 25 Sol. J. 742, 757, at the suit of plaintiffs, proprietors of "The Times" newspaper, the defendant was enjoined from publishing any paper of the same name.

In *Corns v. Griffiths*, W. N. (1873), p. 93; *Cox Man.* 420, "The Iron Trade Circular" (edited by Samuel Griffiths), was restrained by injunction at the suit of plaintiff, publisher of "The Iron Trade Circular" (Rylands).

In *Mack v. Petter*, L. R., 14 Eq. 431; 41 L. J. Ch. 781; *Cox's Man. of Trade-Mark Cases* 403, it was held that "The Children's Birthday Text Book" was an infringement of "The Birthday Scripture Text Book." Lord Romilly, M. R., said: "The defendants would be at liberty to publish a Daily Text Book, and so far to adopt the scheme of the plaintiff's work; but it was the plaintiff's own idea to have a text book associated with a birthday, and so to adapt it to those sentiments of religion with which most persons regard a day which marks the completion of another year of their lives. The plaintiff is entitled to a copyright in the use of the title, 'Birthday Text Book,' whatever other words may be associated with it, and the defendants must be restrained from the publication of their work, and they are not entitled to publish a work with such a title, or in such a form, as to binding or general appearance, as to be a colorable imitation of that of the plaintiff."

In *Clowes v. Hogg*, W. N. (1870) 268; L. J. Notes of Cases (1870) 267; W. N. (1870) 40, a publication called "English Society" was enjoined, on the ground of being a fraudulent imitation and continuation of "London Society," the magazine of the plaintiff.

Bradbury v. Beeton, 21 L. T. N. S. 323, was a suit by "Punch" to restrain "Punch and Judy." Malins, V. C., said: "The principle is clear that you cannot adopt a trade-mark or use a name, calculated to mislead or deceive persons as to an article, already appropriated, into the belief that they are purchasing one thing when they are purchasing another. On the whole, I come to the conclusion that this publication is not calculated to mislead the ordinary run of mankind, who are alone to be considered. The court does not legislate for the careless class, who know not what they are purchasing. The word Punch is well known, and it is impossible that an ordinary person can be misled."

In *Kelly v. Hutton*, L. R., 3 Ch. 703; *Cox's Man. of Trade-Mark Cases* 292, Sir W. Page Wood, L. J., said: "Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp*, 2

Bos. & P. N. R. 67, and *Ex p. Foss*, 2 De G. & J. 230."

In *Ingram v. Stiff*, 5 Jur. N. S. 947, an injunction was granted to restrain the defendant from printing, publishing, or selling any newspaper or other periodical, under the name of "The London Journal," or under any other name or style of which the words "London Journal," should form a part, and from doing or committing any act or default that might tend to lessen or diminish the sale or circulation of the plaintiff's periodical called the "The London Journal." The defendant's Journal was called "The Daily London Journal." In the court of appeals, October 1st, 1839, the injunction was continued, but was doubted, and the court suggested that defendant call his paper, "The Daily Journal."

In *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117, the plaintiffs, being the publishers of a paper called "Bell's Life in London," the defendants were restrained from publishing a paper entitled "The Penny Bell's Life and Sporting News," or any paper the name of which shall contain the words "Bell's Life." Stuart, V. C., said, for the court, that he considered the application in the light of one to support a right to property; that the defendants had contended that for the plaintiffs to support their claim to relief they must prove a fraudulent intention on the part of the former. But Lord Cottonham, in *Millington v. Fox*, 3 Myl. & C. 338, had expressed a totally different opinion, to the effect that when a trade-mark had been made use of, even innocently and conscientiously, to the injury of another, that party was entitled to the interference and protection of the court.

In *Prowett v. Mortimer*, *Cox's Man. of Trade-Mark Cases* 141; 2 Jur. N. S. 414; 27 L. T. 132; 4 W. R. 519, the defendant, the owner and publisher of "The Britannia" newspaper, sold it to the plaintiff, who combined it with another paper, "The John Bull," calling the two "The John Bull and Britannia." Defendant began the publication of a new paper, "The True Britannia," purporting it to be a continuation of "Britannia." It was held to be an infringement, and an injunction was granted.

In *re Edinburgh Correspondent Newspaper* (July 4th, 1822), Ct. of Sess. Cas., 1st Ser., I. 541 (new ed. 496); *Cox's Man. of Trade-Mark Cases* 34, an injunction was granted at the

arbitrarily selected, and do not describe the geographical location of the place of publication, or the author,¹ or the subject-matter, so closely as to give others a right to use the name with equal

suit of the plaintiffs, publishers of the above paper, to restrain the publication of a paper of the same name.

In *Spottiswoode v. Clarke*, 2 Ph. 154; 1 Coop. C. C. 254; 10 Jur. 1043; 8 L. T. 230-271; *Cox's Man. of Trade-Mark Cases* 85, it was held that "Old Moore's Pictorial Almanack" was not sufficiently similar to "The Pictorial Almanack" to grant an injunction. It was held, also, that no exclusive right to the use of a descriptive word, such as "Pictorial" or "Illustrated," could be gained, but there might be a combination of such with other words.

In *Edmonds v. Benbow*, *Cox's Man. of Trade-Mark Cases* 33; *Seaton* (3d ed.) 905 (4th ed.) 238, the title "The Real John Bull" was held to be an infringement of "The Old Real John Bull."

In *Chappell v. Davidson*, 2 K. & J. 123, defendants were restrained from printing a song entitled "Minnie, dear Minnie," with the title-page containing a picture of Madame Anna Thillon and her name beneath, for it was held that this was an obvious imitation of plaintiff's song "Minnie," sung by Madame Anna Thillon, and likely to deceive the public. See also *Chappell v. Sheard*, 2 K. & J. 117, where defendant was enjoined from selling another imitation of plaintiff's song, "Minnie," under the name "Minnie Dale, sung by Madame Thillon at Julien's Concerts, etc."

In *Hogg v. Kirby*, 8 Ves. 215, defendants were enjoined from publishing the "Wonderful Magazine, New Series Improved," a continuation of plaintiff's work, the "Wonderful Magazine." It was said by Chancellor Eldon: "It is equally competent to any other person, perceiving the success of such a work, to set about a similar work, *bona fide* his own; but it must be in substance a new and original work; and must be handed out to the world as such. . . . Most of the cases have been, not where a new work has been published as part of the old work, but where, under color of a new work, the old work has been republished and copies multiplied. . . . I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same."

1. An author's *nom de plume* is not sufficient to constitute *per se* a trade-mark. *Clemens v. Belford*, 14 Fed. Rep. 728; 114 P. & S.; *Cox's Man. of Trade-Mark Cases* 685. *Blodgett, J.*, said: "The bill rests, then, upon the single proposition: Is the complainant entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of 'Mark Twain' in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him?"

. . . The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name; . . . but an author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country, that the 'publication of a literary work without copyright is a dedication to the public, after which anyone may republish it.'

In *England v. New York Pub. Co.*, 14 P. & S.; 8 Daly (N. Y.) 375; *Daly, C. J.*, said: "It is well settled, as a general proposition, that a person has the legal right to use his own name to designate an article produced and sold by him, although another person of the same name has previously manufactured and sold the like article with the same designation. *Burgess v. Burgess*, 17 Jur. 292; 22 L. J. Ch. 275; 17 L. & Eq. 257; *Meneely v. Meneely*, 1 Hun (N. Y.) 367; *Wolfe v. Burke*, 7 Lans. (N. Y.) 156. *Faber v. Faber*, 49 Barb. (N. Y.) 359; *Browne on Trade-Marks*, §§ 205, 423. This rule, however, does not hold good where there is evidence of fraud on the part of the defendant, and danger of deceiving the public. *Stonebraker v. Stonebraker*, 33 Md. 268; *Holloway v. Holloway*, 13 Beav. 209; *Croft v. Day*, 7 Beav. 84; *Roger v. Nowill*, 5 M. G. & S. 109; 57 E. C. L. 111. The right of a son who has learned to manufacture a particular article in his father's service, to affix his name to an article of the same kind when engaged in business for himself, is distinctly recognized in two of the cases that have been cited (*Burgess v. Burgess*, 17 Jur. 292; *Meneely v. Meneely*, 1 Hun (N. Y.) 367), however

truth. They will not be protected if the publications to which they are applied have been copyrighted and the copyright has expired.¹

detrimental it might be to the father's business. . . . This case does not even go as far as this. It is the publication of a newspaper, different in its special character from those published by the plaintiff, and which by its title, denotes that it is published, not by the father, but by the son." See *PARTNERSHIP*, vol. 17, p. 824.

"Mark Twain" agreed with a publisher to allow him to publish one of his essays in a book of selections, and sent him a number from which to select, which had been published but not copyrighted. The publisher published all of the essays, and also another, alleging in the advertisement and title-page that all were by "Mark Twain," which was the *nom de plume* of the plaintiff. An injunction was granted restraining the defendant from using the name "Mark Twain" in any manner other than as provided by the agreement. *Clemens v. Such* (N. Y. Sup. Ct.), Codd. Dig. 312; *Cox's Man. of Trade-Mark Cases* (1st ed.) 429.

In *Archbold v. Sweet*, 1 M. & Rob. 162, L. Tenderden, C. J., said: "Plaintiff, author of law book, sold copyright and edited second edition, but refused to edit third edition. Publisher put out a third edition bearing name of author, as if he had edited third edition. Third edition contained errors which were prejudicial to author. Injunction granted to restrain publisher from issuing third edition with any statement which would lead public to suppose that it was edited by author."

A publisher advertised for sale certain poems which were represented to be by Lord Byron. An application for injunction was made by friends of Lord Byron, who was abroad. It was granted because the publisher would not swear that the poems were by Lord Byron. *Byron v. Johnston*, 2 Meriv. 29.

1. In *Merriam v. Texas Siftings Pub. Co.*, 48 Fed. Rep. 944, Shipman, D. J., said: "The plaintiffs are not entitled to an exclusive use of the name 'Webster's Dictionary' upon copies of editions, the copyrights of which have expired, for the name is not a trade-mark. Mere copies of the edition of 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public

to believe that it is another book, the right to publish which is the exclusive property of the plaintiff. The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared, does not, in the mind of the public, connect the plaintiffs with the manufacture of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size."

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, the court, by Thayer, J., said: "I have no doubt that defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Anyone may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.' The latter words, which appeared on the title-page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work. . . .

In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter-heads and bill-heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark."

A novel called "Trial and Triumph," was first published in 1854 by the plaintiff's assignor, and subsequently in 1860. It was then, for a long time, suffered to remain out of print. In 1875, the defendant published a novel under the same name. It was held that the sale of the latter would be enjoined, the plaintiff not being disentitled to relief by the fact of having allowed his rights to lie dormant. In this case the court, by Malins, V. C., said, *inter alios*—"The title of the book is part of the book; you cannot read any book, or turn over the title-page, without finding that the title is at the commencement of the book, that it is part of the book, and it is as much the subject of copyright as the book itself. . . . Would anyone be entitled to publish a book called

8. Trade Name as Applied to Business Stand; Signs.—It is very well established that a trade name or sign, which is not technically a trade-mark, will receive protection from the courts,¹

'Vanity Fair,' leaving out the author's name? A person buying the cheap edition would expect to get Thackeray's work, and what a fraud it would be if he had got some spurious thing which was not worth reading." *Weldon v. Dicks*, 10 Ch. Div. 247; 39 L. T. N. S. 467; *Cox's Man. of Trade-Mark Cases* 638. It is thought that this case must rest upon the ground that the copyright had not expired. But see *Cox's Man. of Trade-Mark Cases* 685, note.

In *Metzler v. Wood*, 8 Ch. Div. 608; 47 L. J. Ch. 625; 38 L. T. N. S. 541; 26 W. R. 577, it was held that "Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor" was an infringement of "Henry's Royal Modern Tutor for the Pianoforte," the former being a revised edition of Jousse's work, but with Henry's name in large letters and hence liable to deceive.

See *Osgood v. Allen*, 1 Holmes (U. S.) 185, where it was held that "Our Young Folks' Illustrated Paper" was no infringement of "Our Young Folks: an Illustrated Magazine for Boys and Girls," and no injunction was granted without proof of actual deception. Shipley, J., said: "No case can be found, either in *England* or in this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate."

In *Jollie v. Jaques*, 1 Blatchf. (U. S.) 627, Nelson, J., said: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident."

1. In *Saunders v. Jacob*, 20 Mo. App. 96, the plaintiff was proprietor in St. Louis, of the "New York Dental Rooms." Defendant opened a dental office near plaintiff, calling it "Newark Dental Rooms." An injunction was granted, and the defendant appealed. The court, by Thompson, J., said: "To justify an injunction in such a case, it should appear that the resemblance between the two trade-marks or trade names is sufficiently close to raise a probability of mistake on the part of the public, or to show a design to mis-

lead and deceive on the part of the defendant. . . . In the present case both of these elements concur. There was sufficient resemblance between the two signs to raise a probability of mistake on the part of the class of customers that frequented the plaintiff's place of business. The evidence further shows that such mistakes actually occurred. It further satisfies us that the defendant intended that they should occur." *

"Deception of the same kind will be restrained when the name is a designation of the place at which the business of an individual or firm is carried on, and by which it is known and recognized. Thus, 'Osborne House' (*Hudson v. Osborne*, 39 L. J. Ch. 79); 'The Carriage Bazaar' (*Boulnois v. Peake*, 13 Ch. Div. 513, n), etc. But in such cases the plaintiff must prove that there is something distinctive in the appellation which he has given to his establishment, since no relief can be given him if that appellation is merely descriptive, as 'The Antiquarian Book Store' (*Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; *Cox's Man. of Trade-Mark Cases* 336); . . . and he must also prove that the result of the defendant's act is to represent that his business is identical with that carried on by the plaintiff." *Sebastian on Trade-Marks* 240.

"Practically the same law prevails to prevent the use of the name of a place of business, and in these and similar instances it is only necessary for the plaintiff to prove that the defendant's conduct is of such a nature as to be calculated to deceive the public into believing that the defendant's business is the same business as that of the plaintiff." *Slater on Copyright and Trade-Marks* 271.

In *Hoby v. Grosvenor Library Co.*, 28 W. R. 386, plaintiff was the proprietor of a library known as "The Grosvenor Library." Defendant used the name "The Grosvenor Library, Limited," applied to a similar business in the same quarter of the city. An injunction was granted.

In *Boulnois v. Peake*, 13 Ch. Div. 513, n, plaintiffs, who were dealers in carriages, called their store "Carriage Bazaar." Defendant opened a carriage store in

if it is not descriptive,¹ and contains no deceptive words or

the same street, and called it at first "Carriage Repository," then changed this to "New Carriage Bazaar." An injunction was granted.

In *Colton v. Thomas*, 2 Brew. (Pa.) 308, plaintiff, proprietor of the "Colton Dental Association," sued to enjoin defendant, formerly in his employ, from the use of the words "Colton Dental Rooms," preceded in small letters by "formerly operator at the," on his sign. Both offices were on the same street, a few blocks apart. The court, by Allison, J., said: "This case, we think, is clearly within the rule of prohibition. It is difficult to believe that the words 'late operator,' and 'formerly operator,' being in letters and type so much smaller than the other letters upon the cards and sign of the defendant, have not been thus placed with a purpose to mislead and to create an impression that his rooms are the Colton Dental Rooms, or the rooms of the Colton Dental Association. But whether intended to produce this result or not, no one can doubt that they are calculated to mislead the majority of unwary persons, and even of the most wary and cautious, when suffering from acute pain and seeking for immediate relief."

In *Walker v. Alley*, 13 Grant's Ch. (U. C.) 366, plaintiff was the proprietor of a clothing store called "The Golden Lion," on the front of which was displayed the figure of a lion. Defendant, formerly in the plaintiff's employ, opened near by a clothing shop of his own, calling it "The Golden Lion," with a figure similar to the lion of the plaintiff. An injunction was issued to restrain defendant. See also *McCardel v. Peck*, 28 How. Pr. (N. Y. Supreme Ct.) 120.

In *Woodward v. Lazar*, 21 Cal. 449; 82 Am. Dec. 751, plaintiff had been the lessee of a house which he had used as a hotel and called the "What Cheer House." Subsequently, he built another hotel, for a while running both under the same name, but transferring the principal sign to the new house. Finally the business in the first house was entirely discontinued, and the house vacated for a period of three months. Defendant afterwards leased the first house and opened a hotel under the name of "Original What Cheer House," the word "original" being in small letters. An injunction was granted. The

court, by Norton, J., said: "Conceding that the name of a hotel must pertain to some particular house, or be the trade-mark of the person as the keeper of a particular house, it does not follow that the name becomes inseparably connected with the building to which it was first applied. The name is not a 'fixture.' A person may have a right, interest, or property, in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrevocably to the landlord."

In *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, plaintiffs and the proprietor of the Revere House, made a contract for the conveyance of persons between the railroad station and the hotel, whereby the plaintiffs were authorized to put on their coaches and the hats of their hackmen, "Revere House." A similar arrangement had existed between the hotel proprietor and defendants, but had terminated by mutual consent. Defendants still continued the use of "Revere House" on their coaches, etc., and called "Revere House" at the station. At the suit of plaintiffs, an injunction was granted, restraining the defendants from these misrepresentations. Fletcher, J., said: "This principle is by no means novel in its character; or in its application to a case like the present; it is substantially the same principle, which has been repeatedly recognized and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. . . . The ground of action against the defendants is not that they carried passengers to the Revere House or that they had the words 'Revere House' on the coaches, and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the lessee of the Revere House, in violation of the rights of the plaintiffs."

1. In *Goodyear Rubber Co. v. Good-*

year's India Rubber Glove Mfg. Co., 128 U. S. 598, plaintiffs, incorporated under the name "Goodyear Rubber Co." in 1872, brought suit to restrain defendants, incorporated in 1847 under the name of "Goodyear's India Rubber Glove Manufacturing Co.," from using on their signs, business letters, etc., the abbreviation, "Goodyear Rubber Manufacturing Co." An injunction granted at the trial below was dissolved, the name being only descriptive. Mr. Justice Field, for the court, said: "'Goodyear Rubber' are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. . . . Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of anyone; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name. . . . The case at bar cannot be sustained as one to restrain unfair trade. . . . There is no proof of any attempt of the defendant to represent the goods manufactured and sold by him as those manufactured and sold by the plaintiff."

In *Armstrong v. Kleinhans*, 82 Ky. 303; 56 Am. Rep. 894, plaintiff leased a house which was very high, and used it as a clothing store, designating it, with the consent of the landlord who paid half the expense of the sign, "Tower Palace." Plaintiff subsequently removed his business to another store, transferring the sign, without the consent of the landlord, to the new house. The landlord continued the use of the name and leased to defendant, who used the store under the name of "Tower Palace" as a clothing establishment. An injunction was refused. In distinguishing this case from *Woodward v. Lazar*, 21 Cal. 448; 82 Am. Dec. 751, Lewis, J., said: "But conceding the correctness of the conclusion of the court in that case, it does not sustain the claim of appellant. There the name of the hotel was not applicable to or descriptive of a particular building, but was arbitrary, and applied to the business carried on first in the building upon the leased premises and after-

wards in both of the buildings. Here the name 'Tower Palace' was intended to describe and designate the place, and not the particular business, nor the person carrying it on. It never was used as a trade-mark by appellant, but simply to indicate the particular place on Market street where he did business, and consequently he never acquired the exclusive right to use the name, except as applicable to and while he occupied that building."

In *Eggers v. Hink*, 63 Cal. 445; 49 Am. Rep. 96, plaintiff, the proprietor of a saloon in San Francisco, had adopted as a business sign, a row of beer barrels with "P. B.," stamped on the heads, and the words, "Depot of the Celebrated" above, and "Philadelphia Beer" below, the barrels. Defendant in the same city began the use of a similar sign, substituting "F. B." for "P. B.," and "Fredericksburger" for "Philadelphia." The court, in refusing to grant the plaintiff protection, said: "A sign placed over a man's place of business with a row of beer barrels painted on it would indicate that he sold beer; the letters 'P. B.,' stamped on the head of the barrels, and the words 'Depot of the Celebrated,' placed above, and the words 'Philadelphia Beer,' placed below, the row of barrels, would indicate that he sold Philadelphia beer. It does not appear that the plaintiff is the manufacturer of the Philadelphia beer, nor the sole agent for its sale. For aught that appears, anyone else has as much right to sell Philadelphia beer as the plaintiff. In our opinion, the sign and label of the plaintiff relates only to the description of the beverage dealt in by him, and therefore cannot be protected as a trade-mark." See also *Civil Service Supply Assoc. v. Dean*, 13 Ch. Div. 512.

In *Gray v. Koch*, 2 Mich. N. P. 119, plaintiff and defendant were dealers in ready-made clothing, and had adjoining stores. Plaintiff began to designate his store as "Mammoth Wardrobe," and put up such a sign. Defendant did the same, and plaintiff sued. An injunction was denied, as the words were only descriptive of the plaintiff's store.

In *Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; *Cox's Man. of Trade-Mark Cases* 336, plaintiff, proprietor of the "Antiquarian Book Store," sought to restrain defendant, also a book dealer, from using the words "Antiquarian Book and Variety Store." An injunction was denied; the term "Antiquari-

meaning,¹ and a rival will be enjoined from conducting the same business in the same locality under the same trade name, while he might be permitted to use the name in a different locality.² A trader will sometimes be enjoined from the use of his

an," being merely descriptive of the nature of the store.

1. In *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592, plaintiff, who had designated his place of business as "IXL General Merchandise Auction Store," sued to restrain defendant from using on his sign "Great IXL Auction Co." An injunction was denied.

2. In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278, defendant purchased from the executors of Joseph Hall the latter's agricultural implement supply store, 10 South Water St., Rochester, N. Y., April, 1869, continued the business under the name of "The Old Joseph Hall Agricultural Works, No. 10 South Water St., Rochester, N. Y." In September, 1869, plaintiffs rented a small store near by in Water St. and began a like business, under the name of "The Glen & Hall Manufacturing Co., No. 10 South Water St., Rochester, N. Y." Plaintiffs sued to restrain defendant from the use of the words "No. 10 South Water St." Dwight, C., in upholding the defendant, said: "The case at bar, properly considered, is a species of 'good-will' analogous to a trade-mark. . . . It is a well-known fact that the 'good-will,' like a trade-mark, is a species of property. . . . It would follow from these principles, that if a person had established a business at a particular place, from which he has derived or may derive, profit, and has attached to that business a name indicating to the public where or in what manner it is carried on, he has acquired a property in the name, which will be protected from invasion by a court of equity, on principles analogous to those which are applied in case of the invasion of a trade-mark."

In *Lee v. Haley*, L. R., 5 Ch. App. 155; *Cox's Man. of Trade-Mark Cases* 325, Giffard, L. J., said: "The case is that the plaintiffs have carried on business in Pall Mall for a series of years under the name of 'The Guinea Coal Co., and there is evidence to show that they were well known, and that, as one would expect, they were frequently spoken of as 'The Pall Mall Guinea Coal Co.'

The defendant, first of all, sets up as 'The Pall Mall Guinea Coal Co.' in Beaufort Buildings. That was not found, and, indeed, was not calculated, to induce persons to deal with him under the supposition that they were dealing with the plaintiffs. All persons, of course, going to Beaufort Buildings would know perfectly well that they were not dealing with the persons carrying on their business in Pall Mall. He then proceeds to set up under the same name in Pall Mall, and and that is the proceeding which is now complained of. It was urged, on behalf of the defendant, that there are a number of other companies who call themselves Guinea Coal Companies, some with prefixes, and others with no prefixes, and that for this, among other reasons, the plaintiffs cannot have any property in the name of the Guinea Coal Co. I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. The other persons who use the name of 'The Guinea Coal Co.' carry on business in such situations that they are not likely to be mistaken for the plaintiffs; but as regards the use of it by the defendant, there is abundant evidence showing that many persons have been deceived, and when we see exactly what the defendant did, I must emphatically say, that I do not acquit him of an intention to deceive. . . . For these reasons I am clearly of opinion that this injunction was properly granted, and there is no objection to it upon the ground that it is confined to the particular street of Pall Mall; it is quite right that it should be so confined, because in all probability if the same name were used in some other street it would lead to no mistake or deception."

own name, if fraud and an intention to deceive the public be manifest;¹ but unless this appears, the honest and fair use of his name by a trader or manufacturer cannot be enjoined.² Trade names applied to business stands, which are arbitrary or personal, become the personal property of the first adopter and may be transferred by him from one location to another, or sold with his business, independent of the location where it is conducted;³ but if the name is local—that is, derives its origin from any local

In *Croft v. Day*, 7 Beav. 84, plaintiffs, executors of Charles Day, surviving partner of the well-known firm of Day & Martin, blacking manufacturers, 97 High Holborn, were conducting business. Defendant, named Charles Day, formed a partnership with another Martin and called the firm Day & Martin, blacking manufacturers, 90½ Holborn Hill, and so advertised themselves on wagons, show cards, etc., and were using labels very similar to those of plaintiff. The master of the rolls, in granting the injunction, said: "My decision does not depend on any peculiar or exclusive right which the plaintiffs have to use the names of Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. . . . He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

1. In *Hookham v. Pottage*, L. R., 8 Ch. App. 91, plaintiff and defendant had been trading for some time as "Hookham & Pottage;" the partnership was dissolved by a decree of the court, and the continuation of the business awarded to Hookham, who substituted the sign "Hookham & Co." for "Hookham & Pottage." Defendant established a store only a few doors away, and displayed as a sign his own name, with the words "from Hookham & Pottage," in equally conspicuous lettering. The plaintiff prayed for an injunction, which was granted.

In *Glenny v. Smith*, 11 Jur. N. S. 964; 2 Dr. & Sm. 476; 13 L. T. N. S. 11; 13 W. R. 1032; 6 N. R. 363, defendant, a former employé of the plaintiffs, established a business of his own, putting on his business sign, his own name, far to the top, and in the most conspicuous position "Thresher & Glenny" in large letters, preceded by the word "from" in small letters. Injunction was granted.

In *Churton v. Douglas, Johns*, 174, defendant, with plaintiffs, traded as "John Douglas & Co.," sold good-will to plaintiffs, who continued under the name of "Churton, Bankhart and Hirst (late John Douglas & Co.)." Defendant subsequently opened a store next door as "John Douglas & Co." An injunction was granted to plaintiff, on the ground that the circumstances indicated an intention on the part of the defendant to mislead the public into believing that defendant was carrying on the business of the old firm which was the property of the plaintiff. See *supra*, this title, *Persons of the Same Name*.

2. In *Turton v. Turton*, 42 Ch. Div. 128, plaintiffs were trading under the old established name of "Thomas Turton & Sons." Defendant had been trading as "John Turton & Co.," but on taking his sons into the business, changed the firm name to John Turton & Sons. It was held that "there being no evidence of intention to deceive, although mistakes might occur, the defendants could not be restrained from the fair and honest use of their own names."

3. In *Mossop v. Mason*, 18 Grant's Ch. (Up. Can.) 453, plaintiff purchased from defendant, the business and good-will of the "Western Hotel." Defendant, after sale, opened a hotel in the same town under that name. It was held that the name passed with the sale of the good-will, and defendant must be enjoined from the use of that name in the same city.

In *Howard v. Henriques*, 3 Sandf.

peculiarity or purpose or use of a particular building—it becomes an inseparable part of the building, and will pass with a sale or lease of it, and cannot be severed from the building even by its first adopter and user.¹

(N. Y.) 725, plaintiff was the proprietor of the "Irving House" or "Irving Hotel." Defendant, in the same city, started a hotel, calling it the "Irving Hotel." The court, by Campbell, J., said: "We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business." An injunction was granted.

In *Robertson v. Buddington*, 28 Beav. 529, Romilly, M. R., said: "The good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated."

1. *Fullwood v. Fullwood*, 9 Ch. Div. 176. In *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1, defendant, who with plaintiff had been carrying on the drug business under the firm name of "Caswell, Hazard & Co., Established 1780," sold out the good-will of the business to plaintiffs, and then established another store, using the words "Established 1780." An injunction was granted restraining defendant from using these words. The court, by Westbrook, J., said: "Used, as these words and figures were, to identify a drug house, and to give it character by its age, and such use, continued for many years, necessarily distinguishing it from any other, it is quite apparent, that the exclusive enjoyment of such use is as valuable, as a species of trade-mark, to the continuers of that business, as the exclusive enjoyment of a trade-mark upon a well-known article is valuable to the manufacturer thereof. . . . No man may injure another's business and impose upon the public alike, by selling his own goods so disguised by the use of either the other's name or mark as to induce the buyer to believe they are those of the person whose name or mark they bear. The argument is as sound when applied to

an entire business as it is when applied to a single article."

Edwin Booth built in New York a theater which he named "Booth's Theater." He subsequently leased it to his brother, by whom it was assigned to the defendant, who continued to run it under the name of "Booth's Theater." Booth sought to restrain defendants from using this name, claiming that the public would be misled into believing that he was acting there. An injunction was refused. This was an unwarrantable supposition, the name merely designating the building. *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169.

In *Hudson v. Osborne*, 39 L. J. Ch. 79, defendant, proprietor of the "Osborne House" in Ludgate Hill, London, became insolvent and his business was sold to the plaintiff. Defendant subsequently opened a new place but a few doors distant from his former one, calling it "Osborne House." An injunction was granted.

In *Redlon v. Barker*, 4 Kan. 445; 96 Am. Dec. 180, it was held that, on the sale of a hotel, there being no clause of reservation in the deed, the sign post "Barker's Hotel," passed to the vendee.

In *Howe v. Searing*, 19 How. Pr. (N. Y. Super. Ct.) 14, it was held that a trade name will not pass with the sale of the good-will of a business.

In *Elliott's Appeal*, 60 Pa. St. 161, the court, by Read, J., said: "The cases cited by the auditor and on the part of the appellees differ from the present case in a very important particular, that Mrs. Elliott is the actual owner of the house and tavern stand, and derives no interest from the decedent in either. The good-will of an inn or tavern is local, and does not exist independent of the house in which it is kept."

In *Musselman's Appeal*, 62 Pa. St. 83, Thompson, C. J., said: "Nor can I comprehend how it (the good-will) existed independently of the property."

"The good-will of the business is nothing more than the advantage attached to the possession of the house, and the mortgagee, being entitled to the possession of the house, is entitled to the whole of the advantage." *Chisum v. Dewes*, 5 Russ. 30.

"It is difficult to see how the good-

9. Suggestive Names.—Names which to some extent suggest the character, quality, or ingredients of an article, or some supposed advantage to be derived from using it, or some effect to be produced by its use, have been ordinarily upheld as valid trade-marks.¹

10. Collocation of Words.—A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trade-mark.² Each case of this class will depend upon its own facts, for the reason that it will only be some peculiarity of selection, arrangement, or sound which will

will, consisting in the habit of the trade being carried on in the same place, can be distinguished, and separated from the lease of the house." *Crawshay v. Collins*, 15 Ves. 224.

In *King v. Midland R. Co.*, 17 W. R. 113, Giffard, V. C., held "that the good-will was incident to the mortgaged premises and passed with them."

In *Llewellyn v. Rutherford*, L. R., 10 C. P. 456, Lord Coleridge, C. J., held that the good-will of a public house inured to the benefit of the owner of the land, upon a tenant leaving it, who had built up a trade.

1. As for example, "Pain Killer," as applied to a medicinal compound, *Davis v. Kendall*, 2 R. I. 566; *Dr. J. M. Lindsay's Improved Blood Leecher*, "Blood Leecher," "Annihilator," *Fulton v. Sellers*, 4 Brew. (Pa.) 42; "Barker's Stomach Bitters," *Funke v. Dreyfus*, 34 La. Ann. 80; "Warren Hose Supporter," *Frost v. Rindskopf*, 42 Fed. Rep. 408; "Lightning Hay Knives," *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34; "La Favorita," *Menendez v. Holt*, 128 U. S. 514; "Cough Cherries," *Stoughton v. Woodard*, 39 Fed. Rep. 902; "Invigorator Spring Bed," *E. & P. Hayman*, 18 Pat. Off. Gaz. 922; "Anti Washboard Soap," *O'Rourke v. Central City Soap Co.*, 1043 P. & S.

2. The phrase, "Syrup of Figs," designating a liquid medicine, constitutes a valid trade-mark. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 175. Here Beatty, D. J., said: "The appellants contend that the phrase 'Syrup of Figs' is merely descriptive of the preparation, and therefore cannot be adopted as a trade-mark. . . . The law, as stated in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322 . . . is that 'words in common use, with some exceptions, may be

adopted, if at the time of their adoption they were not employed to designate the same or like articles of production.' . . . But, though it is not necessary that the word adopted as a trade-mark should be a new creation, never before known or used, there are some limits to the right of selection. . . . And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it entitled to legal protection. The phrase 'Syrup of Figs,' is in no sense a generic one. It is not a name of a natural product, or of a class of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural product; hence indicates rather its origin, than its quality, or even its nature."

In *Frost v. Rindskopf*, 42 Fed. Rep. 408, plaintiffs, whose trade-mark consisted of the words "Warren Hose Supporter," with a cut of the garter attached to a stocking, sued to restrain defendants from the use of "Warranted Hose Supporter," with a similar cut.

An injunction was granted. Wheeler, J., said: "Perhaps, as argued for the defendants, the words 'Warren Hose Supporter,' alone would not constitute a valid trade-mark; but in connection with the cut, they appear to be more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods when used for that purpose."

In *Ransom v. Ball* (Supreme Ct.), 7 N. Y. Supp. 238, protection was granted to "Miller's Universal Magnetic Balm," a medicine; Dwight, J., saying: "It is not pretended that the liquid possessed any of the properties of magnetism in the scientific sense of the word; nor do we think it clear that the use of the word 'Magnetic' in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific sense; and there was but little danger of its being misunderstood."

In *Stoughton v. Woodard*, 39 Fed. Rep. 902, "Cough Cherries," applied to confections, was upheld as a valid trade-mark, Bunn, J., saying: "The words 'Cough Cherries' are not properly merely descriptive of the qualities of the thing manufactured and sold, but are to a large extent arbitrary and fanciful. . . . If the label adopted had been 'Cough Candy,' 'Cough Remedy,' or 'Cough Confection,' or if the article sold had been cherries in fact, and labeled as these goods were, the case would come within the ordinary rule. . . . But the words 'Cough Cherries,' applied to a confection, are clearly distinguishable, in my judgment."

In *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492, plaintiffs, whose trade-mark was "Pratt's Astral Oil," sued to restrain defendants from using the words "Standard White Astral Oil." An injunction was refused. Acheson, J., said: "In the first place, I strongly incline to the opinion that the word 'Astral' was without the range of lawful appropriation as a trade-mark for refined petroleum, by reason of the fact that long before it was employed by Charles Pratt, the appellation had been given to an oil-burning lamp well known and in common use. . . . Then, in the second place, the appropriation of the word 'Astral' in one combination of words, does not preclude its use in all other combinations. See 13 W. N. C. (Pa.) 303; *Desmond's Appeal*, 103 Pa. St. 126; 119 P. & S. . . . The

plaintiff's trade-mark consists, not of the word 'Astral' alone, nor yet of the two words 'Astral Oil.' The prefix 'Pratt's' is the distinguishing word, in the plaintiff's combination, and in truth, is indispensable."

In *Pierce v. Guittard*, 68 Cal. 68; 58 Am. Rep. 1, "German Sweet Chocolate" was held to be infringed by "Sweet German Chocolate." The court declined to pass on the question of the validity of the words as a technical trade-mark.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, "Sliced Animals," the name of a toy puzzle, consisting of pictures of animals, etc., was upheld as a valid trade-mark.

In *Desmond's Appeal*, 103 Pa. St. 126; 49 Am. Rep. 118, plaintiff, manufacturer of "Samaritan's Gift" and "Samaritan's Root and Herb Juices," patent medicines, sued to restrain defendant from selling "Samaritan's Nervine." An injunction was refused. The court said: "An examination of the two shows they are quite dissimilar in names and appearance. It is true, each has the word 'Samaritan,' but in such different form and combination of words as to preclude one medicine being taken for the other. . . . The appropriation of the word 'Samaritan' in one combination of words does not prevent its being used in all other combinations."

In *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369, "Electro-Silicon," a polishing powder, was held to be a valid trade-mark. Brady, J., said: "But, as we have seen, it conclusively appears that neither the words in combination or singly employed, describe the article which they are intended to designate. It is a substance for polishing composed of infusorial earth, the proper description of which is not silicon, which exists in small quantities and is not an article of commerce. The words, therefore, are arbitrary and coined for the purpose of distinguishing an article which the plaintiff's predecessor first introduced into the commerce of the nation, of which it has become a part."

"Mere numbers are never the objects of a trade-mark, where they are employed to indicate quality, but they may be where they stand for origin or proprietorship, in combination with words and other numerals." *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., said: "Words or devices, or even a name in certain

cases, may be adopted as a trade-mark, which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale." See also similar observations by Clifford, J., in *McLeon v. Fleming*, 96 U. S. 254.

In *Ex p. Glines*, 8 Pat. Off. Gaz. 435, the words "Slate Roof Paint," as a trade-mark for a paint for roofs, not containing over two per cent. of slate, were considered not descriptive, and admitted to registration; Spear, Act. Com., saying: "Upon careful consideration, I am inclined to think that they are not in any sense such terms as would naturally be employed in the ordinary use of the language to describe any composition of this general description, and that therefore the words are arbitrarily chosen and sufficiently out of the ordinary signification to constitute a peculiar mark. It is no objection to a mark sought to be registered as a trade-mark that it is appropriate to the article to which it is to be applied, or suggestive of good qualities, or peculiarly fit in any such way."

In *Davis v. Kennedy*, 13 Grant's Ch. (U. C.) 523, an injunction was granted to restrain defendant from the use of the words, "The Great Home Remedy, Kennedy's Painkiller," an infringement of the plaintiff's trade-mark, "Perry Davis' Vegetable Painkiller." Spragge, V. C., said: "The defendant's counsel contend that what the plaintiffs call a trade-mark is not properly a trade-mark, but a term of description of the article which they prepare. I do not agree in this. I take the word to fall within the class of trade-marks usually called fancy names or 'trade-marks'; which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature. It is true that the term 'painkiller' is suggestive of the use of the medicine, but it is not an adjective nor is it used adjectively. It is a quaint combination of words, never probably used together before, forming a name by which the inventor desired that his preparation should be known, and calculated, as he rightly judged, from its quaintness to fix itself in the memory of the general public."

But see *Davis v. Harbord*, 60 L. J.

Ch. 16; 15 App. Cas. 316; 63 L. T. N. S. 389, where Lord Herschell, in declining to decide whether the words "Painkiller" were distinctive or not, said: "The two words no doubt are common English words, and when used in combination do convey a specific idea; but inasmuch as that combination of words has never, so far as one knows, been applied to anything except this preparation made and sold by the appellant, they have come to be used as descriptive of that preparation, so that the use of those words, and those words alone, would suggest the idea of that preparation and nothing else." See also *Davis v. Kendall*, 2 R. I. 566.

In *Williams v. Johnson*, 2 Bosw. (N. Y.) 1, plaintiffs, the *New England* manufacturers of "Genuine Yankee Soap," sued to restrain defendant in *New York* from the sale of soap of the same name. An injunction was granted, irrespective of the validity of the words as a technical trade-mark. Woodruff, J., said: "Whether, upon the taking of the proofs in the cause, it will appear that the particular words 'Genuine Yankee Soap' are to be deemed descriptive of the kind of soap which anyone may make and sell by its proper name, or are terms properly designating the plaintiff's manufacture, and so to be descriptive of their peculiar skill in making an article already in known and common use, by its proper and only generic name, soap, is perhaps not free from doubt." See *Williams v. Spence*, 25 How. Pr. (N. Y. Super. Ct.), 366, where the validity of the phrase as a trade-mark is established.

The following combinations of words have been protected as trade-marks:

"Cream Baking Powder." *Price Baking Powder Co. v. Fyfe*, 45 Fed. Rep. 799.

"Priestly's Silk Warp Henrietta." *Priestley v. Adams*, 59 Hun (N. Y.) 380.

"Piries Parchment Bank," a particular kind of paper. *In re Goodall's Trade-Mark*, 42 Ch. Div. 566; 38 W. R. 189.

In *Re Dunn's Trade-Mark*, 41 Ch. Div. 439; 63 L. T. N. S. 6; 39 W. R. 161; 15 App. Cas. 252, "Dunn's Fruit Salt Baking Powder" was held to be no infringement of "Cuo's Fruit Salt," an effervescent drink. Both were allowed registration.

"Hostetter's Celebrated Stomach Bitters." *Myers v. Theller*, 38 Fed. Rep. 607.

cause the courts to depart from the usual rule which denies protection to descriptive words;¹ but if any one or more of the

"The Baeder Flint Paper Company, New York." *Baeder v. Baeder*, 5 N. Y. Supp. 123; 52 Hun (N. Y.) 170.

"Akron Dental Rubber." *Keller v. B. F. Goodrich Co.*, 117 Ind. 556.

"Prince's Metallic Paint." *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443.

"La Favorita," a brand of flour. *Menendez v. Holt*, 128 U. S. 514.

"Black Diamond," name of a scythe stone. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896.

"Johnson's Anodyne Liniment." *Jennings v. Johnson*, 37 Fed. Rep. 364.

"Moxie Nerve Food." *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 148. See *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205.

"Maryland Club Whisky." *Cahn v. Gottschalk (C. Pl.)*, 2 N. Y. Supp. 13.

"Union Made Cigars." *Allen v. McCarthy*, 37 Minn. 349.

"A. N. Hoxie's Mineral Soap," "A. N. Hoxie's Pumice Soap." *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149.

"S. N. Pike's Magnolia Whisky, Cincinnati, Ohio." *Kidd v. Johnson*, 100 U. S. 617.

"Charter Oak," trade-mark for a stove. *Filley v. Child*, 16 Blatchf. (U. S.) 376.

"Pond Lily Wash," name of a washing-fluid. *Wright v. Simpson*, 15 Pat. Off. Gaz. 968.

"Roberts' Parabola Needles." *Roberts v. Sheldon*, 18 Pat. Off. Gaz. 1277; 8 Biss. (U. S.) 398.

"Dr. C. McLane's Celebrated Liver Pills." *McLean v. Fleming*, 96 U. S. 245.

"Vanity Fair," for cigarettes. *In re Kimball*, 11 Pat. Off. Gaz. 1109.

"Lacto-peptine," a medicine, infringed by "lacto-pepsine." *Carnick v. Morison*, L. J. Notes Cases (1877), p. 71.

"Bethesda Mineral Water." *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395.

"Apollinaris Water." *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

"Licensed Victuallers' Relish," name of a sauce. *Cotton v. Gillard*, 44 L. J. Ch. 90.

"The Rising Sun Stove Polish," not infringed by "The Rising Moon Stove Polish;" both valid. *Morse v. Wor-*

rell, 9 Am. Law Rev. 368; Codd. Dig. 242.

"Grenade Syrup," made from the juice of the pomegranate. *Rillet v. Carlier*, 61 Barb. (N. Y.) 435.

"Sweet Opoponax of Mexico," name of a perfume. *Smith v. Woodruff*, 48 Barb. (N. Y.) 438.

"Stephens' Blue Black Writing Fluid." *Stephens v. Peel*, 16 L. T. N. S. 145.

"Pharaoh's Serpents," name of fireworks. *Barnett v. Leuchars*, 13 L. T. N. S. 495.

"Bell's Life in London and Sporting Chronicle," name of a paper. *Clement v. Maddick*, 5 Jur. N. S. 592; 33 L. T. 117; 1 Giff. 98.

"Taylor's Persian Thread." *Taylor v. Taylor*, 23 L. J. Ch. 255; 2 Eq. Rep. 290; 22 L. T. 271.

"The graduated, grooveless, drilled-eyed, ground down," applied to a new style of needle. *Shrimpton v. Laight*, 18 Beav. 164.

1. In *Fischer v. Blank*, 138 N. Y. 245, Maynard, J., said: "So with respect to the term 'Black Package Tea,' we do not think it is such a distinctive appellation as will entitle the plaintiffs to its exclusive use in their business. It manifestly has reference either to the quality of the article, or to the color of the package in which it is sold. In either case it cannot be made the subject of individual appropriation."

"Trade-Mark Best Soap." *Babbitt v. Brown* (Supreme Ct.), 23 N. Y. Supp. 25.

In *Keasbey v. Brooklyn Chemical Works* (Supreme Ct.), 21 N. Y. Supp. 606, *affirming* 16 N. Y. Supp. 318, plaintiffs, manufacturers of "Bromo-Caffeine," sued to restrain defendants from using the same name; Van Brunt, P. J., saying: "It is conceded that . . . the coupling together in combination of words which before that had been used apart, and had entered into the common or scientific vocabulary, does not give a right to the exclusive use of such combination, where it is indicative, not of origin, maker, use, and ownership alone, but also of quality and other characteristics. The questions, therefore, which are presented for solution by the facts found in this case, are: Does the trade-mark in question inform the reader or hearer of

the general characteristics and composition of the thing to which it is attached? Does it also inform of its quality and other characteristics, or is it indicative only of origin, maker, use, and ownership?" The court decided the former question affirmatively, thus holding the words no trade-mark.

In *Gessler v. Grieb*, 80 Wis. 21, "Gessler's Magic Headache Wafers" were held not to be infringed by "Brown's Alpha Headache Wafers." Cassoday, J., said: "We must hold that the words 'Headache Wafers,' as used by the plaintiff, whether together or separately, are each in common use, descriptive of common objects and qualities, and hence he has no exclusive right to the same as a trade-mark."

In *Trask Fish Co. v. Wooster*, 28 Mo. App. 408, plaintiffs sought to have protected, as a valid technical trade-mark, the words "Selected Shore Mackarel." Lewis, P. J., said: "But this claim cannot be sustained consistently with fundamental rules in the law of trade-marks. A man cannot adopt any set of words that may happen to suit his fancy, without any reference to their purport or meaning, and then, by simply branding or otherwise placing them on every package of a commodity sold by him, acquire an exclusive right to their use as a trade-mark. No such right can be acquired in words which, by common understanding, are merely descriptive of the article, or of its kind, qualities or characteristics, as these are generally known or talked about. Thus, if a grocer should brand or label the words, 'Best Brown Sugar,' on every parcel of that article sold by him, would it ever be supposed that all other grocers should be thereby precluded from using the same words in connection with their sales of the same article?"

In *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453, "Brown's Iron Bitters" was held to be not infringed by "Brown's Iron Tonic." Thayer, J., said: "Complainant's counsel does not, in express terms, assert that the words 'Brown's Iron Bitters,' either singly or collectively, constitute a trade-mark. Such a proposition, if asserted, could not be maintained, as it goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark."

Mere length in a collocation of words,

not peculiarly arranged, and purely descriptive, does not constitute a valid trade-mark. Thus, in *Gilman v. Hunnewell*, 122 Mass. 139, "The Universal Cough Remedy" was held not infringed by "Hunnewell's Celebrated Cough Remedy." Gray, C. J., said: "The plaintiffs cannot have a trade-mark in the descriptive words 'Cough Remedy,' or in the more extended description, 'A sure remedy for chronic or common cough, sore throat and other minor throat complaints so often by neglect the forerunner of consumption.'"

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, "Eureka Ammoniated Bone Superphosphate of Lime," was held to be a valid trade-mark. Giles, J., said: "The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. . . . But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation, and subsequent use, become a trade-mark. Such was the Greek word 'Eureka' applied to a fertilizer. . . . But the words 'Ammoniated Bone Superphosphate of Lime,' being the proper name of an article which anybody may make or sell, by themselves could never constitute a trade-mark. 'Eureka' was, therefore, for the purpose, and in the connection in which it was used, the complainant's trade-mark."

In *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233, "Ferro-Phosphorated Elixir of Calisaya Bark" was held not to be a valid trade-mark, being merely descriptive of the ingredients of a medicine.

In *Gray v. Koch*, 2 Mich. N. P. 119, the name "The Mammoth Wardrobe," applied to an establishment for the sale of ready-made clothes, was held not capable of exclusive appropriation, on the ground of descriptiveness.

In *Town v. Stetson*, 3 Daly (N. Y.) 53, protection was refused to the term "Desiccated Codfish," as applied to salt fish.

In *Braham v. Bustard*, 1 H. & M. 447; 11 W. R. 1061; 9 L. T. N. S. 199, "The Excelsior White Soft Soap" was protected as a valid trade-mark. Wood, V. C., said: "If, in this case, the plaintiffs had sought protection for the name 'White Soft Soap' only, the same principle would have been applied (*i. e.*,

words used be arbitrary, such as the name of a newspaper, it will support the use of other words which are either geographical or descriptive.¹

protection would have been refused). . . . But here the plaintiffs put the word 'Excelsior' before the 'White Soft Soap,' and it was not an unimportant circumstance that the plaintiffs did not simply call their article 'Excelsior White Soft Soap,' but 'The Excelsior White Soft Soap.'

In *Fetridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385, the court refused to grant protection to the phrase "Balm of Thousand Flowers" as a trade-mark for liquid soap, because, first, it was a misrepresentation, or second, descriptive. Duer, J., said: "In short, an exclusive right to use, on a label or other trade-mark, the appropriate name of a manufactured article, exists only in those who have an exclusive property in the article itself, and it is not pretended that the plaintiff or his firm have any exclusive property in the preparation or compound to which the well-sounding name of 'Balm of Thousand Flowers' has been given. . . . This, however, is a species of property that, in my opinion, is unknown to the law, and that can only be given to one by an infringement of the rights of all." But see *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156.

The following collocations of words have been refused protection as trade-marks:

"John Bull Brand," applied to beer. *In re Paine's Trade-Mark*, 61 L. J. Ch. 365; 66 L. T. 642.

"Horsford's Acid Phosphate." *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524.

"International Banking Co." *Koehler v. Sanders*, 48 Hun (N. Y.) 48.

"Red, White and Blue" on a coffee label. *In re Hanson's Trade-Mark*, 37 Ch. Div. 112.

"Melrose Favorite Hair Restorer;" "Electric Velveteen." *In re Van Duzer's Trade-Mark; In re Leaf, Sons & Co.'s Trade-Mark*, 34 Ch. Div. 623.

"Hudson's Carbolic Acid Soap Powder," though admitted to registration in connection with other parts of a label. *In re Hudson's Trade-Marks*, 32 Ch. Div. 311.

"Price's Patent Candle Company, National Sperm." *In re Price's Patent Candle Co.*, 27 Ch. Div. 681.

"Braided Fixed Stars" applied to a particular kind of matches. *Bagallay, L. J.*, said: "I understand 'fixed stars' to mean cigar lights and the word 'braided' to indicate their having been prepared in a particular way." *In re Palmer's Trade-Mark*, 24 Ch. Div. 504.

"Highly Concentrated Compound Fluid Extract of Buchu." *Westbrook, J.*, said: "Neither is it pretended that the mixture is not, in fact, what its name declares, 'A Fluid Extract of Buchu,' the right to make which and to declare by plain words in common and general use the character of the mixture, must, in the absence of a patent, protecting the process of manufacture, belong to anyone able to make the article, and who desires to utilize his knowledge by its preparation and sale." *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453.

"Improved Patent Gold Medal Self-Cleaning Rapid Water Filters." The patent having expired, the above words were only descriptive thereof, and open to public use. *Cheavin v. Walker*, 5 Ch. Div. 850.

"C.'s Patent Filters." *Cheavin v. Walker*, 46 L. J. Ch. 686.

"Nourishing London Stout." *Baggett v. Findlater, L. R.*, 17 Eq. 29.

"Aromatic Schiedam Schnapps" applied to gin; "Schnapps" meaning "dram," "drink," "Schiedam" the place of manufacture, and thus denoting quality; and "Aromatic" also denoting a particular quality. *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204.

"Club House Gin," having come to indicate the quality. *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Upton* 187.

1. In *Stokes v. Allen*, 56 Hun (N. Y.) 526, "Spice of Life" was held to be no infringement of "Good Things of Life," the latter referring to extracts from "Life;" *Daniels, J.*, saying: "It may properly be conceded that words of common use may be so employed as to acquire a limited additional significance by way of designating a particular article of manufacture or production, and in that sense be entitled to the protection of the court by way of injunction against infringement by another person or persons."

Although there can be no exclusive right in the commercial name of an

11. Statements True by Claimant and Untrue by All Others.—Ordinary words or statements which, although descriptive, are indicative of some fact, which is true with reference to the person, firm, or corporation using them, may be protected as trade-marks, provided the words or statements are untrue when used or made by others, and by use have come to represent a valuable part of the reputation and good-will of a particular man, firm, company, or place of business.¹

article, as "Borax Soap," yet, when it is coupled with other distinctive features, the whole may be so appropriated. *Dreydoppel v. Young*, 14 Phila. (Pa.) 226.

1. In 1827, a drug business was established by one Wm. L. Rushton in New York City, which, by a succession of changes in the firm, was finally conducted by Wm. Hegeman and his son, J. N. Hegeman, under the name of Hegeman & Co. Their special preparations were distinguished by various names, and the labels attached bore a complicated device and the words "Established 1827." After the death of Wm. Hegeman, an assignment for the benefit of creditors was made, and the assignee thereunder sold to a purchaser the trade-marks, good-will, and trade name of the business, etc. After this sale, the surviving partner, J. N. Hegeman, with another, opened a business under the name of Hegeman & Co., sold the special preparations of the old firm, and used labels in all respects like that used by the old firm, except that the designation of the place of business was different. *Daly, J.*, said: "There is a certain value in the business name, and they, and they alone, are entitled to the advantages of it, whatever those advantages may be. As they are carrying on the same business in the same place, the business name and the locality, as I have said, enter into, and are parts of, what in such a case constitute the good-will. *Howard v. Henriques*, 3 Sandf. (N. Y.) 725. 'This,' Lord Eldon said: 'is the probability that the old customers will resort to the old place' (*Crutwell v. Lye*, 17 Ves. 346); and 'the name of a firm,' in the language of Vice Chancellor Wood in *Churton v. Douglass*, 1 Johns. 176, 'is a very important part of the good-will of the business carried on by the firm.'" *Hegeman v. Hegeman*, 8 Daly (N.Y.) 1. See *Washburn Mfg. Co. v. Haish*, 4 Fed. Rep. 900.

The words "Established 1780," or

"Established A. D. 1780," used conspicuously for a long period on the signs, bill heads, and labels of a firm, are a valid trade-mark. *Westbrook, J.*, said: "When the copartnership between the plaintiffs and the defendant Caswell ended, in 1876, it is evident that the right to use the words 'Established 1780,' or 'Established A. D. 1780,' belonged to the business, and passed to the successors of the firm. Used, as these words and figures were, to identify a drug house, and to give it character by its age, and such use, continued for many years, necessarily distinguishing it from any other, it is quite apparent, that the exclusive enjoyment of such use is as valuable, as a species of trade-mark, to the continuers of that business, as the exclusive enjoyment of a trade-mark upon a well-known article is valuable to the manufacturer thereof. . . . The defendants in their new places of business, are not entitled to use a mark or sign which conveys an untruth, because it injures the plaintiff and the public alike." *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1.

In *Fullwood v. Fullwood*, 9 Ch. Div. 176; 47 L. J. Ch. 459; 38 L. T. N. S. 380; 26 W. R. 435, plaintiff was carrying on the business of an annatto manufacturer, established by his father in 1785, under the name of "R. J. Fullwood & Co.;" defendants, one of whom had formerly been a partner of plaintiff, but had sold to plaintiff his interest in the business, described their firm as "E. Fullwood & Co. (late of Somerset Place, Hoxton), Original Manufacturers of Liquid and Cake Annatto," and used upon their wrappers, in the same way as plaintiffs, the words "Established in 1785." An injunction was granted to restrain defendants from representing their business to have been established in 1785, or as having been lately carried on at Somerset Place, Hoxton, or as being identical with or in any way connected with the business of plaintiffs.

IV. WHAT MAY NOT BE A VALID TRADE-MARK—1. Descriptive Words and Marks—*a*. QUALITY AND CHARACTER.—Words or names which simply indicate the quality of articles or of their ingredients, or their character, are, as a general rule, words which others may employ for the same purpose with equal truth, and hence cannot be exclusively appropriated by any one as a trade-mark. They are words of the English language or of other languages used in their ordinary sense, for the purpose for which all men have a right to use them, and to allow any such words to be appropriated by one trader, would result in great injustice and inconvenience to the public.¹

In 1847, three brothers, named Rogers, commenced the manufacture of plated spoons, stamping them with various devices, each containing the name "Rogers." In 1862, said brothers contracted with petitioners that the latter should manufacture such goods under their supervision. These goods were stamped "1847 Rogers Bros. A 1." Defendant acquired the right from other persons named Rogers, to use said name on such goods manufactured by himself, and adopted as his mark "C. Rogers Bros. A 1," and "C. Rogers & Bros. A 1." It was held that the "combination" of complainants constituted a trade-mark. An injunction was granted to restrain the use of all words in the stamp but "Rogers." *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 401. See also *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

In *James v. James*, L. R., 13 Eq. 421, Lord Romilly, M. R., said: "Lieutenant James discovered a valuable ointment for blistering horses. He assigns it to persons, who carry on the business and sell his blistering ointment, there being nobody else in the field, and they state, with perfect propriety, that the only genuine one is theirs. Another person gets the recipe in such a form that he is entitled to use it; and thereupon he says: 'I am the only genuine one.' I am of opinion that he is not entitled to say that; but is he thereupon entitled to file a bill, and call upon the others to alter their advertisements? I do not know that that has ever been determined; all I can say is, that that would be relief which I could not give in this suit."

The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so doing, an injunction will be

granted to restrain another manufacturer from applying the designation to his goods. *Cocks v. Chandler*, 11 Eq. 446. The complainant in this case was the successor in business to the original inventor of "Reading Sauce," and had been in the habit of labeling this article, as his predecessor had done, with the words "The Original Reading Sauce." An injunction was granted to restrain the use by defendant of the word "Original."

In *Glen, etc., Mfg. Co. v. Hall*, 6 Lans. (N. Y.) 158; 19 Am. Rep. 278, the court said: "If the man who uses the street or number as a part of his trade-mark (*e. g.*, No. 10 South Water St.), has the exclusive use of the building indicated by the number, I do not doubt he may use it as a part of his trade-mark against persons who have no right to or interest in the building indicated by the number, but who use it as a part of their trade-mark, in order to pirate on the one justly entitled to use such number to designate his place of business."

In *Lazenly v. White*, Cox's Man. Trade-Mark Cases 344, plaintiffs were successors in business of the inventor of "Harvey's Sauce" (that name having become generic), and defendant began to sell a sauce under name of "The Original Lazenly's Harvey Sauce." An injunction was granted. See also *Lazenly v. White*, L. R., 6 Ch. 89; 19 W. R. 291.

1. The words "Svenska Snusmagisinet," meaning "Swedish snuff-stove," are descriptive of the business carried on, and cannot be monopolized. *Bolander v. Patterson*, 136 Ill. 215.

The word "Tycoon," applied to tea as a trade-mark, cannot be protected, it appearing in evidence that it has been for many years in common use as a term descriptive of a class of teas introduced into the American market

from *Japan*. *Corbin v. Gould*, 133 U. S. 308. See also *Stachelberg v. Ponce*, 128 U. S. 686.

The words "Selected Shore Mackerel," are purely descriptive, and invalid as a trade-mark. *Trask Fish. Co. v. Wooster*, 28 Mo. App. 408.

The words "International Banking Company," are descriptive of the business carried on, and are not a valid trade name. *Koehler v. Sanders*, 48 Hun (N. Y.) 48.

"Liquid Glue," applied to the article so called, is descriptive, and not a valid trade-mark. *Russia Cement Co. v. LePage*, 147 Mass. 206.

The words "Taffy Tolu," applied to chewing gum, "indicate or describe the character of the labeled goods, rather than their origin," and are not a valid trade-mark. *Colgan v. Danheiser*, 35 Fed. Rep. 150.

Registration was refused the word "Crystalline," applied to artificial stones, etc., on the ground of descriptiveness. *E* p. Kipling*, 24 Pat. Off. Gaz. 899.

The term "Straight Cut," applied to cigarettes, is descriptive of the ingredients and character of the article used, and is not a valid trade-mark. *Wallace, C. J.*, said: "No principles are better settled in the law of trade-marks than that a generic name, or a term merely descriptive of the ingredients, quality or characteristics of an article of trade, cannot be the subject of a trade-mark." *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782.

The term "Snowflake," as applied to bread or crackers, is descriptive and not a valid trade-mark. *Larrabee v. Lewis*, 67 Ga. 562; 44 Am. Rep. 735.

The words "time keeper" are not the proper subject for a trade-mark for watches, their only office being to indicate the nature of the goods to which they are applied. *E* p. Strasburger*, 20 Pat. Off. Gaz. 155.

In *Electro-Silicon Co. v. Levy*, 59 How. Pr. (N. Y. Supreme Ct.) 469, the court said: "The plaintiff can have no exclusive right in the use of the word 'silicon,' which is reasonably, in so far as the substance of this powder is concerned, descriptive." But the combination "electro-silicon," as applied to a polishing powder, was held by the same court to be valid, in *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189, and the subsequent case of *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369.

The term "Crack-proof," applied to

rubber goods, is descriptive of quality and not registrable. *In re Goodyear Rubber Co.*, 11 Pat. Off. Gaz. 1062.

The symbol " $\frac{1}{2}$ " in red, on cigarettes, indicates, although it does not express, the idea of two kinds of tobacco being used in the cigarette—"half and half"—and is not protectible. *Kinney v. Allen*, 1 Hughes (U. S.) 106.

The word "Julienne," a name applied to an article composed of vegetables for soup, is not protectible when used with reference to a specific kind of that article, it being merely descriptive. *Godillot v. Hazard*, 49 How. Pr. (N. Y. Super. Ct.) 5.

Registration was refused "Parson's Purgative Pills, P. P. P.," and "Johnson's American Anodyne Liniment, Established A. D. 1810," on the ground of descriptiveness, although the letters themselves, if used alone, might have acquired an arbitrary signification and been registrable. *In re Johnson*, 2 Pat. Off. Gaz. 315.

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, an agricultural compost had been called "Eureka Ammoniated Bone Superphosphate of Lime." Protection was asked (and granted) as to the word "Eureka," but was not asked for the rest of the phrase.

In *Choyinski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476, the phrase "The Antiquarian Book Store," was held to be merely descriptive of the class of books sold, and not entitled to protection.

The term "Desiccated Codfish," is descriptive of the article sold, and cannot be protected. The court said: "No manufacturer can acquire a special property in an ordinary term or expression, the use of which, as an entirety, is essential to the correct and truthful designation of a particular article or compound." *Town v. Stetson*, 5 Abb. Pr. N. S. (N. Y. C. Pl.) 218; 3 Daly (N. Y.) 53.

The words "Old London Dock Gin," are descriptive of the article, and not a valid trade-mark. *Binninger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206.

The name "Night-Blooming Cereus," applied to a perfume, cannot be protected; first, on the ground of misrepresentation (the perfume not being made from that flower); second, because, even if made from that flower, the words in question would be merely descriptive. The court said: "The trade-mark, to be capable of exclusive use, must be such as will identify the

b. PECULIAR EXCELLENCE.—Words, numbers, letters, or symbols which merely indicate the peculiar excellence of goods, cannot be exclusively appropriated.¹

article to which it is affixed as that of the person naming it, and distinguish it from others. A word which is the name of the article, or indicates its quality, cannot be so appropriated. Every one has the right to manufacture the same article, and to call it by its name or descriptive character." *Phalon v. Wright*, 5 Phila. (Pa.) 464.

The words "Club House," as a brand for gin, are invalid as a trade-mark. They express quality. *Corwin v. Daly*, 7 Bosw. (N. Y.) 222.

The words "Schiedam Schnapps," applied to gin, are descriptive, and incapable of exclusive appropriation. The court said: "When a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles." "Schiedam" is the name of a town in *Holland*, and "schnapps" is a word adopted from the German language, meaning a dram. *Wolfe v. Goulard*, 18 How. Pr. (N. Y. Supreme Ct.) 64. A different ruling was held in *Wolfe v. Barnett*, 24 La. Ann. 97; but the first was sustained in *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204, and *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125-134.

English Cases.—The word "Satinine," applied to starch and blue, is descriptive of a glossy surface, and not registrable. *In re Meyerstein's Trade-Mark*, 43 Ch. Div. 604. See *In re Leonard's Trade-Mark*, 26 Ch. Div. 288.

In *Leonard v. Wells*, 53 L. J. Ch. 233; 32 W. R. 532; W. N. (1884), p. 60, the word "Valvoline" was refused protection, on the ground that it was a mere term of description meaning "valve oil," and had been used by claimants for years. See also *In re Horsburgh*, 53 L. J. Ch. 237; *Cox's Man. of Trade-Mark Cases* 597.

There is no exclusive right to the words "Civil Service," used as part of a trade name. *Civil Service Supply Assoc. v. Dean*, 13 Ch. Div. 512.

Both the word "Porous" and the

phrase "Allcock's Porous Plasters," are descriptive and incapable of registration. *In re Brandreth's Trade-Marks*, 9 Ch. Div. 618; 47 L. J. Ch. 816; 27 W. R. 281.

There is no exclusive right in the term "Station" as part of a hotel name, it being a mere descriptive title. *Carleson v. Campbell*, Ct. of Sess. Cas. 4th Ser. IV. 149; 14 Scot. L. R. 104.

In *Raggett v. Findlater*, L. R., 17 Eq. 59; 43 L. J. Ch. 64; 29 L. T. N. S. 448; 22 W. R. 53, the words "Nourishing Stout," on labels attached to bottles containing that liquor, were refused protection, on the ground that a mere English adjective denoting quality could not be the subject of a trade-mark. The court said: "It is of great importance that, by the use of a particular word or anything which may be called a trade-mark, the right should not be unduly extended so as to infringe on the rights of traders to call their articles by a quality they possess, or to give an undue protection to any man who happens to use a particular word."

The words "*Ne Plus Ultra*," having become common to the trade, are not a valid trade-mark on packets containing needles. *Beard v. Turner*, 13 L. T. N. S. 746.

In *Colonial Life Ins. Co. v. Home*, etc., Ins. Co., 33 Beav. 548; 33 L. J. Ch. 741; 10 Jur. N. S. 967; 10 L. T. N. S. 448; 12 W. R. 783; 4 N. R. 129, the word "Colonial" was refused protection as part of a trade name, it being merely descriptive of the kind of business carried on.

In *Burgess v. Burgess*, 3 D. & G.; M. & G. 896, it was held that the words "Essence of Anchovies," applied to a fish sauce, correctly described the article, and could not be a valid trade-mark.

An exclusive right cannot be acquired in such words as "Pictorial" or "Illustrated." *Spottiswoode v. Clarke*, 2 Ph. 154; 1 Coop. C. C. 254; 10 Jur. 1043; 8 L. T. 230-271.

The words "Medicated Mexican Balm," applied to a hair tonic, are not a valid trade-mark, "because all the words that are used in the phrase are perfectly capable of being applied to a very different composition." *Perry v. Truefitt*, 6 Bear. 66; 1 L. T. 384.

1. There can be no trade-mark in the

c. GRADE.—The marks, letters, numbers, or words, by which the grade or quality of a manufactured article is designated, cannot alone be protected as a trade-mark, notwithstanding the fact that the symbols indicating grade may by long use have come also to indicate ownership and origin. If the symbols do actually

words "Trade-Mark Best Soap." *Babbitt v. Brown* (Supreme Ct.), 23 N. Y. Supp. 25.

The words "La Favorita," as applied to particularly selected and classified flour, were sustained as a valid trade-mark; *Fuller, C. J.*, saying: "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. . . . The case clearly does not fall within the rule announced in *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51." *Mendendez v. Holt*, 128 U. S. 514.

In *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, the court said: "Mere numbers are never the objects of a trade-mark, where they are employed to indicate quality, but they may be where they may stand for origin or proprietorship, in combination with words and other numerals."

In *Miller Tobacco Manufactory v. Commerce*, 45 N. Y. L. 18; 46 Am. Rep. 750, the declaration states that plaintiff manufactures and puts up for sale a certain kind of tobacco, in wrappers on which are printed "Mrs. G. B. Miller & Co. Best Smoking Tobacco," with their address, etc., and that defendants fraudulently stamped similar packages with the words "Mrs. C. B. Miller & Co. Best Smoking Tobacco," etc. A demurrer to the declaration was overruled.

In *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592, the phrase, "IXL General Merchandise Auction Store" was refused protection against "Great IXL Auction Co.," the signs not being sufficiently similar. The court said: "It is claimed that the letters 'IXL' could not be used by the respondent after being appropriated by the appellant. The letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former

proprietors and inventors thereof, and do not by themselves make a trade-mark, any more than the word 'excelsior' which is often used with other words to make a trade-mark or sign."

The words "Gold Medal," applied to saleratus, indicate excellence, and are not a valid trade-mark. *Taylor v. Gillies*, 59 N. Y. 331; 17 Am. Rep. 333.

In *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; 48 N. Y. 374; 8 Am. Rep. 553, the court said: "The mark last named ('303' on pens) except, perhaps, the words 'extra fine,' seem to be within the rule that allows a device to become a trade-mark. . . . A word that is well known in the language and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade-mark. Nor can the appropriated name of a manufactured article, if the article is a known substance or production, be exclusively used as a trade-mark, except by those who have an exclusive property in the article itself, though a mere name may be protected as a trade-mark where it is used merely to indicate the true origin or ownership of the article offered for sale, or when a new preparation or compound is made, and a distinctive and specific name is necessarily given to it, which has not before by adoption and use become known."

In *Braham v. Bustard*, 1 H. & M. 447; 9 L. T. N. S. 199; 11 W. R. 1061, *Wood, V. C.*, said: "He could not hold that the name (Excelsior) merely described a quality, so that, like 'superfine,' it had become common property."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, *Duer, J.*, said: "As the plaintiffs could not have acquired, by their prior occupation, an exclusive right in the use of the words, 'first quality,' or 'superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning." See *In re Barrows*, 5 Ch. Div. 353. See also *supra* this title, *Devices or Symbols: Numerals*.

indicate grade and were adopted for that purpose alone, protection will be refused.¹

1. This rule is based upon the leading case of *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55, where it was held that the letters "A. C. A.," adopted by the Amoskeag Manufacturing Company for the purpose of indicating the first quality of their product, was not a valid trade-mark for the reason that it indicated grade, and was in the opinion of the court adopted for the purpose of indicating grade only. This decision was made, notwithstanding the fact that the letters "A. C." were the initials of the Amoskeag Company and stood for the name of the manufacturer, the letter "A" indicating the first quality of the goods. The evidence also showed that the letters "A. C. A." were the well-known and well-understood distinguishing brand of the Amoskeag Manufacturing Company, and that wherever the goods of the Amoskeag Company were sold under this brand, as they had been for thirty or forty years at the date of the suit, they were well-known to the trade by these letters. The case lays down the doctrine stated above, that if letters, symbols, or words are adopted by a manufacturer to indicate quality merely, that no amount of subsequent reputation which those letters, figures, or words may acquire, and which reputation has caused the letters or words to become clearly distinctive of ownership or origin, can save the trade-mark and bring it within the limits of what a court of equity will protect. Attention is especially directed to the dissenting opinion of Justice Clifford in this case; the English cases hereafter referred to, are considered with great care, and with a great desire to do equity, and have fallen into the same line suggested by Justice Clifford—that is to say, they hold that there is no good reason why a trade-mark, which is not objectionable as a trade-mark, but which was originally adopted to indicate quality only, and which, by subsequent acceptance and use, has come to indicate ownership and origin clearly, should not be protected and be given the benefit of all personal reputation which has by use come to be attached to the marks.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776; 138 U. S.

537, it was held that the letters "L L.," stamped on cotton sheeting, being adopted originally by complainant to indicate quality, and being previously known to the trade as indicative of quality, are not a valid trade-mark. Jackson, J., said: "Whether letters, by themselves, or in combination, can be employed to represent both the grade or quality of the goods and their origin, thus performing, at the same time, the double office of trade-mark and description, or classification of the article to which they are affixed, is a question not discussed in either of the supreme court decisions above referred to. This theory that the letters 'L L' signify or possess the dual meaning contended for, is unsupported in point of fact by the evidence. But, suppose it actually existed, it may well be doubted whether such double signification could stand under the law of trade-marks, so as to confer an exclusive right to the use of such a symbol. . . . Does the law allow to parties the privilege of thus blending public and private rights? . . . This would be a strange anomaly in the law and would lead to inextricable confusion. Where origin and ownership is otherwise indicated, as by the use of the manufacturer's name, then the symbol, mark, or device which is intended to designate grade, class, or quality, cannot properly be also employed to denote origin or manufacture, and thus confer exclusive right to its use." In the opinion in the above recited case, the fact that complainants had stamped goods of inferior grade, but of the same weight and class, with the same mark, was relied upon by the court as indicating an intention to deceive, and thereby precluding complainant from obtaining protection. In the *United States Supreme Court* Fuller, C. J., said: "Nothing is better settled than that an exclusive right to the use of words, letters, or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Strat-*

ton, 12 Fed. Rep. 696); yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark."

In *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331; 45 Am. Rep. 229, *reversing* 59 How. Pr. (N. Y.) 17, plaintiff used the term "Royal" to designate the best grade of his flavoring extracts. Rapallo, J., said: "Letters or figures which, by the custom of trades or the declaration of the manufacturer, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by anyone, like the adjectives of the language."

In *Avery v. Meikle*, 81 Ky. 73, complainants branded steel series of plows with word "Pony" and letters "A O," "B O" and "C O," and their cast series with numerals $\frac{1}{2}$, "1," "2," "3" and "8," besides their trade-mark, a maltese cross, etc., and the words of caution, "Keep all taps screwed up." Defendants used almost identical letters, the same numerals, and the same words of caution. Hargis, C. J., said: "As to the numerals, $\frac{1}{2}$, etc., they were used by appellants to denote the size and quality of their cast series. This is the evidence, and although the letters and numerals on both sides may have come to indicate to the public the origin or ownership of appellants' plows, as they did not appropriate them by adoption, use, or claim, as a part of their trade-mark, they cannot be treated as a part of it simply because they appear capable of serving the same purpose."

Numerals arbitrarily selected, and used on goods in combination with other devices, to denote the origin of goods and not their quality, are a valid trade-mark, and a person who uses them in combination with other devices which he has a right to use, may be restrained by a bill in equity from so using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive, and does deceive, persons buying his goods. The court said: "It appears that these figures (523) were selected arbitrarily; that they were of unusual and distinctive form; that they were added to the original device, consisting of the eagle, the wreath, and the plaintiff's name, at the time when the word 'trade-mark' was also added; and that the whole, so com-

posed, has been used as one trade-mark ever since." *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362.

In *Re Eagle Pencil Co.*, 10 Pat. Off. Gaz. 981, application for the registration of a trade-mark for pencils, consisting of the combination of the whole number usually marked thereon, with a fraction, as $1\frac{1}{4}$ for 1, etc., was refused on the ground that this device was "simply a new arrangement for the purpose of indicating quality."

In *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 333, the court said: "There is no principle more firmly settled in the law of trade-marks, than that the words or phrases which have been in common use and which indicate the character, kind, quality and composition of the thing, may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect. Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words must express only the latter." See *Hirst v. Denham*, L. R., 14 Eq. Cas. 542.

No exclusive right can be claimed in the letters and numerals "A No. 1," "A. X. No. 1," etc., used to designate different qualities of plows. *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125.

In *Stokes v. Landgraff*, 17 Barb. 608, the terms "Galen," "Lake," "Cylinder," "Wayne," and "New York," under which certain grades of glass were sold, were held to indicate quality merely, and not origin, and not to be capable of exclusive appropriation.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, the letters "A. C. A.," on a label attached to cotton tickings, were held indicative of quality and could not be protected. The court, by Duer, J., said: "As the plaintiffs could not have acquired by their prior occupation, an exclusive right in the use of the words 'first quality,' or 'superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning. It is immaterial whether words, or letters, or figures, or any other signs, are used, if the single fact that they are used to indicate or declare, is a truth that other manufacturers or dealers have an equal right to express and communicate.

d. WORDS INDICATING A PROCESS OF MANUFACTURE. — Words indicating a process of manufacture, cannot be protected as a trade-mark, apart from other words indicating ownership and origin, if the process is known and is public property. If the process is secret, but is known by a name, then the name necessarily indicates ownership and origin, and will be protected; or if the process be patented and the patent held as a monopoly by the owner or owners, then words indicating the patented process or goods made under it, will be protected, because any use of them by another would be a false statement, unless the user were an infringer, and in any case the use of such words by one not an owner or licensee under the patent, would be enjoined as a fraud upon the owner of the patent and the public, and an unlawful interference with the exclusive rights granted to the patentee by his patent.¹

... He (the owner of an original trade-mark) has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose."

In *Ransome v. Graham*, 47 L. T. N. S. 218, it was held that where a manufacturer places on his goods a series of combinations of letters as trade-marks, each of which serves to indicate to purchasers, first, that the goods are manufactured by the person using the mark; and second, the quality of the goods as compared with the goods respectively bearing the other marks in the series; the marks, being exclusively used by the manufacturer, are valid trade-marks, notwithstanding that they are indicative of the quality of the goods to which they are applied. Here plaintiff marked a series of plows R. N. (R. standing for Ransome, and N. for Newcastle); and in order to distinguish the patterns of the series, and the purposes for which the series might be used, he added further letters, as R. N. D., R. N. E., etc., and also numerals, which referred to sizes and shapes of the several parts of each plow. There had also been a patent under which complainant's plows (not this particular series only) were made, but it had long since expired, apparently long before the adoption of the said marks.

It is proper to register a series of marks which differ from each other only by combining in different modes a mark common to them all and peculiar to the trader, with words merely indicative of the quality of the goods marked, or

symbols common to the trade. *In re Barrows Trade-Mark*, 5 Ch. Div. 353. In this case, various words and devices, commonly used in the trade as indicative of various qualities or grades of iron, were combined with the initials of the firm and in such connections sustained. The court said: "Now, in this case, if anybody were to put on their iron 'Extra Treble Best' simply, there would be no trade-mark and no infringement of any right; but if anybody put on their iron 'B. B. H. Bloomfield, Extra Treble Best,' B. B. H. meaning Bradley, Barrows & Hall; Bloomfield meaning the works, the whole combination would mean the iron of which 'Extra Treble Best' is the description . . . and the combination becomes a trade-mark.

1. Whether a name has acquired a generic meaning indicative of kind, quality, or class of goods, and has therefore become *publici juris*, is a question of fact. *Williams Mfg. Co. v. Noera*, 158 Mass. 110. See *Coats v. Merrick, Thread Co.*, 36 Fed. Rep. 324; 149 U. S. 562.

Where a patentee uses his name and marks to designate his invention, and also the product of it, as manufactured by himself, so that the public cannot separate the one from the other, he cannot acquire any right to the exclusive use of the name and marks after the patent has expired. So there is no exclusive right to the use of the word "Singer;" and the shuttle device of complainant is not infringed by that of defendants, the only similarity being that the labels in both cases are affixed to the arms, and the letter "S" to the

legs. *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. The court said: "It is the consideration now due to the public, when the patents have expired, that it shall have the unobstructed benefit of these inventions, and there is not the least foundation in principle or reason for allowing the patentees to continue to enjoy as much of the monopoly as they can save by the claim to use exclusively the trade names and marks by which they identified and secured to themselves the reputation of their inventions."

The words "Indurated Fiber," as applied to wares made of wood pulp, "are not arbitrary or fanciful words, but are descriptive rather of the quality, ingredients, or characteristics of the manufactured article." *Indurated Fiber Co. v. Amoskeag Indurated Fiber Ware Co.*, 37 Fed. Rep. 695.

In *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, Field, J., said: "But the name of 'Goodyear Rubber Company' is not one capable of exclusive appropriation. 'Goodyear Rubber' are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by anyone." See the earlier cases of *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 30 Pat. Off. Gaz. 97; P. & S. 141; and *Goodyear Rubber Co. v. Day*, 22 Fed. Rep. 44.

The words "Gold Leaf," as applied to flour, being a brand in common use in the trade to designate quality and the process of manufacture, are not a valid trade-mark. *Partlo v. Todd*, 17 Can. Sup. Ct. 196.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "The complainant was incorporated under the laws of *New York* in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline . . . that, in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word 'celluloid,' . . . and used the word as a trade-mark. . . . That in 1873 complainant caused said word 'celluloid' to be registered as a trade-mark . . . and again registered in 1883, under the subsequent act. . . .

Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied, from the evidence adduced before me, that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right. It seems to me that it cannot. As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one; it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles; the complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactured celluloid; but this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and, if it has such right (which, it seems to me, it has), then such a use by the defendant of the word 'celluloid' itself, or of any colorable imitation of it, would be an invasion of the complainant's right. As a trade-mark, it indicates that the article bearing it is the product of the complainant's manufacture."

Where it is very doubtful whether the name claimed does not describe the articles themselves, and the kind of them, and indicate that they are made according to the patent, known by the name claimed, rather than that the patentee made them, a preliminary injunction should not be granted. The words claimed were "Pile Leclancha" and "Disque," Leclancha being the name of the patentee. Leclancha Bat-

tery Co. v. Western Electric Co., 21 Fed. Rep. 538.

See also *Leclancha Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276, where Wallace, J., said: "When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which it is recognizable."

In *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279, the word "Singer," applied to a sewing machine, was refused protection as a trade-mark after the expiration of the patent. The court said: "Inasmuch as the word 'Singer' indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word 'Singer' attached to such machine is common property." The above case was cited with approval and followed in *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. See also the late case of *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208, where the court said: "It would be a dangerous doctrine to concede that a patentee, who has invented a machine which has gone into extensive public use, can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine."

In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679, Paine, Commissioner, said: "But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark at common law, subject, of course, to the rights of other persons of the same name, whatever they might be. The fact that the owners of the trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been

used during the life of the patent. If the applicants are the legal assignees of the patents and of the trade-mark, they are protected by the statutory provision which preserves the right to register common-law trade-marks which were in use before 1870. If the applicants shall so amend their application as to show in their oath that they are the assignees of this trade-mark; that it has been used by their assignors for seventeen years, and that they are also the lawful assignees of the patents relating to parts of this fruit jar, under which the jar bearing the trade-mark in question has been sold, they will be entitled to registration."

In *re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 269, Doolittle, Acting Commissioner, said: "Applicants adopt the name 'Mason' as the essential mark. . . . If there were an accompanying mark, that should be the one recorded and known as the particular trade-mark of applicants. It is a universal custom to refer to patented articles by the name of the inventor, as the Howe sewing machine, the Bell telephone, etc.; and such names soon become generic in their character, designating a particular kind or class of articles. So it is in the present case. During twelve years precedent to the year 1870, the particular form of fruit jar made by applicants had become widely known as 'Mason's Fruit Jar,' and it no doubt will continue to be so known as long as the demand for it exists. It is also clear that applicants were enabled to stamp on their goods the label 'Mason's Fruit Jar,' and to protect themselves in the exclusive manufacture and sale of the article by virtue of the patents owned by them. If ownership or right to manufacture under the patents had been vested in others, there can be no doubt that they, too, would have been entitled to use this stamp. When all such rights cease by the expiration of the patents, the public will succeed thereto, and no one can be prevented from manufacturing and selling Mason's fruit jars, and stamping them as such." See *Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455.

In *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151, it was held that the word "Singer," as applied to sewing machines, was descriptive of the principle of manufacture and invalid as a trade-mark, the various patents having expired. But in *Singer Mfg. Co. v. Brill*,

5 Month. L. Bull. (Ohio) 523, the word "Singer" was protected, apparently on the ground that evidence showed the machines of the plaintiff not to be manufactured on any one system.

In *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 834; 47 L. J. Ch. 430; 38 L. T. N. S. 448; 26 W. R. 463, the word "Linoleum," being the name given to a new substance by the inventor and patentee, it was held that he had no exclusive right to the word after the patent had expired. The court said: "The word directly and primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are sole manufacturers. In my opinion, it would be extremely difficult for a person, who has been, by right of some monopoly, the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article."

In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337, the words "Fairbanks' Patent" were cast in the scales made by both parties. All the patents which Fairbanks & Co. had, had expired. An injunction to restrain Jacobus from using the words "Fairbanks' Patent" on his scales was denied, the words not being a valid trade-mark.

In *Cheavin v. Walker*, 5 Ch. Div. 850; 46 L. J. Ch. 265, 686; 35 L. T. N. S. 757; 36 L. T. N. S. 938, the words "Patent Gold Medal Self-Cleaning Rapid Water Filter," etc., on a tablet placed on filters, was held to be merely an inscription and descriptive. James, L. J., said: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world."

In *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310, complainant, the licensee of a patented process (called "Heliotype") for making prints, registered the same word as his trade-mark for prints, and had used it for some time in connection with these particular prints. It was held that his right to said mark was limited to prints made under the "Heliotype" process. This decision was under the 77th and 78th sections of Act of July 8th, 1870, 16 *United States Stat.* at Large 210, and the state-

ment filed in the patent office at the time of registration, which sets out that said mark is to be used "in connection with the production and publication of prints," and that "the particular article of trade upon which we have used it is the 'print' which we designate as 'Heliotype.'"

In *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 220, the court said: "There is no doubt, I think, that a word which was originally a trade-mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of Harvey's Sauce (Seton (4th ed.) 237). . . . Then what is the test by which a decision is to be arrived at, whether a word which was originally a trade-mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone."

The words "Wheeler & Wilson," although the names of original manufacturers and patentees of a certain kind of sewing machines, being indicative of the plan of manufacture, cannot, after the expiration of the patent, be exclusively appropriated as a trade-mark, but may be employed by anyone making such machines. *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. Ch. 36. The court said: "It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying,

'I have got a trade-mark in the name of a thing which was the subject of the patent.'

In *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298, the phrase "Liebig's Extract of Meat" was refused protection, on the ground that for some time it had been commonly used as descriptive of an article made in a particular way. There was no patent, and the inventor did not seem to care to preserve the right of property in his name. See also *Anderson's Trade-Mark*, W. N. (1883), p. 185; 26 Ch. Div. 409.

The cases on this subject of words indicating process of manufacture, are conflicting, and it seems impossible to reconcile some of them. The doctrine is well established that trade-marks which are employed to designate the ownership and origin of goods manufactured under a *United States* patent for an invention, cannot be held as exclusive property after the expiration of the patent, unless the trade-mark be older than the patents, in which case the interposition of a patent cannot defeat the otherwise valid trade-mark. This doctrine is discussed, *infra*, this title, *Name of Patented Article After Expiration of Patent*, which see. Where, therefore, the trade name or trade-mark, either by virtue of the words used in their natural and necessary meaning, or by association, have come to indicate the patented process of which the goods are manufactured, this trade-mark or trade name becomes public property upon the expiration of the patent, and all who have a right to make the goods by the patented process, have an equal right to designate these goods by the name with which they were christened by the manufacturer under the patent. Goods which are made under a process which is not patentable may be given a trade-mark to indicate their ownership and origin, and this trade-mark will be protected. If the process of manufacture or method by which the goods are made, is not patentable, it will be because the process is either old, or no invention was involved in devising it. If this be the case, then the knowledge of how to make the goods was within the public reach, and every manufacturer had an equal right and equal power to make the goods before they were made by the adopter of the trade-mark. The mere fact that the adopter of the trade-mark was in fact the first person to

make the particular goods or article and put it on the market, should not logically have any influence upon his right to adopt for those goods a trade-mark to indicate the origin and ownership of the particular goods made by him; and yet some of the judges have used language which in its broad signification would indicate that exclusive property in a trade-mark or trade name cannot be acquired by a person who is the actual originator of goods which are not patented, for the reason, as they have stated, that when any new article is put out it must necessarily be christened with a name by which it may be known, and that this name, becoming the only appellation by which it can be distinguished, becomes *publici juris*. See *Petridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; *Siebert v. Findlater*, 7 Ch. Div. 801; *Leclanché Battery Co. v. Western Electric Co.*, 21 Fed. Rep. 538; *James v. James*, 41 L. J. Ch. 353; *Young v. Macrae*, 9 Jur. N. S. 322; *Hostetter v. Fries*, 17 Fed. Rep. 620; *In re Leonard's Trade-Mark*, 26 Ch. Div. 288.

We think, however, that this doctrine would not apply to articles which, although new in themselves, were the result of a process which was old or which did not require invention to devise it. All other manufacturers being presumed to be possessed of the same knowledge as the maker of the article, had it within their power, prior to his first making the article and giving it a name, to have made the article themselves and given it a name, which would have indicated the article as of their production. They still possess the same right after its manufacture and christening by the first maker, to make the same article and designate it by a different name, to denote their particular manufacture of the article. There is one case which seems to be contrary to this line of reasoning, and it is a case of so much weight that we hesitate to express an opinion different from it. It is the case of the *Celluloid Manufacturing Co. v. Cellonite Manufacturing Company*, 32 Fed. Rep. 94, opinion by Bradley, J. He holds that the word "Celluloid," which was a coined name given to a patented product made by the exclusive manufacturers of it, and used subsequently by the assignees of the original manufacturers, after a long period of time, after the expiration of the patent, became the exclusive trade name and trade-mark property of the original manufacturers

e. PURPOSE OR USE.—Words which describe, in ordinary language, the purpose or use of an article, cannot be protected as trade-marks; but they often form strong evidence of an intention to deceive, and of a likelihood of deception, and hence frequently play an important part in making out a case of unlawful competition in business, which as a general rule controls the decision of trade-mark cases.¹

and their assignees, notwithstanding the fact that the product was patented, and the patents had expired, although the article made under the patents was an entirely new article, was christened by its inventors with the name "Celluloid," and became universally known by that name to so great an extent that the word is now a part of the language, as describing a particular thing made in a particular way, no matter by whom it may be produced, and although the process by which the goods are manufactured has been called by the same name, the "Celluloid" process. In fact, a large class of modified processes by which articles of the same general nature, but varying slightly in composition or quality from that originally made by the first inventor, are made, are all classed under the general generic term "Celluloid" processes. The authority of this case is doubted in *Holt v. Wadsworth*, 41 Fed. Rep. 34. We do not see how it is possible to avoid the logic of the cases in which it has been held that when a name comes to be generic, it becomes *publici juris*, except in the one case which is discussed *infra*, this title, *Exceptions*, where an article old in character is made to a great extent exclusively by one manufacturer, and sold to so great an extent, that the whole class becomes known by the trade-mark name of the particular manufacturer. In this case the fact that the name has to a great extent become generic by acceptance, does not, and cannot, operate to defeat the legally acquired trade-mark rights of the adopter of the mark in it.

1. There can be no trade-mark in the phrase "Magic Headache Cure." *Gessler v. Grieb*, 80 Wis. 21.

In *Harris Drug Co. v. Stucky*, 46 Fed. Rep. 625, the court said: "The words 'Cramp Cure' are descriptive of the purpose and character of the medicine, and cannot, under the rulings, be exclusively appropriated by the manufacturer of a remedy for the disease."

The words "Puddine," "Rose," and

"Vanilla," applied with reference to uncooked ingredients for pudding, cannot be protected. *Clotworthy v. Schepp*, 42 Fed. Rep. 62.

The words "Microbe Killer," applied to a preparation for destroying microbes, are descriptive, and not a valid trade-mark. *Alff v. Radam*, 77 Tex. 530. See also *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122.

In *Humphrey's Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, the court said: "It cannot be successfully maintained that the words 'Homeopathic Specifics,' standing alone, can be appropriated by any one as a trade-mark; they are too broad, and, if allowed, would give the taker a monopoly in a school of medicine, which Hahnemann, its founder, threw open to all disciples."

There is no right of trade-mark in such words as "cough remedy" or "a sure remedy for chronic or common cough, sore throat," etc., etc. *Gilman v. Hunnewell*, 122 Mass. 139.

The phrases, "Für Familien Gebrauch" and "Lawrence Feiner Familien Flannel" indicate the quality and use, and are not registerable. *In re Lawrence*, 10 Pat. Off. Gaz. 163.

In *Re Roach*, 10 Pat. Off. Gaz. 333, the words, "Croup Tincture," as trade-mark for a croup medicine, were refused protection as being merely descriptive.

"Lieutenant James' Horse Blister," was the name given by the inventor to an unpatented production. It was held that his assignees, after his death, had no right to its exclusive use. *James v. James*, L. R., 13 Eq. 421; 41 L. J. Ch. 353; 26 L. T. N. S. 568; 20 W. R. 434. The court said: "When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like), may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by

f. INGREDIENTS OF MEDICINES.—Names of medicinal preparations or articles of manufacture which include the names of medicines or medicinal ingredients, will not be protected as trade-marks, even though the compound or article in which the medicine may be used, is an entirely new article, and the words by exclusive use have come to a great extent to indicate ownership and origin; but if the name of an ingredient be made the basis for a coined arbitrary word, such word may be protected.¹

him." See the criticism of this case in *Thorley's Cattle Food Co. v. Massam*, 42 L. T. N. S. 851.

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76, the words "Washing Powder," were held to be not a valid trade-mark. The court said: "He (the claimant) will not be protected in the use of figures, or symbols, or combinations of words which serve merely to indicate the name, kind or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin or ownership."

1. In *Battle v. Finlay*, 45 Fed. Rep. 796, the word "Bromidia," coined and applied arbitrarily to a medicinal preparation, which nevertheless contained bromide of potassium, was held entitled to protection as a valid trade-mark. The court said: "The word is an arbitrary word, descriptive of nothing unless it is of the complainant's goods, and that only for the reason that the complainants have introduced them to the public under such arbitrary name."

The words "Iron Bitters," indicate the composition of the article so called, and are not a valid trade-mark. *Brown Chemical Co. v. Sterns*, 37 Fed. Rep. 360. This case follows, and the court cites with approval, *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453, wherein the court says: "It goes without saying that the words 'Iron Bitters' are merely descriptive of an ingredient and quality of the article, and for that reason cannot be appropriated as a trade-mark." The latter case was subsequently affirmed on appeal to the Supreme Court (139 U. S. 540), where the court, through Mr. Justice Brown, says: "The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark."

The term "Acid Phosphate," applied to a medicinal preparation, is not meaningless and arbitrary, but sufficiently describes the characteristics and qualities of the article, and is not protectible. *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524. The court observing: "The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended."

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, the court said: "The word 'Cresylic,' when applied to distinguish an ointment made of soap and the article known in commerce as cresylic acid, is descriptive of the nature and quality of the compound."

The words "Rye and Rock," used to designate a mixture of rock candy and whisky, are not a valid trade-mark. *Van Beil v. Prescott*, 82 N. Y. 630.

Such names as "Ferrated Elixir of Bark, or Elixir of Calisaya Bark with Iron," "Celebrated Remedy for Diarrhœa," etc., indicate the "qualities, ingredients, or composition of the articles," and are not protectible. *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1.

In *Ayer v. Rushton*, 7 Daly (N. Y.) 9, "Cherry Pectoral" was not protected, "cherry" indicating one of the ingredients of the medicine, and "pectoral" the intended application.

The words "Highly Concentrated Compound Fluid Extract of Buchu," are purely descriptive, and incapable of appropriation. *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453. The court said: "A trade-mark must, in a case like this, as the term imports, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot

g. **GENERIC NAMES.**—Words which were originally valid trade-marks indicating ownership and origin, but which by acceptance and use have lost their meaning of ownership and origin, and come to indicate only quality, are said to have become generic, and are denied protection on the same ground that words which, by their necessary meaning indicate quality, are refused protection.¹

be the appropriation of words belonging to the general public which describe truly a known product."

The phrase "Ferro-Phosphorated Elixir of Calisaya Bark," indicates the ingredients of the medicine to which it is applied, and cannot be protected. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233.

In *Burnett v. Phalon*, 9 Bosw. (N. Y.) 193; *aff'd* 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 212, the plaintiffs were manufacturers of a hair oil which they sold under the name of "Cocaine," and the defendants began to sell an oil of their own under the name of "Cocaine." An injunction was granted to restrain defendants from so doing, that name being held to be a valid trade-mark, and the property of the plaintiff. *Pierrepont, J.*, said: "Every man has a right to the reward of his skill, his energy, and his honest enterprise; and when he has appropriated as his trade-mark letters combined into a word before unknown, and has used that word and has long published it to the world as his adopted trade-mark, he has acquired rights in it which the court will protect. . . . No one can appropriate a word in general use as his trade-mark, and restrain others from using that word. *Burnett* cannot acquire property in the word, gin, wine, brandy, or ale, or in any other word known to the language and in common use to designate things, or the qualities of things. But the word appropriated by the plaintiff is not of that character." *Robertson, J.*, filed a dissenting opinion in the lower court. The doctrine in this case seems to be generally accepted in the *United States*, see *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; but the ruling in *England* seems to be different, see *Linoleum Mfg. Co. v. Nairn*, 38 L. T. N. S. 448; *Leonard v. Wells*, W. N. (1884), p. 60; *In re Horsburg*, 1 Trade-Marks 260; *Cox's Man. of Trade-Mark Cases* 597. See also *Upton on Trade-Marks*, p. 185, where it is said that this doctrine is a departure from the principles announced in the *Amoskeag Mfg. Co. v.*

Spear, 2 Sandf. (N. Y.) 599, and *Williams v. Johnson*, 2 Bosw. (N. Y.) 1.

In *Brown v. Freeman*, 12 W. R. 305; 4 N. R. 476, it was strongly intimated that the word "Chlorodyne," applied to a new medicine by its inventor, was capable of protection. See also *Brown v. Freeman*, W. N. (1873), p. 178.

In *Thomson v. Winchester*, 19 Pick. (Mass.) 214; 76 Am. Dec. 733, plaintiff, an inventor of certain medicines, gave them the name of "Thomsonian Medicines," by which name alone they became generally known. The name having acquired a generic meaning, and the medicines not having been patented, it was held that the name could not be protected.

In *Canham v. Jones*, 2 Ves. & B. 218, the name in question was "Velno's Vegetable Syrup." *Velno*, the compounder of the medicine, was dead, and neither party claimed any right from him. It was held that the plaintiff, although for a long time the sole manufacturer of the medicine, yet having no exclusive right to the manufacture of the medicine, had no exclusive right to the name.

In *Singleton v. Bolton*, 3 Doug. 293, the compounder of a medicine known as "Dr. Johnson's Yellow Ointment" was deceased, and the words had come to be recognized as the generic name of the medicine. It was held that plaintiff, although he, and his father before him, had long manufactured it under this name, had no exclusive property in the name.

1. Under this head fall all of the cases of expired patents where the trade-mark has designated a patented article during the life of the patent; but as a general rule, in other cases, a name seldom, if ever, becomes generic except by abandonment. It is true that cases do exist, and may occur, in which a new article is made and put on the market by a manufacturer and given a name by which it becomes known, and which becomes its generic name to so great an extent as to make it impossible for the originator subsequently to assert a monopoly in the

name itself. Still, we think that all of these cases, wherever they have occurred or may occur, may be decided by the test laid down in the text, *supra*, this title, *Words Indicating a Process of Manufacture*, that if the article is essentially new, it must be the result of patentable invention. If it is the result of a patentable invention, the monopoly can only be protected by the patent laws, and with the expiration of the patent the trade-mark will become public property. If the article is not the result of invention, then it cannot be said to be so essentially new, either in itself or in its process of manufacture, that the names given to it by the first manufacturer should be said to be generic.

When a preparation has become known by the name of the original manufacturer (*e. g.*, "Ward's Lini-ment"), a third person, manufacturing it, has no right to the exclusive use of such name; and this, it seems, in spite of the fact that he has been granted by the original manufacturer all the rights which he had in the name. *Watkins v. Landon*, 52 Minn. 389.

One Weymouth invented and took out a patent for a certain kind of hay-knives. The patent was assigned to Holt, who, after some time, adopted the trade-mark "Lightning" for these knives. They became known to the trade as "Weymouth's patent" and "Lightning" hay-knives. It was held that the word "Lightning" was a valid trade-mark during and after the expiration of the patent, but the words "Weymouth's Patent," after the expiration of the patent, could not be exclusively appropriated. In *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34, Wallace, J., said: "If the case of *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 99 (the 'Celluloid Case'), contains any opinion opposed to the view that the defendants have the right to print the words 'Weymouth's Patent' upon hay-knives sold by them similar to the patented article, it is not accorded to, and is antagonistic to the cases of *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337, and *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276."

The word "Reverse," applied to a game of cards, one of the features of which is a system of reversing, is not a "fancy" word under the act of 1875. *Waterman v. Ayres*; *In re Waterman's Trade-Mark*, 39 Ch. Div. 29.

The court said: "I think that an ordinary Englishman, not knowing foreign languages, would consider 'Reverse' as in some way intended to describe turning over or reversing." It was held, also, that a name which has been given to a new article, and which is the only name whereby it is known, cannot be a fancy word as regards that article.

The word "Gem," applied to air-guns, becoming, after three years' use, descriptive of the gun, is then registrable. *Arbenz's Appeal*, 35 Ch. Div. 248. Lopes, L. J., said: "The rule, in my opinion, is that where a name or word was originally, or has come to be, descriptive of the article to which it is attached, so that, while indicating what the article is, it does not connect that article with any particular manufacturer, such name or word cannot be registered as a trade-mark." With reference to the word "Gem" itself, the same judge says: "I think, whatever it may have been originally, it is not now a fancy word. I think it indicates commendation of the article, and is therefore descriptive, and not a fancy word within this section."

In *Re Leonard's Trade-Mark*, *Leonard v. Wells*, 26 Ch. Div. 288, Cotton, L. J., said: "Now, in my opinion, when a man invents a new article, and invents a word as descriptive of that article, then if all the world are at liberty to make that article, he stands in a very great difficulty as regards claiming to himself the exclusive use of that name which he has invented to describe the article. It is not, however, necessary to give an opinion upon that question, etc."

Seem, that the name of a patented article (*e. g.*, "The Home-Washer," applied to a washing machine), which has become known in the trade, is not a fitting trade-mark after the expiration of the patent, since it would have the effect of extending the patent beyond its legal limit. *In re Ralph's Trade-Mark*, 25 Ch. Div. 194.

In *Hostetter v. Fries*, 17 Fed. Rep. 620, it is held that there is no trade-mark in the words "Dr. J. Hostetter's Stomach Bitters." The court said: "When a new article is made, a name must be given to it, and this name becomes by common acceptance the appropriate descriptive term by which it is known, and therefore becomes public property."

In *Marshall v. Pinkham*, 52 Wis.

572; 38 Am. Rep. 756, the court said: "It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good-will of his business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also, in making sales, to describe it as such. Upon that assumption the words 'Old Dr. S. Marshall's Celebrated Liniment' were merely descriptive of the compound, and, if truthfully applied by the defendant in making sales, no one could rightfully complain, as no one had any patent upon it, or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good-will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark."

In *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527, the court said: "It is now so well settled that it is no longer necessary to cite authorities, that a trade-mark may consist of marks, forms, symbols, or even words in common use, provided they are used in such a way as to designate the true origin or ownership of the article, and have not already been appropriated by others in connection with the same article. In case of prior appropriation of part, or parts, by others, the combination of the plaintiff, as a whole, must be new, and intended and calculated to designate ownership or origin. No right accrues to the use of mere generic words used to designate the article or its quality."

In the case of *In re Hall*; *In re Atkinson*, 13 Pat. Off. Gaz. 229, it was held that although "Calhoun," on plows, was originally a valid trade-mark of the firm of Calhoun & Atkinson, yet, having become, by reason of use by others without any opposition of the representatives of said firm, *publici juris*, registration must be denied it.

The words "Angostura Bitters" had become the term by which a certain medicinal preparation was generally known. It was held that they could not be exclusively appropriated, in case the secret of the manufacture of the article should become known, there being no patent right. The court said: "It is to be observed that the person who produces a new article and is the sole maker of it, has the greatest diffi-

culty (if it is not an impossibility), in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from." *Siebert v. Findlater*, 7 Ch. Div. 801; 26 W. R. 459. The term "Angostura" is also geographical. See also *Siebert v. Abbott*, 61 Md. 276; 48 Am. Rep. 101.

The words "Holbrook's School Apparatus" (Holbrook being the name of the original manufacturer), having been used by others without opposition, are descriptive and generic, and not entitled to protection. *Sherwood v. Andrews*, Chicago Super. Ct., 5 Am. L. Reg. N. S. 588.

In *Young v. Macrae*, 9 Jur. N. S. 322, plaintiff was the owner of a patent for distilling "Paraffine Oil," and defendant began to sell another oil under the same name. It was held, that although a fancy name, "and the more ridiculous it is, the better it is," will be protected if it indicates ownership, etc., yet where a person "has found out an article which is a natural product, and has given that natural product a name," such name designates the product, and may be commonly used.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; 13 How. Pr. (N. Y.) 385, the name "The Balm of Thousand Flowers," applied to a cosmetic, was held not to be a valid trade-mark. The court, by Duer, J., said: "It is not necessary to deny, that a name may in some cases be rightfully used and protected as a trade-mark, but this is only true when the name is used merely as indicating the true origin and ownership of the article offered for sale—never where it is used to designate the article itself, and has become by adoption and use its proper appellation. When a new preparation or compound is offered for sale, a distinctive and specific name must necessarily be given it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation, and passes as such into our common language. Hence, all who have an equal right to manufacture and sell the article, have an equal right to designate and sell it by its appropriate name, the name by which alone it was distinguished and known. . . . In short, an exclusive right to use on a label, or other trade-mark, the appropriate name of a manufactured article, exists only in those who

h. EXCEPTIONS.—It sometimes happens that a name, which at the time of its adoption had been a valid trade-mark, has, by long use and association with goods of a particular kind, come to be used for the purpose of describing the kind, character, and quality of the goods; but although this may be true, and the name thoroughly descriptive in this sense, still the trade-mark will be protected because it would be the height of injustice to an honest trader, who, by the expenditure of his time, labor and money had so widely extended the knowledge of his goods that his valid trade-mark had come to describe their character, quality, and ingredients to deprive him of the fruit of his labor just when it was most valuable to him.¹

have an exclusive property in the article itself." But in *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156, decided just after the above, Hoffman, J., expressed the opinion that the phrase "Balm of Thousand Flowers" is "extrinsic and not indicative," and is a valid trade-mark.

1. In *Lloyd v. Merrill Chemical Co.*, 25 Ohio L. J. 319, plaintiffs, discovering salt obtained from "wintergreen," with antiseptic qualities, gave it the name "Asepsin," to indicate the antiseptic qualities of the salt, and registered the same as a trade-mark. It was held that, the word being new, it was not an invalid trade-mark because suggesting the qualities of the article. See *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34. See *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776; 138 U. S. 537, set forth *supra*, this title, *Grade*.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "When the word ('Celluloid') was coined and adopted, it was clearly a good trade-mark. The question is, whether the subsequent use of it by the public, as a common appellation of the substance manufactured, can take away the complainant's right. It seems to me that it cannot. As a common appellation, the public has a right to use the word for all purposes of designating the article or product, except one; it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to, and stamping it upon, the article."

But see *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, where complainant failed to restrain the use of "Celluloid" as applied to starch or in the firm name of the company making starch, on the ground that so applied

it was fanciful, and not apt to deceive the public.

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, Judge Rapallo, in delivering the opinion of the court, after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name (as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'), consisting either of a new word or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in the *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, in the opinion by Mr. Justice Bradley, and also in *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712, in the opinion by Mr. Justice Shipman.

In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679, registration was asked for the word "Mason," in the collocation "Mason's Fruit Jar." The court said: "The fact that the owners of a trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole and not merely certain parts of it, have terminated the existence

2. Color.—The color of a label, wrapper, capsule, or package alone, cannot be protected as a trade-mark, but, like "Directions for Use," is often strong evidence of an intention to deceive and a likelihood of deception. Color is one of the most marked indicia of a package, label, or dress of an article, and when other elements combine with the color to make up an imitation of an article of established reputation, the likelihood of deception is great, and the courts are not slow to enjoin the acts of the defendant.¹

of the trade-mark 'which had been used during the life of the patent. . . . While the fact that the term has become generic would be fatal to its subsequent adoption by these or any other applicants, it certainly is not fatal to its continued use, or to its registration by the lawful assignees of those whose use rendered it generic, any more than to its continued use or registration by the assignors themselves. Otherwise a trade-mark, as soon as it should become valuable enough to be generic, would expire."

In *Carrick v. Morson*, L. J. Notes of Cas. (1877), p. 71; Cox's Man. of Trade-Mark Cases 543, the word "Lactopeptine," applied to a medicine of plaintiff's invention, was protected as a valid trade-mark.

The names "Turin," "Sefton," "Leopold," or "Liverpool," applied to certain trouserings to distinguish certain patterns, are capable of being exclusively appropriated. *Hirst v. Denham*, L. R., 14 Eq. Cas. 542. In this case the plaintiff was the inventor of at least three of the patterns. The court said: "When a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of such name and mark, which becomes what is usually called his trade-mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance."

In *Davis v. Kendall*, 2 R. I. 566, the inventor of a compound called it "Pain-Killer," prefixed by his name and the word "Vegetable." The court said: "The plaintiff has no patent and no exclusive right to the compound called 'Pain-Killer.' He invented the compound and gave it the name 'Pain-Killer,' and this seems to have been the first application of the term to a medical compound. The plaintiff,

though not entitled to the compound, is entitled to his trade-mark, and the law recognizes and will protect this right." The case was, however, decided on the ground of deception.

In *Davis v. Kennedy*, 13 Grant. Ch. (U. C.) 523, the name "Pain-Killer" was protected as being fancy and sufficiently arbitrary. In *Davis v. Harbord*, 15 App. Cas. 316, it was held by two Lords, JJ., that the term was not special and distinctive within the Act of 1875, § 10.

1. In *Coats v. Merrick Thread Co.*, 149 U. S. 562, Brown, J., said: "There is, no doubt, a general resemblance between the heads of all spools containing a black and gold label, which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the center of the label, etc. Having done this, we think they are relieved from further responsibility. If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself, the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer."

In *Von Mumm v. Frash*, 56 Fed. Rep. 830, Benedict, J., said: "They (the defendants) should also be prohibited from placing the words 'Extra Dry' upon any bottles of their product, of the character that has been described, either in combination or otherwise. This upon the ground that the words 'Extra Dry,' as applied by them to the article they manufacture, constitute an untrue and deceptive representation, made, not for the purpose of description, but for the purpose of fraud, and which is calculated to deceive, to the injury of the complainants. They must also, upon the same grounds, be prohibited from surrounding the neck and cork of a bottle of the form generally used to contain champagne wine, which contains their product as herein described, a rose-colored capsule of metal, whether stamped with the words 'Extra Dry,' and an imitation of the complainants' trade-marks, as in the exhibit before the court, or otherwise. The rose color in question may doubtless be lawfully used in other ways than in the way indicated. But the use which the defendants make of the rose color, in connection with a metal capsule upon bottles of the form usually employed to contain champagne wine, which contain their product, is accompanied with a fraudulent intent, and when so used constitutes an untrue and deceptive representation, which may well be forbidden by a court of equity. No injury to the defendant can follow such a prohibition as I have decided. The public will be protected thereby from fraud, and the complainants relieved from danger of injury. If any doubt can be fairly entertained as to defendants' purpose in using a rose-colored capsule in the way they do, as was said by Judge Wallace, in *Association v. Piza*, 24 Fed. Rep. 151, 'it is not unreasonable to resolve any doubt that may remain in favor of the complainants.'"

In *Babbitt v. Brown* (Supreme Ct.), 23 N. Y. Supp. 25, Van Brunt, J., said: "In the case of *Morgan v. Troxell*, 89 N. Y. 293, it was expressly held that a party cannot acquire a trade-mark simply in the form and color of the package or the manner in which it is wrapped, and that mere general resemblance forms no ground for interference, as the products of dealers can be distinguished only by the brands, marks, or names which may be put upon them, and these can be protected

as trade-marks only as far as they are new and comply with the other conditions necessary to constitute a trade-mark. When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but, to sustain an action, there must be an imitation of something that can be legally appropriated as a trade-mark. The only resemblance seems to be in the size and color of the wrappers, and in such size and color, as already suggested, the plaintiff cannot acquire a trade-mark."

In *Fischer v. Blank* (Supreme Ct.), 19 N. Y. Supp. 65, Andrews, J., said: "The packages of the defendant are of the same shape and size as those of the plaintiffs; the paper of the wrappers is of the same color; the pictures and symbols are of the same color; the size and color of the labels on the end are the same. The pictures and symbols, though different from those on the plaintiffs' packages, are arranged in a similar manner. The differences between the packages can be seen upon a close inspection, but without such inspection the general appearance of the defendant's packages is so nearly the same as that of the plaintiff's packages that any person, whether illiterate or not, if making a purchase in a place where the light was not good, would readily mistake the packages of the defendant for those of the plaintiffs; and such inspection satisfies us that the object and the intent of the defendant was to put up his tea in packages so similar to those of the plaintiffs that they would be mistaken for the packages of the latter, and yet that the differences upon the wrappers should be such that the plaintiffs would not be able to maintain an action."

In *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, Paxson, C. J., said: "There is no trade-mark shown nor alleged which it is charged the defendant has pirated. On the contrary, the bill alleges that the plaintiff manufactures a peculiar kind of horse-shoe nail. It is known to the trade as a bronzed nail, being covered with a coating of bronze.

. . . The bill charges that the defendant is selling a precisely similar nail; that it is bronzed like those of plaintiffs, to deceive purchasers, and induce them to purchase them as plaintiff's nails. The defendant has not imitated its label, for it has none. He has not even imitated the plaintiff's man-

ner or style of putting up its packages. There is nothing beyond the mere averment, that he makes a similar nail. We have never yet carried the doctrine of trade-marks to the extent claimed for it by the plaintiff. We have never hesitated to restrain the imitation of a trade-mark, when the fact justified it. We are now asked to go one step further, and protect the manufacture of the article itself. This we do not see our way clear to do. The manufacture of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufactures."

In *Mumm v. Kirk*, 40 Fed. Rep. 589, Coxe, J., said: "The complainants use a rose-colored capsule upon bottles containing wine made by them known as 'Extra Dry.' They seek by this suit to prevent the defendant from using a capsule of similar color. . . . It was necessary for him to use a capsule of some kind. Almost all colors harmonious for this use, such as gold, silver, and white, had previously been appropriated by other dealers in champagne. He could hardly select a capsule without coming in contact with some of them. He chose rose color, as he had a right to do. If he had simulated the complainant's labels in other respects, a different proposition would have been presented."

In *Fleischmann v. Newman* (Supreme Ct.), 4 N. Y. Supp. 642, Macomber, J., said: "The manufacture of this article is open to all competitors, and they cannot be held liable in any action to restrain them, where they plainly put their name upon the label, even though they do happen to use light yellow for the background of the paper upon which the description of the commodity is given."

In *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, Wheeler, J., said: "The plaintiffs insist that their long use of these words and figures, displayed in these forms and colors upon their labels on the central parts of their spool-heads of light-colored wood, has made the mere appearance of the spools, without reading the labels, a representation that the thread is of their manufacture, etc. . . . Whether the appearance amounts to such a representation, is a question of fact to be determined on the evidence. Black and gilt labels appear to have been used by others on spools of thread

nearly and perhaps quite as early as by the plaintiff." *Affirmed* 149 U. S. 562.

In *Re Hanson's Trade-Mark*, 37 Ch. Div. 112, Kay, J., said: "It is the plain intention of the act that, where the distinction of the mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like, but you cannot register a mark of which the only distinction is the use of a color, because practically, under the terms of the act, that would give you a monopoly of all the colors of the rainbow."

In *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767, Scholfield, J., said: "It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance, or finish of his goods, so that another cannot lawfully make his goods like them. Nor can there be a trade-mark in the form or color of a package or box. . . . The boxes in which appellees' corsets are placed to be sold, are of the same shape, size, and general color as those in which appellants' corsets are placed to be sold. It does not appear, however, that there is anything unusual in the shape or structure or color of these boxes, and so far as we perceive, this similarity may result from the use required, and the convenience of the makers of the boxes; at all events, it does not appear that this may not be so, and we regard it a reasonable inference in the absence of all proof as to the purpose or motive."

In *Fleischmann v. Starkey*, 25 Fed. Rep. 127, Colt, J., said: "The position is taken by the complainants that the essential part of their trade-mark consists of a label having a yellow color, and that, therefore, they cover all yellow colored labels used upon compressed yeast, and that the use by the defendant of a yellow colored label upon the compressed yeast made and sold by him, constitutes an unlawful imitation of their trade-marks. . . . The color of a label, apart from a name or device, can hardly be the subject-matter of a trade-mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped. This might

seriously interfere with trade and with legitimate competition."

In *Ex p. Landreth*, 31 Pat. Off. Gaz. 1441, Butterworth, Commissioner, said: "The matter presented is a red bag to be used for seed-peas. . . . There is no limitation in respect to the matter claimed as essential in this case, except the color of the receptacle. As to shape and material, it is limited to nothing, except that it must be such material as can be made into a bag—paper, canvas, silk, leather, etc., any textile stuff capable of receiving a red color—and the bag may be of any shape or size, an envelope, a lady's reticule, a gunny-sack, as well as the particular canvas bag shown in the exhibits. . . . The conclusion to be drawn from these various decisions (cited in case) is that neither the color alone, nor the form alone, of a package, nor the color alone of an article of commerce can constitute a trade-mark. . . . As words, characters, and symbols, descriptive in their application to any merchandise, cannot be appropriated by anyone to his exclusive use, for the same reason, ordinary materials sold in the market and capable of employment for manifold uses, cannot be exclusively appropriated to any particular one of these uses by any one. . . . Red materials, suitable for bags, being commonly on sale and in use, there can be no legal restrictions upon their use by any person for any lawful purpose that suits his convenience. If the contrary were true, if it were in the power of the applicant to appropriate to his own use a red bag for peas, it would be equally in the power of the next man to appropriate a blue bag to the same merchandise, and the next a green bag, and so on. Who can say where the line must be drawn? Is there any reason why the trader who chooses should be prevented from adopting a white bag to distinguish his goods, if the door is once opened? Such a suggestion needs no answer. There can be no restriction on the use of white paper or fabrics for any lawful purpose, and the examiner can see no reason why this is not just as true of red cloth and red paper, or of cloth or paper of any hue or shade commonly sold and used."

In *New York Cab Co. v. Mooney*, 15 Abb. N. Cas. (N. Y.) 152, Lawrence, J., said: "As I have already observed, my examination of the affidavits convinces me that the defendant's design

is to induce the public to believe that his cab is the property of the plaintiff, and that the device which he has adopted and the color to which he has resorted, were adopted and resorted to for the purpose of misleading the public in that respect. By this I do not mean to say that the plaintiff is entitled to any exclusive property in color or words, but I am clearly of the opinion that it has so far established a trade-mark in the words, and colors, and device, as they are combined and used upon its cabs, as to entitle it to call upon a court of equity for protection against imitations designed to mislead the public and to deprive the plaintiff of its profits."

In *Sawyer v. Horn*, 4 Hughes (U. S.) 239, Morris, J., said: "The red top being, as to its use, a covering for the perforations in the metal top, and as to its color and material one of the most common of all the cements used to close and seal the mouths of jars, bottles, cans, and similar packages, and there being impressed on it no mark or design, it cannot, we think, be said to be a trade-mark, and cannot be exclusively appropriated by the complainant; nor can the form of his box, it having been decided not to be a patentable contrivance, be monopolized by him; nor can the color of the label, nor the allocation of words thereon, nor the type, be exclusively appropriated. . . . But we do find that the respondent has been guilty of improper and inequitable conduct, to the injury of the complainant, in having designedly so put up, labeled, and packed his goods that purchasers for whose use they are intended, are misled and deceived."

In *Enoch Morgan's Son's Co. v. Schwachhofer*, 55 How. Pr. (N. Y. Supreme Ct.) 37; 5 Abb. N. Cas. (N. Y. Supreme Ct.) 265, Lawrence, J., said: "It is claimed that the plaintiffs cannot have an exclusive right to use tinfoil or ultramarine blue-colored paper in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiff's label, whether as to color, shape, or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper, as used by the defendant, is calculated to deceive purchasers, and I think it is very clearly

proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market."

In *McLean v. Fleming*, 96 U. S. 255, Clifford, J., said: "Mention may also be made of the fact that the color of the label and the wax impression on the top of the box, are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

In *Frese v. Bachof*, 13 Pat. Off. Gaz. 635, Wheeler, J., said: "The orator claims that his firm and their predecessors have long been accustomed to pack this article in long cylindrical packages with pink wrappers, and to have crimson papers of directions, and yellow ones of warning, tied in with each package, and their firm name painted across a white label, etc., so that the package by its form and colors would be at once known by its general appearance without taking time to read anything on it, and that their wares have come to be well known as theirs by the appearance of the packages. . . . Probably no mere form of a package would ever alone amount to a representation capable of indicating that the wares contained in it were those of any particular make. But when the form of the packages, the color of the wrappers, and the papers done up with them, and the form and color of the labels are considered all together, it is quite apparent that when they have been so long used by the orator's firm for holding this particular compound, when offered for sale, the mere appearance of the package would amount to a representation that they contained that article of manufacture."

In *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 389, Ingraham, J., said: "Upon the second question, as to labels and wrappers, I am of the opinion that the plaintiff is entitled to the injunction. The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff, and the directions for using are an exact copy of those used by the plaintiff. It is impossible to adopt any conclusion other than that the intent was to lead purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying. It is true that the defendants have substituted

their name as the manufacturers, but that alone will not relieve the defendants from the charge of an attempted imitation of the labels and wrappers of the plaintiff, for the purpose of misleading purchasers."

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, Daly, J., said: "An inspection of the two labels shows that the one afterward used by the defendants, and the use of which the plaintiffs seek to restrain by injunction, was, in respect to form, color, words and symbols, so like the former as to make it manifest that the design of the defendants in using it was to deceive, the resemblance being such as would be likely to impose upon ordinary purchasers. . . . It was alike in the size and form of the label; in the color of the paper, a peculiar, delicate gray tint."

In *Faber v. Faber*, 49 Barb. (N. Y.) 357, Sutherland, J., said: "Nor can I see upon what ground the plaintiff can complain of the manner in which the defendant Faber's pencils are put up for the wholesale market. The plaintiff certainly has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils by the gross in a book form, or any other particular form."

In *Williams v. Spence*, 25 Abb. Pr. (N. Y. Super. Ct.) 366, Monell, J., said: "Although there are some marks of dissimilarity, both in the labels, devices, and hand-bills, yet the prominence given to the name 'Yankee Soap,' the inferiority of the size and shape of the cakes, the covering of tin-foil, the color of the labels, the size and shape of the boxes, the almost literal adoption of the language used in the plaintiff's labels and hand-bills, overwhelm the small marks of difference which the defendants hoped would relieve them from the consequence of using the plaintiff's trade-mark."

In *Williams v. Johnson*, 2 Bosw. (N. Y.) 1, Woodruff, J., said: "They (the plaintiffs) have adopted in reference to their manufacture (of an article which any and everyone may manufacture and sell if he please), a form and size of cake, a particular mode of covering and packing, a combination of three labels on each cake, an exterior hand-bill upon the box, and have so arranged the whole as to suggest, to any one desiring to purchase their soap, upon an inspection, that the article is theirs, and made by them, like that heretofore

3. Form of Article or Package.—The form of an article or package alone can rarely be the subject of trade-mark protection. If the form is peculiar enough to be protected for itself alone, it may be the subject of a design patent; but the form of an article or package, like the color and other indicia, is to some extent arbitrary, because the vendor might have adopted almost any form for the packing of his goods, and having adopted and adhered to one particular form until it has become well known to the public, he will be protected in it so far as the court can go without creating unlawful monopolies or appropriating public property to private use without legal grant.¹

made, sold, and known as their manufacture. All this the defendant has copied, with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny. . . . We have no hesitation in saying, that his acts are a clear infringement of the plaintiffs' rights. He has copied the form, appearance, color, style, and substantial characteristics in all respects, which distinguish the plaintiffs' goods."

In *Croft v. Day*, 7 Beav. 84, the M. R. said: "It is truly said, that if any one takes upon himself to study these two labels, he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons." See also *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767; *Mooreman v. Hoge*, 2 Sawyer (U. S.) 78.

1. In *Brown v. Seidel*, 153 Pa. St. 60, the court said: "We are not prepared to say that the mere resemblance, accidental or otherwise, in the size and style of putting up packages, is of itself sufficient to justify the interference of a court of equity."

In *Fischer v. Blank*, 138 N. Y. 245, Maynard, J., said: "The plaintiffs have no proprietary right to this form of package, and are not entitled to its exclusive use. It is a convenient form in which to inclose merchandise of this character, when offered for sale, and all who are engaged in the traffic in the commodity, are free to use it without incurring the risk of liability for an infringement of the plaintiffs' rights. It has been too often reiterated, to be

now questioned, that, under ordinary circumstances, the adoption of packages of a peculiar form and color alone, having no distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark."

In *Hoyt v. Hoyt*, 143 Pa. St. 623, Williams, J., said: "The trade-mark must relate to and distinguish the goods to which it is applied. For this reason, among others, the size, or shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put, is not a trade-mark. If there is any new and useful combination in the construction of such box or package, it should be patented as an invention, if the owner wishes to prevent others from using it; but such package cannot be registered as a trade-mark." See *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; *affirmed* 149 U. S. 562.

In *Evans v. VonLaer*, 32 Fed. Rep. 153, Colt, J., said: "Stress is laid upon the fact that the bottles are alike, but, bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important."

In *Adams v. Heisel*, 31 Fed. Rep. 279, Welker, J., said: "It is well settled that a person cannot obtain the monopoly incident to a trade-mark by the mere form of a vendable commodity that may be adopted. In this case, the complainants could not obtain a trade-mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar, without injury to others who may use the same forms."

In *Moxie Nerve Food Co. v. Baum-*

bach, 32 Fed. Rep. 205, Sabin, J., said: "And, again, I would inquire when particular words, or things of common use, or theretofore known and used by the public, are used and appropriated by a party, in connection with his trade-mark, upon a manufacture of an article of commerce, whether the use of such common terms or articles for similar packages by another party can be enjoined from use upon like or simulated preparations manufactured by such other party, bearing in part a similar but different name, but put up in such a manner as to delude an unwary consumer of the article? While it is clear that words or articles of common use could not be enjoined, if used upon other preparations, yet, if used upon like or simulated preparations of same flavor, taste, and appearance, it seems to me that they can; and particularly when the first party using the same, in connection with his trade-mark and style of package, has established such a use of the same, and an intimacy between himself, it, and the public, as to become a matter of value by way of preventing deceit. A champagne bottle, for instance, is a thing long and well known by the public, and any person, under ordinary circumstances, may lawfully use the same in putting up any preparation therein. But when a manufacturer of a hitherto unknown fluid or beverage, as an article of commerce, has a trade-mark therefor, and introduces such article of commerce to the public in a champagne bottle, with a particular kind of label or trade-mark affixed thereto, . . . and thereafter another party or manufacturer, finding such article to be in great demand, introduces an article of like taste, color and appearance, claiming to be for similar use or purpose and with a label sufficiently like the former, . . . I think, that he might be and ought to be enjoined from embarrassing his neighbor and misleading the public by using a champagne bottle in putting up his preparation." This case was approved in *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248.

In *Re James Trade-Mark*, 33 Ch. Div. 392, Cotton, L. J., said: "The appellants cannot claim any monopoly in the shape in which they sell their black lead." Lindlay, L. J., said: "Of course the plaintiffs in this case have no monopoly in black lead of this shape. Anybody may make black lead of this shape, provided he does not mark it as

the plaintiffs mark theirs, and provided he does not pass it off as the plaintiffs' black lead. There is no monopoly in the shape, and I cannot help thinking that that has not sufficiently been kept in mind."

In *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767, Scholfeld, J., said: "It is well settled, moreover, that directions, advertisements, notices, etc., constitute no part of a trade-mark, and that no one can obtain a trade-mark in the form, appearance or finish of his goods, so that another cannot lawfully make his goods like them." See *Davis v. Davis*, 27 Fed. Rep. 490.

In *Alexander v. Morse*, 14 R. I. 153; 51 Am. Rep. 369, Carpenter, J., said: "We find that respondents have used, although perhaps only to a small extent, bottles precisely similar in size and form to those used by the complainants, and having formed in the substance of the glass on the back of the bottle the words, 'Dr. Morse's Celebrated Syrup,' in precisely the same form as used by the complainants. . . . The proof shows that the form of the bottle is not peculiar to the complainants, but that the same form is in use for other purposes. It does not, however, appear that it is in use by others than the parties for the sale of 'Yellow Dock Compound,' or that any other persons use bottles having the words 'Dr. Morse's Celebrated Syrup' on the back. . . . We think, on the whole, that the respondents have infringed the rights of the complainants by using the bottle having the same form as those used by complainants, and having the same words formed in the substance of the glass."

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, Pardee, J., said: "Complainants ought in equity and good conscience to be protected from the imitation of their packages, so far as they are peculiarly designed and shaped for the purpose of distinguishing complainants' goods, and from the imitation in color, design, style and lettering combined of the labels used to make said packages, when put on the market; and complainants ought to be protected, as against the present defendants, from the introduction and sale of all such goods as are put up in such imitated packages and marked with such deceptive labels."

In *Wilcox, etc., Sew. Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; 24 Pat. Off. Gaz. 1272, Wheeler, J., said:

"While no one has the right to sell his own wares as the wares of another, everyone has the right to make and sell any wares not protected by patents. Marks, symbols or dress placed upon the wares might unlawfully misrepresent their source, but when left to speak for themselves alone there could be no wrongful misrepresentation."

In *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294; 11 Abb. N. Cas. (N. Y.) 86, *Rapallo, J.*, said: "The only points of similarity between the two articles sold are, that they are both small cakes of soap covered with tin-foil or tinned paper, and having a blue band around them with gilt lettering. The cakes are not even of the same shape, one being nearly square, and the other an oblong. But we are of opinion that this form of package, with a blue band and gilt lettering, could not be appropriated by the plaintiff as a trade-mark. There is nothing peculiar about it and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade-marks has not yet gone so far as to enable a party to appropriate such a form or package and fashion of label and exclude every one else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes, packages of chewing tobacco, perfumery, . . . would afford food for litigation, sufficient to give constant occupation to the courts. . . . When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but to sustain an action there must be an imitation of something that can be legally appropriated as a trade-mark."

See also *Enoch Morgan's Son's Co. v. Troxell*, 57 How. Pr. (N. Y. Supreme Ct.) 121.

The device of a "drum" for holding collars, with nothing more to identify it, does not constitute a valid trade-mark. *White v. Schlect*, 14 Phila. (Pa.) 88.

In *Sawyer v. Horn*, 4 Hughes (U. S.) 239, *Morris, J.*, said: "The form of the box, it having been decided not to be a patentable contrivance, cannot be monopolized by him. . . . But we do find that the respondent has been guilty of improper and inequitable conduct to the injury of the complainant, in having designedly so put up,

labeled and packed his goods that purchasers for whose use they are intended, are misled and deceived, and do get Horn's blue when they desire and suppose they are getting Sawyer's."

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, *Blodgett, J.*, said: "Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity. So in regard to liquids put up, for instance, in glass bottles or similar packages, lines might be drawn, showing the half, etc.; and no manufacturer, by registering a trade-mark upon a package of that kind, could prevent another manufacturer from thus showing how a measured portion of the contents of his package might be withdrawn."

In *Rose v. Loftus*, 38 L. T. N. S. 409, *Malins, V. C.*, said: "I lay it down as a general rule that it is not justifiable for a trader to fill bottles, or casks, or anything else bearing a known name, so as to induce the public to believe that the thing contained in those vessels is the production of the man whose name they bear; because by doing that he puts it in the power of a person selling these goods to impose on the public."

In *Frese v. Bachof*, 14 Blatchf. (U. S.) 432, *Wheeler, J.*, said: "Probably no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make. But, when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent, that when they had so long been used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation, that they contained that article, of that manufacture."

In *Re Gordon*, 12 Pat. Off. Gaz. 517, *Doolittle, Acting Commissioner*, said: "The box, barrel, or wrapper, containing merchandise, whatever its form, cannot, *per se*, be the trade-mark."

In *Harrington v. Libby*, 14 Blatchf. (U. S.) 128; 12 Pat. Off. Gaz. 188, *Johnson, J.*, said: "The plaintiff claims to be entitled to the exclusive use of a tin

pail with a bail or handle to it. . . . It appears that the ornamented tin pail which the plaintiff employs is a common article in commerce, and that pails made of tin, ornamented, or unornamented, are and have long been in use for all such purposes as anyone may choose to apply them to. . . . The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property. It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by the ornamental pattern." See *McLean v. Fleming*, 96 U. S. 245.

In *Frese v. Bachof*, 13 Blatchf. (U. S.) 234; 13 Pat. Off. Gaz. 635, Johnson, J., said: "I am by no means clear, that as the case stands, the plaintiffs have made out any appropriation to their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined, upon the proofs, to the conclusion that both plaintiffs and defendants have employed the common method used in *Germany* for putting up medicinal teas. Nor do I find, nor have I been referred to, any case, in which, on such resemblances alone, apart from names or labels containing imitative matter, it has been held that an injunction would lie."

In *Re Kane*, 9 Pat. Off. Gaz. 105, Duell, Commissioner, said: "Galvanized iron hoops for barrels have so long been used that their use on whisky barrels can hardly be regarded at this time as an original appropriation by petitioners. But if now first adopted for liquor barrels, it is not sufficiently distinguishable from the same mark on similar barrels to either protect the applicant in the sale of his goods, or to afford notice to the public of original ownership."

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 392, Morell, J., said: "The package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner, although in itself perhaps not a trade-mark, may very properly be a very important part of it; and where a peculiar

device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such especially prepared box or barrel constitutes a part of the trade-mark, and may participate in the protection which will be given to the trade-mark itself."

In *Moorman v. Hoge*, 2 Sawyer (U. S.) 78; 4 Am. L. T. 217, Sawyer, J., said: "I find no case where the vessel, box, package, or whatever contained the article, has been held to constitute a trade-mark by reason of its peculiar form or dimensions, independent of any symbols, figure, or device impressed upon, or connected with it for a trade-mark. I find no case where the use of a package of peculiar form and dimensions has been restrained without having imprinted upon or connected with it, some other symbol, word, letter, or form, adopted as a trade-mark. . . . After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it cannot become, a lawful trade-mark, or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive-right to its use as such."

In *Ellis v. Zeilin*, 42 Ga. 91, Lochrane, C. J., said: "In matters of medical agents whose effects are upon the human system, any man has a right to compound his liver medicine, or other medicine, and publish all the diseases within its range of cure, no matter how many predecessors or precedents he may have had, and to put it in such bottles or packages as he pleases, so long as he does not set up the right to another man's property or advertise for sale another man's wares, and does not use his invention, with its prints, packages and symbols as his own. As soon as he does this, he is liable in law and will be restrained. We recognize the property in trade-marks or business, but do not recognize that every person is restrained from putting his own in two-ounce bottles or four-ounce packages, and printing the diseases it will cure, because somebody else has done so."

In *Woollam v. Ratcliff*, 1 H. & M. 259, Wood, V. C., said: "In this case the plaintiff has a peculiar mode of making up his goods. This is not precisely a trade-mark." Later he said: "There is the express direction to the defendant to imitate the plaintiff's

4. Articles Attached to Manufactured Products.—An article attached to a manufactured product may be a valid trade-mark, the same as any other sign or symbol, provided it complies with the definitions relative to those subjects. The *United States* trade-mark registration law requires that a trade-mark, to be registered and protected, shall be affixed to the article itself.¹

bundle. This is, of course, always an element of suspicion; but I cannot treat it as conclusive."

In *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, Wheeler, J., said: "The plaintiffs have no monopoly of six-cord thread, or of the sale of it in lengths of two hundred yards on spools. All others have a right to manufacture it, put it up in that form, describe it, and dispose of it." *Affirmed* 149 U. S. 562.

In *Davis v. Davis*, 27 Fed. Rep. 490, Carpenter, J., said: "A trade-mark is some arbitrary or representative device attached to, or sold with merchandise, and serving to designate the origin or manufacture of that merchandise. I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trade-mark. In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise."

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Argument to show that the name of the pills, as given in the trade-mark of the respondent, was of a character to mislead and deceive, is scarcely necessary, as they are *idem sonans* in the usual pronunciation; nor can it be doubted that the form of the box containing the pills and the general appearance of the wrapper which surrounded it were calculated to have the same effect."

1. In *Ex p. Straiton*, 18 Pat. Off. Gaz. 923; 60 P. & S., Marble, Commissioner, said: "Applicants in this case seek to register as a trade-mark for cigars, 'A waved band of ribbon of rectilinear form, longer than it is wide, which is fastened to the two ends of a cigar box, and so placed with reference to the cigars within the box as to be below some of said cigars, and above the remaining cigars.' . . . It is not pretended that the device employed by applicant in this case has any mechanical function whatever, nor is it an old form of receptacle applied to a particular use. Indeed, no references whatever are given to show that strips or ribbons

have been attached to boxes of any description in a manner resembling this.

. . . . An inspection of the illustration at such a distance that the printed matter contained on the band cannot be read, shows at a glance that applicants have attached to their wares a device by which they can be readily distinguished from the wares of another. This is the purpose of a trade-mark, and this purpose applicants have in my judgment accomplished."

In *Re Gordon*, 12 Pat. Off. Gaz. 517, Doolittle, Acting Commissioner, said: "The trade-mark sought to be registered, is described as a narrow strip of leaf tobacco placed as a wrapper around the mouthpiece or end of a cigarette, and which varies with the size of the cigarette. . . . I regard it as no objection to the mark now sought to be registered that it is connected so intimately with the article to which it is attached, as to necessitate its consumption with that of the article itself. But does it perform the sole office of a trade-mark? . . . I am constrained to agree with the examiner that the leaf of tobacco wrapped around the mouthpiece or end of the cigarette answers a practical and perhaps a very useful purpose. Being composed of tobacco, it is an addition to the material of the cigarette, strengthens the wrapper, and is probably more agreeable to the taste than the paper of a cigarette, etc. The useful properties of the article, therefore, seem to be the predominant ones, while the function which the wrapper performs as a trade-mark is merely incidental. If applicant has introduced an improvement in the manufacture of cigarettes, and is entitled to protection thereon, it should be by a patent; but if not protected by a patent, other manufacturers of cigarettes cannot be prevented from using the like useful device. The intent of the trade-mark law is to afford protection to symbols, and not to inventions or mechanical devices. It being a common right to use any mechanical device which is deemed useful, the use of which is not restricted

5. **Name of Patented Article After Expiration of Patent.**—When a new thing is created, such as an invention, and is patented under the patent law, and goes into use to such an extent as to be given a name, either by the inventor or the public, that name is the property of the patentee during the life of the patent. But the patent law is based upon a principle which grants a monopoly of an invention to a patentee for a limited period, on condition that the inventor will disclose the whole invention, and after the expiration of the patent the public shall have the free and unrestricted use of the invention. To permit any extension of the monopoly, by protecting the name of the patented article as a trade-mark after the expiration of the patent, would be a violation of this principle, and hence it is that the courts of the *United States* have uniformly held that where the public have acquired the right, by the expiration of the patent, to use the invention, they are equally entitled to use all names, forms, packages, labels or other indicia which have been used by the inventor during the lifetime of the patent, to indicate the identity of the patented article. This applies to the inventor's name, it being held that if the inventor himself continues to manufacture the article after the expiration of the patent, and desires to protect his own personal reputation, he must adopt a new and arbitrary trade-mark and build up his right of ownership therein exactly as if he were a stranger.¹ And this rule applies equally to copy-

by a patent, it would seriously embarrass trade if, in the present instance, the exclusive right should be given to applicant to use his device as a trade-mark."

The plaintiffs claimed an injunction to restrain defendant from selling any champagne in bottles with corks bearing plaintiffs' brand, or only colorably differing from it, etc. Fry, J., comments on the fact that the brand could not be seen until the cork was drawn, but on evidence that it was the common custom of the trade to place the brand on the inside of the corks, he granted the injunction. *Moet v. Pickering*, 6 Ch. Div. 770.

The plaintiffs, since 1855, had rolled their carpets upon a hollow stick, which stick, when put into the center of their rolls of carpet, they claimed to be their trade-mark. The stick consisted of two pieces, ground on the inside, so that when the two pieces were put together, they formed a shell with a rectangular opening, and with the corners of the outside rounded off so that the ends of the stick or shell formed an octagonal ring. This ring was both visible and tangible in each end of each roll of carpet. It was held, "that said

stick, as claimed by plaintiffs, was a good and valid trade-mark; that they were entitled to its exclusive use." *Lowell Mfg. Co. v. Larned, Codd*. Dig. of Trade-marks, § 986.

1. *Wilcox, etc., Sewing Mach. Co. v. Kruse, etc., Mfg. Co.* (N. Y. 1890), 23 N. E. Rep. 1146, *affirming* 14 Daly (N. Y.) 116.

In *Coats v. Merrick Thread Co.*, 149 U. S. 572, *affirming* 36 Fed. Rep. 324, Brown, J., said: "However this may be, plaintiffs' right to the use of the embossed periphery expired with their patent, and the public had the same right to make use of it as if it never had been patented. Without deciding whether, if the embossed periphery had contained a word which was capable of being appropriated as a trade-mark, defendants could have appropriated the same upon the expiration of their patent, it is clear that no such monopoly could be claimed of mere numerals, used descriptively, and therefore not capable of exclusive appropriation because they represent the number of the thread, and are, therefore, of value as information to the public. . . . The patent being, not simply for the embossed number, but

for embossing the same upon the periphery of the spool head, defendants were entitled, upon the expiration of such patent, to use them for a like purpose." See also the observations of Wheeler, J., in the lower court (36 Fed. Rep. 324).

In *Singer Mfg. Co. v. June Mfg. Co.*, 51 Pat. Off. Gaz. 1945, Blodgett, J., said: "The rule deducible from these adjudged cases seems clearly to be this: that if the manufacturer of a patented machine adopts a peculiar style or form, in which to embody the working mechanism covered by his patents, or any special mode of ornamentation to make the machine attractive and salable, such form of construction and ornamentation, although not strictly essential to the operation of the mechanical device covered by the patents, still becomes a part of the machine, as presented to the world on the expiration of the patents. It goes to the public in the dress and with the features which have been given it by its manufacturer under the patents. It is presumable that an intelligent manufacturer, wishing to secure a large sale for a mechanical device, of which he has a monopoly, especially in a machine of the kind under consideration, which has become a part of household furniture, used his best skill and taste as a constructor, to make the machine convenient and attractive, so as to give the best possible embodiment of his patented mechanical devices, and, as I have already said, this dress thus given to the machine becomes a part of it, and the public, when they have the right to use the patent, have the right to use the dress in which the patentee clothed it; hence any sewing-machine manufactured by another person, after the expiration of the patents upon the principles covered by the Singer patents, may be a perfect imitation of the machines which the complainant or its predecessors manufactured under their patents. It is the misfortune, perhaps, in a certain sense, of the complainant, if it continues to manufacture Singer sewing machines of the style originated by it, that others may also manufacture machines which look as well and operate so nearly like those of complainant as that it may take a person of experience to tell the difference between them, aside from the name or trade-mark of the manufacturer thereon; but the fact that this right of others may embarrass the complainant's

business, is only a consequence following the right of the public to make and use, without tribute to the patentee, machines which have in their mechanical principles and forms of construction become public property. It would be a dangerous doctrine to concede that a patentee who has invented a machine which has gone into extensive public use can, after the patents have become public property, still prevent the public from having the benefit of the invention, until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine. I am, therefore, clear that the claim set up by complainant to the exclusive use of the word 'Singer' as a trade name, and to the exclusive right to the mode of construction, external shape, appearance, and ornamentation adopted by the complainant while the patents were in force for its 'New Family Singer' and 'Medium Singer,' is not well founded, and should not be so held, as a matter of law, upon the proofs in this case."

In *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34, Wallace, J., said: "It is also held that the complainants have no exclusive right to use the words 'Weymouth's Patent' as a trade-mark, because they are the name which was given to such hay-knives when they were first made and sold, and the name by which they have become recognized and dealt in by the public; and that after the patent expired all persons had the right to deal in the article by that name, and also to print the name upon the article. These conclusions are but the application of familiar law to the facts of the case, and it would be quite superfluous to indulge in any extended discussion of the authorities."

In *Gally v. Colt's Patent Fire-Arms Mfg. Co.*, 30 Fed. Rep. 118, Shipman, J., said: "The first question in this part of the case is whether the defendant corporation is to be enjoined against selling, in the market generally, Universal Presses, which contain only the devices described in the expired patents. I see nothing . . . which forbids the Colt's Company from selling, or which implies that it is not to sell to any person, the 'Universal Press' after the patents therein have expired. . . . The name 'Universal' or 'Universal Printing Press,' was adopted, at the time the

patents were issued, to designate the patented press. It was not a trade-mark of the plaintiff, which became identified with his workmanship, and indicated that the press was of his manufacture, but was a name which characterized the press which he invented. Any manufacturer, who uses the name now, does so to show that he manufactures the Gally press, which he may rightfully do, and does not represent to the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff. *Filley v. Child*, 16 Blatchf. (U. S.) 376; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436."

In *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74, *Dickman, J.*, said: "Descriptive as the name *Singer* is of machines of a really distinctive character in their construction and principle of operation, when the patents protecting them expired, the right to use that name accompanied the right to make and sell the machines. It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee, if, after the expiration of his patent, he shall be allowed to virtually perpetuate his monopoly, in a measure, by preventing all others from using the name, which will describe and make known the invention that has become dedicated to the public. It is sought by blending the name *Singer* with the trade-mark, to perpetuate an exclusive property in the name after the life of the *Singer* patents. But a patentee or his assignee, by incorporating into his trade-mark the distinctive name by which a patented machine has become known to the public during the existence of the patent, cannot, after the expiration of the patent, take away from the public the right of using such name. The trade-mark cannot be made a guise for extending the monopoly, or preventing the name from becoming, with the patent, the property of the public. *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706. Where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification, in machines of the same kind manufactured and sold by them."

In *Wilcox, etc., Sew. Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; 126 P. & S., *Wheeler, J.*, said: "Accordingly, a manufacturer of a patented article, after the expiration of the patent, has a right to represent that it was made according to the patent, and to use the name of the patentee for that purpose. *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Singer Mfg. Co. v. Loog*, 48 L. T. 3; 15 Rep. 538. Anything descriptive of the properties, style, or quality of the article merely, is open to all. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51. While no one has the right to sell his own wares as the wares of another, every one has the right to make and sell any wares not protected by patents. Marks, symbols, or dress placed upon the wares might unlawfully misrepresent their source, but when left to speak for themselves alone, there could be no wrongful misrepresentation. These principles are not much controverted by the orator's counsel, but it is claimed that, as the orator's machines are somewhat known by this frame, and other shapes easily distinguishable from this might be equally useful, some of which in hexagonal or octagonal, instead of circular, shape are suggested, the defendant should use some of those. But those, doubtless, would have been infringements of the patents, and the style used is as much freed by the expiration of the patents as those are. All the effect which these frames have in representing machines to be those of the orator, appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade-mark, would continue the monopoly indefinitely, when under the law it should cease. It is obvious that the registration of the trade-mark in 1880, would not affect rights which the public already had acquired; it is not claimed that it should."

In *Filley v. Child*, 16 Blatchf. (U. S.) 376; 23 P. & S., *Blatchford, J.*, said: "As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name 'Charter Oak' upon them. . . . Under such cir-

rights.¹ This doctrine has been held to apply to cases where the trade-marks were applied to unpatentable articles, the patents upon which were held to be void by the courts. It would seem that if the patent was invalid it never existed, and hence should not operate to defeat trade-mark rights. But the rule is otherwise, upon the ground that the supposed inventor, having selected his remedy or means of protection by patent, must abide by the

cumstances, the plaintiff cannot, after his patent has expired, and when *M. L. Filley* has the right to make stoves containing said improvements, prevent him from calling them by the name of 'Charter Oak,' so long as he does not represent them as being made by the plaintiff, or induce others to believe that they are made by the plaintiff."

In *Singer Mfg. Co. v. Larsen*, 8 Bias. (U. S.) 151; 13 P. & S., *Drummond, J.*, said: "If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine." See also *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208.

In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; 5 P. & S., *Johnson, J.*, said: "Certainly, if the words, 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another." See also *Frost v. Rindskopf*, 42 Fed. Rep. 408.

The patentee of an alleged invention, in consideration of the exclusive privilege granted to him for a limited period, is bound to disclose fully his secret; and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid, the dedication is immediate and absolute. It has, therefore, been contended that the rights of the public ought to be protected against any subsequent assertions by the patentee of an independent right under the name of a trade-mark. *Consolidated Fruit Jar Co. v. Dorflinger*, 6 Am. L. T. N. S. 511.

1. *Clemens v. Belford*, 14 Fed. Rep. 728; 114 P. & S.; *Cox's Man. of Trade-Mark Cases* 685.

In *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411, *Thayer, J.*, said: "I have no doubt that defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.' The latter words which appeared on the title-page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work." Followed in *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944.

In *Merriam v. Holloway Pub. Co.*, 43 Fed. Rep. 450, *Miller, J.*, said: "When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. . . . The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book. . . . The contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired." See also *England v. New York Pub. Co.*, 8 Daly (N. Y.) 375; 14 P. & S.; *Clement v. Such* (N. Y. Super. Ct.), Codd. Dig. 312; *Cox's Man. of Trade-Mark Cases* (1st ed.) 429.

In *Osgood v. Allen*, 1 Holmes (U. S.) 185, *Shepley, J.*, said: "The right secured by the act, however, is the property in the literary composition, . . . not in the name or title given to it. . . . No case can be found,

consequences of his own acts, and cannot be permitted to hold as trade-mark what he had lost as patent.¹

These rules, however, are subject to this exception: where a valid trade-mark is adopted and used by a manufacturer to designate his goods, and subsequently patents are obtained, either on the whole or part of the article to which the mark is applied, the expiration of such subsequently acquired patents will not affect the validity of the trade-mark.²

either in *England* or this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate." See also *Archbold v. Sweet*, 1 M. & Rob. 162; *Byron v. Johnston*, 2 Meriv. 29.

1. In *Lorillard v. Pride*, 36 Pat. Off. Gaz. 1150, *Blodgett, J.*, said: "It also appears that the complainants' first effort was to secure to themselves the exclusive right of tin as a badge of their goods, by means of the *Siedler* patent, and that their goods acquired the name of 'Tin-Tag' goods while they were acting under their patent, and that it was not until after their patent had been held void that they fell back upon their right to use tin as a trade-mark. Having adopted this use of tin and given to their goods the name of 'Tin-Tag Tobacco' while they were claiming the rights given them by the patent, it seems to me they have no right now to perpetuate a monopoly which the courts decided they could not have, by falling back upon the popular name given their goods marked in pursuance of the patent. If their goods properly became known and designated in the market as 'Tin-Tag' goods, by virtue of their marking them or tagging them in pursuance of their patent, the right to so indicate or mark the goods became public when the patent expired or was declared void, and they cannot perpetuate or continue this right by claiming it as a trade-mark."

In *Selchow v. Baker*, 93 N. Y. 66; 45 Am. Rep. 169, *Rapallo, J.*, said: "When the patent expires, or in foreign countries where the patent has no force, there is no piracy in making or selling the article under the name by which it has become generally known. This name has become the proper description of the article, as indicating that it is made according to the patented invention, and is not the trade-mark of any particular manufacturer. The patentee relies for his protection

upon his patent, and cannot, by calling the name of his patent a trade-mark, protect his monopoly after the patent has expired, or where it has no force. Such are the cases of *Wheeler, etc., Mfg. Co. v. Shakespear*, 39 L. J. N. S. 36; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15."

In *Sawyer v. Kellogg*, 7 Fed. Rep. 720; 81 P. & S., *Bradley, J.*, said: "The complainant's label, which he alleges that the defendant has wrongfully imitated, had been in use substantially in the same form for a dozen or more years prior to the bringing of the suit. . . . It is further suggested that the complainant has lain by for several years, whilst the defendant has been publicly using his own label, and has thus acquiesced in its use. To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing, which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all his rights), ought not to preclude him from falling back on his right to the trade-mark. No essential delay has occurred since the termination of the proceedings on the patent. But, at any rate, an acquiescence in Kellogg's use of his own label was no acquiescence in his use of the new and altered label having *Sawin's* name in the caption. We think the case is with the complainant, and that a decree should be made in his favor. Let a decree be made accordingly."

2. In *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679; 35 P. & S., *Paine, Commissioner*, said: "But now the applicants assert that by assignment they have become the owners, not only of certain patents with which this trade-mark has been associated, but also of the trade-mark itself, and that it has been used by their assignors seventeen years; that it was used as a common-law trade-mark nearly eight years before 1870. This was a valid trade-mark

The English rule differs somewhat from the American. The general proposition is announced,¹ but very strict proof is required to show that the name of the patented article has become purely generic and no longer indicates the origin and ownership

at common law, subject, of course, to rights of other persons of the same name, whatever they might be. The fact that the owners of the trade-mark also owned certain patents with which it was connected, did not change its character as a common-law trade-mark. Nor would the expiration of these patents, even if they had covered the article as a whole, and not merely certain parts of it, have terminated the existence of the trade-mark which had been used during the life of the patent. If the applicants are the legal assignees of the patents and of the trade-mark, they are protected by the statutory provision which preserves the right to register common-law trade-marks which were in use before 1870. If the applicants shall so amend their application as to show in their oath that they are the assignees of this trade-mark; that it has been used by their assignors for seventeen years; and that they are also the lawful assignees of the patents relating to parts of this fruit-jar, under which the jar bearing the trade-mark in question has been sold, they will be entitled to registration."

In *Re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 269, Doolittle, Acting Commissioner, said: "Applicants adopt the name 'Mason' as the essential mark. . . . If there were an accompanying mark, that should be the one recorded and known as the particular trade-mark of applicants. It is a universal custom to refer to patented articles by the name of the inventor, as the Howe sewing machine, the Bell telephone, etc.; and such names soon become generic in their character, designating a particular kind or class of articles. So it is in the present case. During twelve years preceding the year 1870, the particular form of fruit jar made by applicants had become widely known as 'Mason's Fruit Jar,' and it no doubt will continue to be so known as long as the demand for it exists. It is also clear that applicants were enabled to stamp on their goods the label 'Mason's Fruit Jar,' and to protect themselves in the exclusive manufacture and sale of the article by virtue of the patents owned by them. If ownership or right to manufacture

under the patents had been vested in others, there can be no doubt that they too would have been entitled to use this stamp. When all such rights cease by the expiration of the patents, the public will succeed thereto, and no one can be prevented from manufacturing and selling Mason's fruit jars, and stamping them as such." *Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455.

1. In *Re Ralph's Trade-Mark*, 25 Ch. Div. 194, Pearson, J., said: "The trade-mark, as I have already stated, is 'The Home-Washer,' and it is said that, 'The Home-Washer,' no doubt, during the existence of the patent described the machine and was understood in the trade to describe the machine which was made under the patent; but that, if Mr. Ralph is to continue that as his trade-mark after the patent has expired, it really gives him, under the Trade-Marks Act, an addition to the period which is given him under the patent. That point was taken and considered by my predecessor, the present Lord Justice Fry, in the *Linoleum Case*, 7 Ch. Div. 834. Lord Justice Fry there came to the conclusion that it was impossible for this court so to construe the Trade-marks Act as to do away with what has been the law of the land from the time of King James downwards, namely, that the patent comes to an end at the expiration of a period of fourteen years, unless it is renewed and a further grant given, as is done in some cases."

In *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, Lord Selborne, L. C., said: "I am satisfied that the phrase, 'Singer System,' whether scientific or not, whether exact or loose, is used by the defendant, and by other persons in the same trade, to signify, not a figment, but a fact. . . . There are, in fact, a good many different kinds of sewing machines, well known in the trade, which have come to be described by appellations derived from the names of their original inventors, patentees, or manufacturers; of which appellations 'Wheeler-Wilson' is one . . . and that company, like the plaintiffs in the present case, sought to restrain the use of the name 'Wheeler-Wilson' by

other manufacturers. It was decided, however . . . *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. Ch. N. S. 36; *Condy v. Mitchell*, 37 L. T. N. S. 766, that this name 'Wheeler-Wilson' had come to signify in the trade, not the particular manufactures of Messrs. Wheeler & Wilson, or of the Wheeler-Wilson Company, but the kind or kinds of machines which they made, the manufacture of which was *publici juris*. The injunction, therefore, asked in that case was refused."

In *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 834, Fry, J., said: "Plaintiffs have alleged, and Mr. Walton has sworn, that, having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone, after his competitors are at liberty to make the same article. . . . The word 'Linoleum' did bear that meaning which Mr. Walton put upon it, namely, solidified or oxidized oil; that solidified or oxidized oil may be made by the defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to do. If I found they were attempting to use that name in connection with other parts of a trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different."

See also *In re Horsburgh*, 53 L. J. Ch. 237.

In *Cheavin v. Walker*, 5 Ch. Div. 850, Jessel, M. R., said: "No doubt a man may use the word 'patent' so as to deceive no one. It may be used so as to mean that which was a patent, but is not so now. In other words, you may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. . . . Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark. . . . The defendant's label is as follows: 'S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England.' That is to say, that the filter is manufactured according to Cheavin's expired patent by Walker, Brightman & Co. . . . this court ought not to interfere."

In *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. N. S. Ch. 36, James, V. C., said: "I could not restrain the defendant from using the words 'Wheeler & Wilson,' as descriptive of any sewing machine other than the sewing machine manufactured by the plaintiffs. It appeared to me that 'Wheeler & Wilson' was really not the name of the company, either abbreviated or otherwise, but the name of the thing in particular; as the plaintiff's bill represents it, it is called 'The Wheeler & Wilson Sewing Machine,' and there being no other designation for this particular machine, one can easily understand that that was the name of the patentee or the person who at one time had the patent. . . . It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of that patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying, 'I have got a trade-mark in the name of a thing which was the subject of the patent,' and therefore to

of the goods in the patentee or owner of the patent.¹ It has also been held in *England* that where the patented article has one name, the patentee may adopt another name or arbitrary trade-mark and acquire rights in it which will outlive the patent;²

that extent I think the plaintiffs are not entitled to the relief they ask."

In *Edelsten v. Vick*, 11 Hare 78, Wood, V. C., said: "There is no property in a mere name; it may be open to the use of all persons dealing in the article which it describes. Thus, a maker of pins may say, 'I, John Smith, manufacture and sell Tayler's Solid Headed Pins,' and the court would not in such a case grant an injunction to restrain the use of that name." See also *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 448.

1. In *Singer Mfg. Co. v. Spence*, High Court of Justice, Ch. Div. Eng.; Trade-Mark Record, Aug. 16th, 1893, defendants had been selling sewing machines under the names of "Improved Singer," "Improved Singer Sewing Machine," "Frister & Rossmann's Improved Singers," and "Frister & Rossmann's Improved Singer Sewing Machines." Defendants stated that in all the above, manufactured and sold by the German Company, the names of the makers, Frister & Rossmann (supposed to be the real defendants), were stamped in clear and legible type, and that the same care was taken with all the price lists, catalogues, etc. The judgment rendered was, that plaintiff's trade-mark is "Singer," and "Singer" or "Singer's" their trade name. Dealers may make and sell their own goods as of "the Singer system," or "the Singer principle," but can use the word "Singer" only in such a way as to prevent any possibility of a mistake. In the present case this had not been done, nor was absence of fraud clear. An injunction was ordered, to restrain defendants from such farther advertising on cards, posters, etc., and from using the word "Singer" in connection with sewing machines not of plaintiffs' manufacture, in any way calculated to induce the belief that such machines are of plaintiff's manufacture. The costs were to be paid by defendants.

In *Singer Machine Manufacturers v. Wilson*, L. R., 3 App. Cas. 376, the Lord Chancellor (Lord Cairns) said: "It is perfectly clear that the defense set up in this answer, and the issue tendered by the defendant, is that the

term 'Singer,' as applied to a sewing machine, has, in the language of the country and the nomenclature of the trade, come to describe a machine or two machines of a particular structure and formation, without any reference to the manufacture, or to the quality of manufacture, just as the terms 'Brougham' and 'a Hansom' cab have come to mean carriages of a particular shape, by whomsoever made; and the object of the defendant has been to bring the case within the authority of some well-known cases decided in the court of chancery, in which it has been held—but always upon the evidence in each case—that a proper name applied to a patented or other article, may come to be the name of the article, and not a mark or sign indicating the manufacturer. . . . Some attempt was, indeed, made by the respondent to show, in some of the advertisements of the plaintiffs, and in some of the specifications of patents taken out by or for them, the use of the term 'Singer machine' or 'Singer system,' in a wider sense; but I cannot look upon any of the expressions so used by the plaintiffs, whilst speaking of their own machines, as doing away to any serious extent with the effect of the evidence to which I have referred. If, therefore, I were obliged to decide this case upon the issue thus raised, and as it seems to me properly raised, by the pleadings, and upon the whole of the evidence now before your lordships upon that issue, I should certainly feel it impossible to say that the respondent had established the issue upon which he had placed his case." See also *Condy v. Mitchell*, 37 L. T. N. S. 766.

2. In *Re. Palmer's Trade-Mark*, 24 Ch. Div. 504, Chitty, J., said: "The applicants allege that the term 'braided fixed stars' was used to describe the articles manufactured under this patent, and that Palmer & Son could not have any trade-mark in that term. Now, I consider it plain that a man can have a patent for a new manufacture, and at the same time a trade-mark in the name used to designate the goods, though they are made under the patent." In an additional opinion rendered in the same case, Lindley, L. J., said:

but in this country there is, as yet, no settled rule upon this point.¹

6. Words and Marks in Prior Use.—The acquisition of title to a trade-mark, may be compared to the taking possession of a thing in a state of nature; title can be acquired only when the mark has not been used previously by any one as a trade-mark for the same class of merchandise,² or, unless it has been abandoned

"It appears to me that that is what is contemplated, and it is what ought not to be allowed. I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article, so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented article a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out, as a matter of fact, that this mark denotes him as the maker, as distinguished from other makers. At all events, the respondents have not made it out here, and it appears to me, therefore, that this is a mark which is not authorized to be registered under the act."

1. In *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; 75 P. & S., Treat, J., said: "A review of the many cases cited leads to the following conclusions: *First*: That when a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation thereof by which it was known to the public. *Second*: That the original patentee or his assignees have no right to the exclusive use of said designation as a trade-mark. Their rights were under the patent, and expired with it. *Third*: If a corporation or person wished to establish a trade-mark or name, indicative of its own special manufacture of such a machine or product, the right must grow up, just as all other rights of the kind are established—by use of an acquiescence. Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the 'Singer' sewing machine the plaintiff could acquire no exclusive right to the name 'Singer,' but could by proper trade-mark appropriate to itself names

or devices indicating its own manufacture of such machines" after the expiration of the patent.

In *Singer Mfg. Co. v. June Mfg. Co.*, 51 Pat. Off. Gaz. 1948, Blodgett, J., said: "The claim is that complainant originated this trade-mark and began the use of it early in 1871, which, according to the proof, was while many of the patents owned by complainant and its predecessors remained in force; and, while I do not deem it necessary to pass upon the question here, I have serious doubts whether a manufacturer making a machine under a patent or patents can, while doing so, apply a trade-mark which shall continue his exclusive property after the expiration of the patents which gave character to the mechanism; but I feel very sure that if in so applying a trade-mark, the plate or escutcheon on which it is impressed or engraved became a part of the ornamentation of the machine, the plate itself may be used by others as an ornament of the machine after the expiration of the patent, even if the later manufacturer has no right to use the special symbols of the trade-mark."

2. In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 53, Miller, J., said: "Every one is at liberty to affix to a product of his own manufacture, any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others."

In *Coats v. Merrick Thread Co.*, 149 U. S. 569, Brown, J., said: "If the plaintiffs had been the first and only ones to make use of this label, another person seizing upon and appropriating a black and gold label of the same size, and for the same purpose, might be held guilty of infringement, when, if the plaintiffs had no exclusive right thereto, and defendants had done only what others had done before, they would not be so considered."

In *Corbin v. Gould*, 133 U. S. 308, Lamar, J., said: "With respect to the word 'Tycoon,' the evidence shows beyond question that it has been used as

a name or brand for Japan tea for many years. Invoices of 'Tycoon Tea' were received at the custom-house in San Francisco as early as May 15th, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of *California* is all to the effect that the word was in common use as a brand for Japan tea for several years prior to that date. It is unnecessary to go into this evidence in detail; but it is conclusive as to the long use of the word prior to the alleged adoption of it as a part of the trade-mark of the complainants. The authorities cited by complainants' counsel, to show that the prior use of a word as a trade-mark, by another party who had abandoned it, is not sufficient to debar the present owner of it from protection, do not apply to this case. At the time complainants claim to have adopted the word 'Tycoon' as their trade-mark, for the particular species of tea dealt in by them, it was not an abandoned trade-mark, previously used by some other person or firm to designate a particular quality of tea; but it was, and had been for many years, in general and common use as a term descriptive of a class of teas introduced into the American market; a term which all men engaged in the tea business had an equal right to use, and which belonged to no one individual, either as a trade-mark or a trade label. It belonged to the public, as the common property of the trade, and therefore, was not subject to appropriation by any one person. . . . *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 324. See also *Good-year Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182; *Stachelberg v. Ponce*, 128 U. S. 686; *Menendez v. Holt*, 128 U. S. 514. Even conceding that the complainants may claim a trade-mark for the combination of the diamond and the words inclosed in it, as described in their application to the Patent Office, there was, upon the authorities above cited, clearly no trade-mark in the word 'Tycoon,' considered by itself."

In *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182, Field, J., for the court, said: "The Liggett and Myers Tobacco Company, a corporation created under the laws of *Missouri*, manufactured plug tobacco at St. Louis in

that state. This tobacco is put up for sale marked with a star made of tin, having five points and a round hole in the center, and attached to the plug by prongs at its back. The bill alleges that the complainant has for many years been extensively engaged in manufacturing this plug tobacco, and in selling the same in large quantities in St. Louis, Louisville, and throughout the *United States*, and that every plug has been marked with such a star.

. . . That the complainant was the original manufacturer of this tobacco with the design of a star affixed to the plugs; and that the defendant, knowing all this, is manufacturing and selling, at Louisville, *Kentucky*, plug tobacco to which is affixed a round piece of gilded paper having on it a red star, under which the word 'Light' is printed. . . . Upon the first of these two points, the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above; but that he was not the first person to use the design of a star upon plug tobacco. The priority of use, therefore, by the complainant extended only to the tin star, and not to the design of a star generally." For this reason the rights of the plaintiff were held by the court to be limited to the tin star, and this the defendant did not infringe.

In *Stachelberg v. Ponce*, 128 U. S. 686, Harlan, J., said: "If it was satisfactorily shown that those words were not used in the trade to designate a particular kind of cigars, until after the words 'La Normandi' or 'Normandi' had become a part of the established trade-mark of Bijur, it might be necessary to consider whether the former words, taken in connection with the entire label or brand used by the defendant, his mode of packing his cigars, and their size and appearance, were calculated to deceive the public by inducing the belief that they were the same cigars as La Normandi cigars, manufactured and sold by Bijur, and by the plaintiffs. But no such case is made by the proof. . . . An effort is made to discredit the evidence establishing these facts, by showing by witnesses, engaged for many years in the business of manufacturing and selling cigars, that they never knew or heard of any being sold under the name of 'La Normanda.' But the evidence to that effect is entirely negative in its

character, and is not sufficient to overcome the direct, positive testimony of witnesses, some of whom, as early as 1853, actually manufactured and sold 'La Normanda' cigars of the kind above described, while others remember that domestic cigars, under that designation, were in the market before Bijur commenced the manufacture of the 'La Normandi' cigars. In this view of the evidence the plaintiffs are not entitled to the relief asked. The adoption by Bijur of the words 'La Normandi,' as part of his trade-mark, could not take away the right previously acquired by the public in the use of the words 'La Normanda,' as indicating a particular kind of cigars."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., *dissenting*, said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class. Devices of the kind, in order that they may be entitled to protection in a court of equity, must have the essential qualities of a lawful trade-mark; but if they have, the owner becomes entitled to its exclusive use within the limits prescribed by law, the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the device. Hence, the use of it on one particular article of manufacture or merchandise, will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner." See also *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Words or devices, or even a name in certain cases, may be adopted as trade-marks which are not the original invention of the party who appropriates the same to that use; and courts of equity will protect the proprietor against any fraudulent use or imitation of the device by other dealers or manufacturers. Property in the use of a trade-mark, however, bears very

little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application. Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point out the origin, ownership, or place of manufacture or sale of the article to which they are affixed, or to give notice to the public who is the producer, or where it may be purchased. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, Strong, J., said: "The first and leading question presented by this case is: whether the complainants have an exclusive right to the use of the words 'Lackawanna Coal,' as a distinctive name or trade-mark for the coal mined by them and transported over their railroad and canal to market. . . . The word 'Lackawanna,' then, was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. . . . The bill alleges, however, not only that the complainants devised, adopted, and appropriated the word, as a name or trade-mark for their coal, but that it had never before been used, or applied in combination with the word 'coal,' as a name or trade-mark for any kind of coal, and it is the combination of the word 'Lackawanna' with the word 'coal' that constitutes the trade-mark, to the exclusive use of which they assert a right. . . . Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production. . . . But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. . . . We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna Valley as Lackawanna coal, he has made no false representation, and we see no evidence that he

by the first user, prior to its adoption by the person who asserts title to it.¹

7. Geographical Terms—*a. GENERAL RULE IN THE UNITED STATES.*—It must be considered as settled in the *United States*, that no one can apply the name of a district of country to an article of commerce, and thereby acquire such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation. The nature of geographical names is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they are applied. They point only to the place of production, not to the producer, and could they be appropriated exclusively, their appropriation would result in mischievous monopolies. Many of the older cases held that a resident of a locality had rights in the

has attempted to sell his coal as and for the coal of the plaintiffs."

1. Abandonment.—In *Menendez v. Holt*, 128 U. S. 514, Fuller, C. J., said: "They used the words *La Favorita*, to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. . . . These views dispose of two of the defenses specifically urged on behalf of appellants, and we do not regard that of prior public use, even if it could be properly considered under the pleadings, as entitled to any greater weight. Evidence was given to the effect that from 1857 to 1860 the words '*La Favorita*' were occasionally used in St. Louis by Sears & Co., then manufacturing in that city, as designating a particular flour; but the witnesses were not able to testify that any had been on sale there under that brand (unless it were that of Holt & Co.), for upwards of twenty years. The use thus proven was so casual and such little importance apparently attached to it, that it is doubtful whether Sears & Co. could at any time have successfully claimed the words as a trade-mark, and, at all events, such use was discontinued before Holt & Co. appropriated the words to identify their own flour, and there was no attempt to resume it."

In *Symonds v. Greene*, 28 Fed. Rep. 834, Wheeler, J., said: "This is a motion for a preliminary injunction to restrain the use of the word '*Eureka*' in trade, in connection with steam and hydraulic packing. There is no question but that the orator commenced using that name for packing made by him in 1875, and has continued that

use since that time, nor but that the defendants use that name in connection with that kind of packing, not of the orator's make, in trade; nor but that a firm known as Sellers Bros. gave that name to a kind of steam-packing patented by William Beschke in 1872, . . . and used it in connection with that packing until early in 1874. . . . The use of that name by Sellers Bros. was so long ago, and so limited, that it cannot fairly be considered to now have any effect upon the indication by it of the source of goods to which it has for so many years been applied. . . . Still, if the plaintiff adopted the name on account of value which it had acquired from its use by Sellers Bros., he would not appear to have any just right to it now which a court of equity ought to protect. But Sellers Bros. terminated their contract with the patentee, apparently on account of its unprofitableness. The plaintiff did not take up that manufacture, but commenced making a different kind, and there is not enough in the case to show that he appropriated the name wrongfully when he took it. On the whole case, as it now stands, the orator appears to be entitled to the injunction asked."

In *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, Wallace, J., said: "The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may

become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor."

In *Mouson v. Boehm*, 26 Ch. Div. 398, Chitty, J., said: "But it appears to me that Mr. Boehm has established, first, that he did acquire a trade-mark, which became his property in connection with toilet soap, and then the question arises on that whether he ever abandoned it. . . . Now, on the question of abandonment, it appears to me that intention to abandon must be shown. There are some analogous cases in law, such as the case of an easement. Mere non-user of an easement, like a right to foul a stream, for a considerable period of years, would not be sufficient to prove an intention to abandon it. But if, as in the case of *Crossley v. Lightowler*, 1 L. R., 2 Ch. 478, the person who was entitled to such an easement as fouling a stream, has not only ceased from using it for a period of twenty years, but at the same time has allowed the mill, in respect of which the right is claimed, to fall into ruins, or has pulled it down, the court would infer, from the circumstances, an intention to abandon the right which had been previously exercised. In substance, therefore, the question of abandonment is one of intention to be inferred from the facts of the particular case."

In *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436, Acheson, J., said: "The present case turns upon the determination of the question, Had Gray the right to assume the exclusive use of the name 'Taper-Sleeve Pulley Works' as a business designation? And why not? True, it did not originate with him, but this of itself is an immaterial circumstance. Delaware, etc., *Canal Co. v. Clark*, 13 Wall. (U. S.) 322. It did, however, originate with his predecessor in business, A. B. Cook, Jr., and whatever right he may have acquired therein impliedly passed, I incline to think, to Willard, the sheriff's vendee, and from him to Gray. *Kerr Inj.* 479. But if not, Cook having abandoned the name, Gray had the right to appropriate it (*Browne, Trade-marks*, §§ 676, 677), if it could be lawfully selected as a trade name."

In *Julian v. Hoosier Drill Co.*, 78 Ind.

408, Morris, C., said: "It (the complaint) alleges that Joseph Ingels devised and adopted the word 'Hoosier' as a trade-mark in the year 1857, and that he was then engaged in the manufacture and sale of grain drills, and then, and continuously thereafter, until the 27th day of January, 1877; that he used on said drills, by him manufactured and sold, as a trade-mark and name to designate the particular drill, by him made and sold, the word 'Hoosier.' That on the 27th day of February, 1877, the said Ingels transferred and assigned to the appellant all of said letters, patents, . . . and also all the right to and property in said trade-mark which he then had or owned, and the exclusive right to use said trade-mark upon grain drills, . . . that ever since she became the owner of said trade-mark, the said Hoosier Drill Company has been engaged in the manufacture and sale of grain drills, similar in appearance . . . with the trade-mark of the appellant affixed. It is insisted by the appellees that . . . assignor . . . had abandoned the business . . . from the 20th day of March, 1876, until and after the 27th day of February, 1877. Assuming that Joseph Ingels had adequately appropriated the word 'Hoosier' as a trade-mark, which, as before remarked, is hardly questioned by the appellees, that he had, as stated . . . ceased from the 20th of March, 1876, until the 27th of February, 1877, to manufacture and sell the grain drills to which he had been for years accustomed to affix the word as a trade-mark, can it be fairly and legally inferred that he had, by such temporary suspension of the business, abandoned to the public his right to and property in the trade-mark? We think not. The question of abandonment is one of intention, and the burden of establishing it lies upon the party who affirms it. . . . In view of these facts, it cannot be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than to an intention to abandon valuable rights. Browne says that the question of abandonment is one of intention, and that 'A person may temporarily lay aside his mark, and resume it, without having in the meantime lost his property in the right of user. Abandonment, being in

name of the same which would entitle him to enjoin any person not residing therein from using it to his injury, and for the purpose, or with the danger, of deceiving the public. But these cases are considerably weakened by a recent decision wherein the general doctrine is laid down that before a claimant to a trade-mark can enjoin another using the same without his license, he must show that either he or others joined with him in the suit, or who could be joined with him, have an exclusive right to employ the particular trade-mark for the particular purpose, and that this state of facts can never exist in the case of a geographical term which represents such a district or place that others might with equal right establish a similar business at the same place, and designate their goods truthfully as emanating from that particular place.¹

the nature of a forfeiture, must be strictly proven.' It is incumbent upon those alleging the defense of abandonment to show that the right had been relinquished to the public by clear and unmistakable evidence. *Browne on the Law of Trade-Marks*, § 681; *Dental Vulcanite Co. v. Wetherbee*, 3 Fish. Pat. Cas. 87. We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon, and therefore has not abandoned, her right, as to the future, to the exclusive use of her property in the trade-mark. Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment."

In *Blackwell v. Dibrell*, 14 Pat. Off. Gaz. 633, Hughes, J., said: "That whatever title Wright had to the use of the word 'Durham' after leaving Morris, in or about the year 1861, was lost by non-use, his disuse continuing through a period of probably eight or nine years after he left the vicinity of Durham's; and, second, that, during this long period of disuse, the brand of 'Durham Smoking Tobacco' acquired a definite and peculiar meaning with dealer and consumers. . . . But he did abandon its use; he stood by for some eight years and allowed a peculiar commercial and local signification to attach to the word 'Durham,' as descriptive of smoking tobacco, and not until after that local and commercial signification had come to identify the tobacco labeled with the word all over the country. . . . That the right to use a trade-mark may be lost by abandonment or disuse, is too clear to need argument or the support of authority."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "He, who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use, the profits to which the superior skill and enterprise of the other had given him a prior and exclusive title. . . . The allegation that there has been such an acquiescence for some years on the part of the plaintiffs in the conduct of the defendants, as to bar the former from the relief they now seek, I cannot regard; not only is the allegation sufficiently disproved, but I am satisfied that the doctrine of acquiescence, operating as an absolute surrender of an exclusive right, is inapplicable to the case. The consent of a manufacturer to the use of imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous, may certainly be withdrawn, and when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license."

1. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 327. In *New York, etc., Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 277, a cement manufacturer, a resident of Rosendale, *New York*, sought to enjoin a non-resident manufacturer of cement from using the same name to designate his goods. It was held that a geographical name cannot be protected as a trade-mark, even where the defendant is not a resident of the district or city described by the name, and where goods made at

the particular locality have acquired a particular name and reputation, and the use of a name by a manufacturer not residing in the locality is a clear fraud upon the manufacturers who do reside there and liable to deceive the public to its injury. It is a case of *damnum absque injuria*. Mr. Justice Bradley said: "If a person seeks to restrain others from using a particular trade-mark, trade name, or style of goods, he must show that he has an exclusive ownership or property therein. To show that he has a mere right in common with others is not enough."

In *Southern White Lead Co. v. Colt*, 39 Fed. Rep. 492, Blodgett, J., sustains "Southern" and "South Western White Lead St. Louis," as a trade-mark. This case rests rather upon the complainant's rights in the arbitrarily selected words, "Southern White Lead Co." and "South Western White Lead," than upon any rights which the complainant had in the word "St. Louis."

In *Evans v. Von Lear*, 32 Fed. Rep. 163, Colt, J., said: "In the absence of fraud, the complainants cannot enjoin the defendant from the use of a geographical name. . . . The fact that such use by another person may cause the public to make a mistake as to the origin or ownership of the product, can make no difference, if it is true in its application to the goods of one as to the other. Purchasers may be mistaken, but they are not deceived by false representation, and equity will not enjoin against telling the truth. It is manifest, then, that to entitle the complainants to any of the relief sought by this bill, some fraud must be proved."

In *Anheuser-Busch Brewing Co. v. Piza*, 24 Fed. Rep. 149; 148 P. & S., Wallace, J., said: "Although the complainant cannot have an exclusive property in the words 'St. Louis' as a trade-mark, or an exclusive right to designate its beer by the name 'St. Louis Lager Beer,' yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's trade, by any practices designed to mislead its customers, whether these acts consist in simulating its labels, or representing in any other way his products as those of the complainant, the latter is entitled to protection."

Pratt, a refiner of oil in New York

City, adopted the word "Astral" as a trade-mark in 1869. In 1881, the defendant, an oil refiner at Oil City, Pa., built an oil refinery and called it Astral Refinery. The railroad located a station at the factory and called it Astral. The government established a postoffice and called it Astral, and a small town grew up around the factory, and was called Astral. The word Astral had previously been used to designate a lamp, an "Astral Lamp." It was held that whatever rights the plaintiff might have had in the word, the defendant, manufacturing at a town known as Astral, could not be enjoined from using the name as a trade-mark for his oil. *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492. This case was dismissed on appeal to the supreme court under the 10th rule, 136 U. S. 647; but it would probably have been sustained on the ground of estoppel, after the plaintiff had permitted the name to become geographical it was too late to complain.

In *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125, an injunction was granted, notwithstanding the fact that the word "St. Louis" was used as a part of the company name; but the combination of the words, "Southern St. Louis" and "Southern Company St. Louis" were the name of the complainant corporation and to a great extent fanciful, besides which the court says the brand used by the defendants is so like the complainant's as to induce the public to mistake the one for the other.

In *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599, "Glendon" was the name of the town in which the business of both complainant and defendant was carried on. It was contended by the appellant, that this case was taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town in that place. But the court said: "We see nothing in the facts of this case . . . to take it out of the general rule, which denies to one the exclusive use, as a trade-mark, of the name of the town in which the same kind of goods are manufactured by others. The commission of a lawful act does not become actionable, although it may proceed from a malicious motive." The underlying ground of this case is like that of *Pratt* or *Astral v. Estoppel*, 27 Fed. Rep. 492. There was a time

b. THE ENGLISH RULE.—The rule has been long established in *England* that a defendant will not be permitted to state the origin or ownership of his own goods in any manner, true or false, which will enable him to impose upon the public and sell his goods, as and for those of another. This rule has been applied to geographical terms, and defendants have been frequently restrained from falsely employing such terms when they were not residents of the particular locality indicated thereby, and in some cases the courts have gone so far as to restrain a resident from using the name of the town where he did business, as a designation for his goods, when another had previously employed the same name upon similar goods and had established a reputation therefor, and the use by the defendant of the name gave rise

when the complainant might have saved its rights; but having lost them, they cannot be asserted.

In *Lea v. Wolf*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 5, Fancher, J., said: "As a general rule, geographical names cannot be appropriated as trade-marks, but the rule has its exception, where the intention in the adoption of the descriptive word (by the second user) is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trade-mark."

In *Newmann v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588, Earl, J., said: "Yet it is quite clear that the plaintiffs, upon the facts, are entitled to protection against the defendant. It is sometimes said in the cases to which our attention has been called that the claimant to a trade-mark, must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate; the right must be exclusive against the defendant. It is generally sufficient in such cases if the plaintiffs have the right, and the defendant has not the right to use it. The principle upon which the relief is granted is, that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the plaintiff."

See also *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 391; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Wolfe v. Goulard*, 18 How. Pr. (N. Y. Supreme Ct.) 64; *Canedee v. Deere*, 10 Am. Law Reg. N. S. 694.

In *Whitfield v. Loveless*, 64 Pat. Off.

Gaz. 442, Collins, J., said: "Defendant selected the name 'Columbia Hotel,' for the name of the hotel run by him in Chicago. The name had, prior to that time, been used by the complainant to designate his hotel, and he files this bill to enjoin defendant from further use. There are only two questions to be considered on the exceptions to the master's report, all the other allegations of the bill being sustained by the evidence. The first is the defense of laches; the second is the name 'Columbia,' a geographical name and not subject to exclusive appropriation by any person. The court finds, as to the first proposition, that the complainant has not been guilty of laches. As to the second proposition, it will be necessary to consider somewhat critically the sense in which the word 'Columbia' is used. It is a collective noun and is here used in apposition. A noun or adjective, to come within the rule against the appropriation of a geographical name, must be *sui generis* and not collective. To illustrate: German, Swedish and French are *sui generis*, carry a fixed and definite meaning to all minds, under all circumstances, refer to particular countries, and used in connection with a noun, their meaning can never be mistaken. They are the only adjectives that can be directly used to express the fact that any commodity or manufactured article of the country in question, or that the business there carried on is conducted in accordance with the customs of the country to which the adjectives refer. Other nouns and adjectives, while in a loose sense geographical, are not in fact so. It is true that in *Bolander v. Peterson*, 136 Ill. 215, the court says: 'A generic name, or merely descriptive of the

to danger that his goods might be sold for those of the complainant. It is thought that the distinction between the English and American rule will be found in the fact that in *England*, if the court finds from the evidence that the geographical name used as a trade-mark has by long and extensive use acquired a secondary meaning, which causes it to indicate to the public, not only the locality at which the goods are made, but also their ownership and origin, the geographical term will be protected as a trade-mark, the defendant being permitted, however, to state the truthful origin of his goods in such a manner as to avoid, as far as possible, all danger of deceiving the public and causing them to buy his goods as and for those of the first user.¹

article made or sold, or its qualities, ingredients, or characteristics, and which may be applied truthfully by other makers or dealers, is not entitled to protection as a trade-mark." In conclusion the court says: "Moreover, as we have before seen, to constitute such trade-mark or name as will give the first who applies the same the exclusive right to its use, it must not be such as will merely indicate the composition or quality of the article to which it is applied, or to the particular country or district where produced or manufactured. The reason of the rule is clearly this, that a generic name is not to be used where every person is equally entitled to its use, the design of the law being not to foster monopolies, or to tolerate their existence; but where a name, although generic and geographical, does not indicate that the business there carried on is to be patronized by the people of any particular locality, or that any specific product is there to be sold, or any particular language is there to be spoken, it cannot be a generic or geographical name within the meaning of the rule. In the selection of the word 'Columbia' the complainant chose merely a fanciful name. It indicates no people, no locality, no particular service which his hotel will render. It does not hold out the idea that people patronizing his hotel will have any accommodations or advantages different from those offered by any other hotel. So that, in the case cited, in the selection of this name, it is not such as to indicate the composition or quality of the article to which it is applied or the particular country or district where produced or manufactured, or to indicate the particular manner in which the business is there carried on. The court finds, then, that

the word 'Columbia' is a fanciful name; that the person first selecting it is entitled to its use, for the reason that by its selection and exclusive use no monopoly is created, and on the further broad legal ground that that which is prior in time is first in right. *Ex p. Mississippi Glass Co.*, 64 Pat. Off. Gaz. 713, and cases cited; *Osgood v. Allen*, 1 Holmes (U. S.) 185; *New York Law J.* May 31st, 1890."

1. In *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508, Lord Chancellor said: "Now what is 'Glenfield?' Glenfield is not a town like Burton upon Trent, from which ale is named and in which there are many manufacturers of the so-called 'Burton Ale.' Nor is it a place which has any special circumstances connected with it which would make the starch manufactured there particularly good. But it simply happened that this starch was manufactured at the place called Glenfield, which is really only a place of about sixty inhabitants. It is not a parish, it is not a hamlet, it is not a district of any special character; but it was an estate of that name upon which some people seem to have erected some houses or manufactories." L. Westbury said: "I take it to be clear from the evidence, that, long antecedently to the operations of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word 'Glenfield,' therefore, as a denomination of starch, has become the prop-

erty of the appellants. It was their right and title in connection with the starch."

In *Montgomery v. Thompson*, 64 L. J. R. N. S. 749, Lord Herschell said: "The respondents have carried on business as brewers at Stone, in the county of Stafford, a town of six or seven thousand inhabitants, for upwards of a century. There have been, practically speaking, no other breweries carried on there. The ales manufactured by the respondents have gained a high reputation, and although in advertising them the name of *Joule & Co.*, under which the brewing business was carried on, has generally been associated with the words 'Stone Ale,' yet, it is, I think, beyond dispute that the respondent's ales have become known to the market and to the public under the terms 'Stone Ales' or 'Stone Ale,' the latter being exclusively applied to a particular quality of beer, and any one asking for 'Stone Ales' or 'Stone Ale' would desire to be supplied, and expect to be supplied, with the ale manufactured by the respondents. The appellant, who is a licensed victualer owning public houses in Liverpool, has recently established a brewery at Stone. The court below came to the conclusion that he intended to use the terms 'Stone Ale' and 'Stone Ales' in connection with liquor of his own manufacture, with a view of leading to the belief that the ales he sold were those, which, as I have said, had become known to the market and the public, and thus obtaining advantage of the reputation which the respondents' ales had acquired. An injunction was accordingly granted on the application of the respondents, restraining the defendant from carrying on business of a brewer at Stone, under the style of 'Stone Brewery,' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiff's manufacture, under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiff's manufacture, and from infringing the plaintiff's registered trade-mark, or any of them."

In this case it was contended at the bar that no injunction ought to issue for the reason that the term "Stone," being the name of a town, all persons doing business in that town and mak-

ing ale there, had an equal right to use the word "Stone" to designate their place of manufacture.

As a general proposition this argument was not denied, but the court says: "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name. It seems to me idle to argue that it is against public interest to permit a monopoly of the use of the name of a town for trade purposes when the only effect of allowing its use by the person and for the purpose sought to be restrained, would be to deceive the public."

Lord Hannen said: "I think" the evidence "ought to satisfy your lordships that the respondents' goods had acquired by long usage, the name of 'Stone Ale' and 'Stone Ales,' that that name does not merely convey the idea that the beer was manufactured at Stone, but that it was of the respondents' manufacture. The appellant is undoubtedly entitled to brew ale at Stone and to indicate that it was manufactured there; but there are various means of stating that fact without using the name which has now become the designation of the respondents' ale."

In *Lee v. Haley*, L. R., 5 Ch. App. 161, Giffard, L. J., said: "I agree that there is no property in the name 'Guinea Coal Company,' but the principle upon which the cases upon this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In *Siexo v. Provizende*, L. R., 1 Ch. 192, the vineyards of both plaintiff and defendant were called "Siexo." Lord Cranworth said that, "That did not justify the defendants in adopting a device or brand, the probable effect of which was to mislead the public when

c. RIGHTS OF RESIDENTS AGAINST NON-RESIDENTS IN A GEOGRAPHICAL TERM.—In the *United States*, under a recent decision,¹ it is doubtful whether a resident of a town or district may monopolize the name thereof as a trade-mark to any greater extent, as against a non-resident, than as against a resident; but the case referred to is one in which the geographical term employed indicated local origin, character or quality merely.

But the English cases,² and some of the older American cases,³ hold, that where a geographical name, although indicating, and used for the purpose of indicating, the local origin of manu-

purchasing their wine, to suppose that they were purchasing wine produced, not from the vineyards of the defendant, but of the plaintiff."

In *McAndrew v. Bassett*, 4 De G. J. & S. 380, Sir W. P. Wood, V. C., said of "Anatolia," the name of a large tract of country where liquorice root is largely grown: "The plaintiffs have established beyond all doubt the connection of their name with that mark that is beyond dispute. I cannot treat the word as being otherwise than a designation mark which the plaintiffs have caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." And, in addition to this, Lord Westbury, C., said: "I am told that the word 'Anatolia' being a general geographical expression—being, in point of fact, the geographical designation of a whole country—is a word common to all, and that in it therefore there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in a word for all purposes cannot exist, but property in that word, as applied by way of a stamp upon a stick of licorice, does exist the moment the licorice goes into the market so stamped and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality or of some other circumstance that renders the article so stamped acceptable to the public."

For further illustrations, see *Taylor v. Taylor* (Persian Thread), 23 L. J. Ch. 255; *Hine v. Lart* (Ethiopian Stockings), 10 Jur. 106; *Southorn v. Reynolds* (E. Southorn, Brosely), 12 L. J. N. S. 75; *Radde v. Norman* (Leopoldshall Kainit), L. R., 14 Eq. 348; *Apollinaris Co. v. Edwards*, Seton (4th ed.) 237; *Apollinaris Co. v. Norrish*, 33

L. J. N. S. 340; *Powell v. McNulty* (Yorkshire Relish), Dig. 526; *Siebert v. Findlater* (Angostura Bitters), 7 Ch. Div. 801; *Davis v. Taylor* (Ferndale Coal), M. R., April 24th, 1879; *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; *Cocks v. Chandler*, L. R., 11 Eq. 446; *Bulloch v. Gray* (Loch Katrine Whisky), 19 Jour. of Jurisp. 218.

1. *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277. See *supra*, this title, *Geographical Terms—General Rule in United States*, where this case is set out at length, and also the earlier cases.

2. See *supra*, this title, *English Rule*. *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508; *Montgomery v. Thompson*, 64 L. T. N. S. 749; *Lee v. Haley*, L. R., 5 Ch. App. Cas. 161; *Siexo v. Provezende*, L. R., 1 Ch. 192; *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Taylor v. Taylor* (Persian Thread), 23 L. J. Ch. 255; *Hine v. Lart* (Ethiopian Stockings), 10 Jur. 106; *Radde v. Norman* (Leopoldshall Kainit), L. R., 14 Eq. 348; *Apollinaris Co. v. Norrish*, 33 L. J. N. S. 242; *Powell v. McNulty* (Yorkshire Relish), Dig. 526; *Siebert v. Findlater* (Angostura Bitters), 7 Ch. Div. 801; *Davis v. Taylor* (Ferndale Coal), M. R., April 24th, 1879; *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; *Cocks v. Chandler*, L. R., 11 Eq. 446; *Bulloch v. Gray* (Loch Katrine Whisky), 19 Jour. of Jurisp. 218.

3. See *supra*, this title, *Geographical Terms; General Rule in United States*. *Anheuser-Busch Brewing Co. v. Piza*, 24 Fed. Rep. 149; 148 P. & S.; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *Lea v. Wolf*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 5; *Evans v. Van Laer*, 32 Fed. Rep. 153; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599; *Brooklyn White Lead v. Masury*, 25 Barb. (N. Y.) 416; *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442.

factured goods, had, in consequence of the fact that a single manufacturer had, for years, been the only person to manufacture a certain class of goods at the particular place, and had used the name thereof as his trade-mark, come to indicate to the public that the goods upon which such name appeared were of the manufacture of a particular person or factory, such term had by use assumed a secondary meaning, which, when it was applied to those particular goods, caused it to indicate clearly to the minds of the public both ownership and origin, and the first user of the name would be held to have acquired a property in the word, which, while it will not be sufficient to prevent all other residents of the same region from using the same name upon their goods of the same class, to truthfully indicate their place of manufacture, will still require that the geographical term shall be so used by others, as not to be a trade-mark, and to avoid the danger of having the goods of others sold as and for those of the man who had first used the name as a trade-mark and given reputation and value to it.

d. GEOGRAPHICAL WORD NOT USED IN A GEOGRAPHICAL SENSE.—A geographical term, used in a purely fanciful sense by a non-resident of a locality, and in such a manner as to be innocent of misrepresentation as to origin, may be upheld and protected as a trade-mark, on the same principle that fictitious names are protected.¹

The application of this rule will in a great measure depend upon the fact whether or not the geographical name is so well known as necessarily to imply the location of origin.

e. NAMES OF MINERAL SPRINGS.—The names of mineral springs, although necessarily to some extent geographical, and always indicating location, have been uniformly sustained as valid trade-marks, wherever the springs were the exclusive property of the party asserting the ownership of the name as a trade-mark. It is true that such names are, as a rule, arbitrary, and hence, for this reason, unobjectionable as trade-marks; but even

1. *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442.

In *Fleischman v. Schuckmann*, 85 P. & S.; 62 How. Pr. (N. Y.) 92, Van Vorst, J., in speaking of "Vienna Bread," said: "The plaintiff and his assignor were the first to use it here or elsewhere, to distinguish a manufacture of bread. As a mark for bread it is purely arbitrary, and is in no manner descriptive either of the ingredients or quality of the article. . . . By the use of the word Vienna in that connection, no deception is practiced, because the place of its manufacture is given, and it is known that bread cannot be imported from abroad for use here." See also the following cases, where

geographical terms, used in a fanciful sense, have been upheld as valid trade-marks: *Messerole v. Tynburg*, 4 Abb. Pr. (N. Y. C. Pl.) 410; *Hirst v. Denham*, L. R., 14 Eq. Cas. 542 ("Liverpool" for cloth made at Hieddersfield, Eng.); *In re Cornwall*, 12 Pat. Off. Gaz. 312 ("Dublin Soap" made in U. S.); *In re Green*, 8 Pat. Off. Gaz. 729 ("German Soap," made in U. S.); *Bulloch v. Gray*, 19 Jour. of Jurisp. 218 ("Loch Katrine Distillery"); *Siegert v. Findlater*, 7 Ch. Div. 801 ("Angostura Bitters"); *Pike v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Green Mountain, Willoughby Lake, Indian Pond (Scythe Stones)*. See also *supra*, this title, *Fictitious Names*.

where they are not arbitrary, they have been upheld where the claimant was the exclusive owner of the springs.¹

1. In *La Republique Francaise v. Schultz*, Trade-Mark Record, Aug. 16th, 1893, Townsend, J., said: "... In the Industrial Property Treaty of 1887, these three expressions are used: 'Marque de fabrique,' translated 'trade-mark;' 'Marque de commerce,' translated 'commercial mark;' 'Nom commercial,' translated 'commercial name.' The treaty provides that every 'trade-mark or commercial mark,' regularly deposited in the country of origin, shall be admitted to deposit, and so protected in all the other countries of the union" (26 U. S. Stat. at L., art. VI., p. 1376). And the final Protocol, on page 1380, paragraph 4, is as follows: "Paragraph 1, of article VI., is to be understood in the sense that no trade or commercial mark shall be excluded from protection, in one of the states of the union, by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this state, provided that it does satisfy in this regard the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception, which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each of the states shall receive its due application."

Article VIII. of the treaty is as follows: "The commercial name shall be protected in all the countries of the union, without obligation of deposit, whether it forms part or not of a trade or commercial mark."

The question raised by this demurrer is whether the word "Vichy" is a trade-mark or commercial mark, in which case it is claimed that it can receive no protection without registration, or a commercial name, as to which no such obligation exists. It is not alleged in the complaint that the word "Vichy" has been registered. Whether such registry is required in the case of a trade or commercial mark, it is unnecessary to consider. It is only necessary to inquire whether the word "Vichy" is or is not a *nom commercial*, or commercial name.

As the two terms, "commercial mark" and "commercial name," used in the treaty, are translations of terms used in the civil law of *France*, it be-

comes necessary to examine their meaning in said system, in order to understand the distinction between them.

The distinction between a trade-mark and a commercial mark is pointed out by Pouillet, in his work on "*Marques de Fabrique*," section 6, from which I translate as follows: "A trade-mark is not a commercial mark, and it is with reason that the law mentions both. The trade-mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The commercial mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it, in his turn, to the consumer." And again, in section 63: "A name of a town, or more generally, a name of a locality, may, like an ancestral name, serve as a trade-mark; yet, here still, it is on condition that the name shall be presented under a distinct, special form, always the same. It is this peculiar expression which constitutes the mark, and not the name taken separately, and for itself." It will thus be seen that our word trade-mark comprehends both the *marque de fabrique* and *marque de commerce* of *France*. Browne on Trade-Marks, § 85.

Under the title "Nom Commercial," Pouillet divides the various classes of commercial names into the general head of names of manufacturers and names of localities. He defines the commercial name as follows: Section 374. "The commercial name is the name of the individual, or any name which is the property of a merchant, without reference to its use as a mark, or trade-mark, in a distinctive form. . . . It is the name considered as the accessory of the business, as the *pavillon de la merchandise*, which I understand to mean 'sign,' or 'brand,' or 'standard,' of the goods." He adds: "M. Gastambide says, speaking of the name from a commercial point of view, 'The name will be for us a mere means of securing good-will.'" Under sections 394-411 of "*Noms Commercial*," the author includes names of places, and discusses fully the rights of parties, under the law of *France*, who claim the exclusive use of a name of a locality, including owners of mineral waters or springs.

It therefore appears that the name

"Vichy" is a commercial name, and, as such, is protected under the Industrial Property Treaty, without obligation of deposit, whether it does or does not form part of a trade or commercial mark.

Where the city of Carlsbad, Bohemia, sole owner of the mineral springs there, for fifty years has sold the salt therefrom as "Carlsbad Salts," etc., other parties will be restrained from using these words for similar artificial productions, even with the word "Artificial" prefixed. *Carlsbad v. Thackeray*, 57 Fed. Rep. 18.

The doctrine seems to be impliedly recognized that the exclusive owner of a natural product has a right to restrain the use by others of the name of that natural product, unless applied by them to the original product itself, which is obtainable, directly or indirectly, only from the exclusive owner. *In re Apollinaris Co.'s Trade-Marks*, 61 L. J. Ch. 625. See *Luyties v. Hollandeer*, 30 Fed. Rep. 632.

A contract being entered into between plaintiff and defendant for the sale of "Clysmic Water," from plaintiff's spring of that name, defendant sold other waters under the same name. *Dyer, J.*, said: "Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant, Lockwood, during the continuance of the contract relations subsisting between them, we must hold that the name 'Clysmic' became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as 'Clysmic Water,' and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring, from such designation." *Hill v. Lockwood*, 32 Fed. Rep. 389.

Complainant contracted with the owner of a spring in *Hungary*, by which he acquired the exclusive right to export and sell the water in *Great Britain* and *America* under its name of "Hunyadi Janos." Defendant purchased water from those to whom it had been sold in *Germany* and resold it in the *United States* in the same form. An injunction to prevent defendant selling the water was refused, *Wallace, J.*, saying: "No doubt is entertained that the name when applied to the water is a valid trade-mark, and that the complainant should be pro-

tected against the unauthorized use of the trade-mark by another. . . . But the defendant is selling the genuine water, and therefore the trade-mark is not infringed. There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked." *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18.

A natural product, such as mineral water, which has become private property, may be the subject of a trade-mark consisting of that name. "*Hunyadi Janos*" case, Ct. of Cassation (*France*), Bulletin Officiel No. 2, p. 26. *Browne on Trade-Marks*, § 191.

Complainant was the lessee of a spring known as the "Apollinaris Spring," and defendant used the word "Apollinaris" in connection with water compounded by him. An injunction was granted. *Apollinaris Co. Limited v. Moore*, C. C. U. S. E. D. of Pa., *Cox's Man. Trade-Mark Cases* 675.

In the Cromac district in Belfast, numerous springs of water were found, commonly known as "Cromac Springs," and the water therefrom as "Cromac water." The water was much used in the manufacture of aerated waters which were generally described as "manufactured from the Cromac Springs" or as "Cromac Water." Plaintiff had one of these springs on his premises, and adopted the words "Cromac Springs" as his trade address, registering it after several years' use as his trade-mark. Defendant also had one of these springs on his premises, and adopted the same words as his trade address. The court said: "Any maker of aerated water is entitled to say that he manufactures his waters from these 'springs,' or 'waters,' or 'wells,' if the fact be so. But that does not in the slightest degree interfere with the right of a person, under proper circumstances, using the words 'Cromac Springs' as a trade-mark (*aiting* the '*Anatolia*' case with approval). . . . I am of opinion that the plaintiffs did appropriate the words 'Cromac Springs' as a trade-

mark, and not merely as a description of the material used by them. They used the name as the designation of their factory or place of business, and so connected their goods with it that they became known to buyers and consumers by that name." *Wheeler v. Johnston*, L. R., 3 Ir. 284. In this case, an injunction was granted to restrain defendant from using the words "Cromac Springs" in connection with his trade as a manufacturer or seller of mineral waters, so as to represent that his said waters were so manufactured or sold by plaintiffs at their works, called the "Cromac Springs;" or from using the words "Cromac Springs" as the name of defendant's place of business so as to represent as aforesaid.

The word "Apollonis," in connection with a representation of a bow and arrow, was used by defendants on labels and bottles. Plaintiffs used, in the same way, the word "Apollinaris" and the device of an anchor, which was calculated to mislead. A preliminary injunction was granted. *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatch. (U. S.) 380.

The owner of a peculiar natural product (as the water of a mineral spring), which has acquired reputation, etc., in the market, is entitled, like the manufacturer of artificial products, to have his original trade-mark protected. The name "Bethesda," applied to a mineral spring and the waters thereof, is a proper trade-mark and capable of protection against one who owns another spring within twelve hundred feet of that of plaintiff, although the water has same constitution and properties, the name "Bethesda" not being a geographical designation of any district within or near which either of said springs is located. *Dunbar v. Glenn*, 42 Wis. 118.

Plaintiffs were the exclusive importers of Apollinaris water into *England*, under a contract with the owners of an Apollinaris Spring in *Germany*. Defendants used the word "Apollinaris" in connection with waters not genuine. An injunction was granted. *Apollinaris Co. v. Edwards, Seton* (4th ed.) 237; *Cox's Man. Trade-Mark Cases* 509.

Plaintiffs having the exclusive right of selling "Apollinaris Water" in *Great Britain*, defendants made and sold an artificial mineral water under the name and description of "London Apollinaris Water, possessing all the properties of the natural water." An injunction was

granted to restrain defendant's use of the words "London Apollinaris Water" or any other name of which the word "Apollinaris" so forms a part as to be calculated to mislead the public into purchasing the artificial for the real water of that name. *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

Plaintiff, having the exclusive right of importing from Leopoldshall mines in Duchy of Anhalt, a rock salt called "Kainit," sold it as "The Genuine Leopoldshall Kainit." Defendants sold salt, not that imported from Leopoldshall mines, as "Kainit (Leopoldsalt)." An injunction was granted. *Radde v. Norman*, L. R., 14 Eq. 348; 41 L. J. Ch. 525; 26 L. T. N. S. 788; 20 W. R. 766. See also *Braham v. Beachim*, 7 Ch. Div. 848; 47 L. J. Ch. 348; 38 L. T. N. S. 640; 26 W. R. 654, where the practical owner or lessee of all the collieries within a parish, obtained an injunction against defendants restraining the use by them of the name of the parish in their firm name, until they should become owners or lessees of collieries within that parish.

Although where a person "has found out an article which is a natural product, and has given that natural product a name," that name becomes designatory of the natural product and may be generally used, *Young v. Macrae*, 9 Jur. N. S. 322; yet the exclusive owner of that natural product has a right to designate it by a trade-mark exclusively his own. So in the leading case of *Congress*, etc., *Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, reversing 57 Barb. (N. Y.) 526, the plaintiffs, being purchasers of the "Congress Spring" at Saratoga, continued, as their predecessors had done, to sell the medicinal water from the spring as "Congress Water." The defendants began to use the word "Congress" in their corporate name and in connection with the water from another spring. It was decided that the owner of a peculiar product of nature, who has applied to it a conventional name by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article. Also, that where the spring first known as and named "Congress Spring" produces mineral water of peculiar properties possessed by no other spring, the words "Congress Water"

8. Utility of Distinguishing Mark.—All things or methods useful in manufacturing, or preparing, or packing goods for market, which are not patented, are free and open to the public to use, and cannot be monopolized by anyone under the guise of a trade-mark. To allow such a practice, would soon result in the adoption of common forms of packing and marking as private trade-marks, which would greatly hamper trade and inconvenience the public, without yielding any corresponding benefit.¹

and "Congress Spring Water" appropriately indicate the origin and ownership of water from the "Congress Spring," and the word "Congress," used in connection with the sale and bottling of such water, is a proper and legitimate trade-mark.

The words "Geyser Spring" were refused registration as a trade-mark for Saratoga mineral water, on the ground that it is a familiar geological term and has a meaning well known to the public, and is therefore generic and descriptive. *Ex p. George S. Batcheller, Browne on Trade-Marks*, § 276.

1. *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337. There can be no trade-mark in the coating of nails with bronze to make them more popular and salable. *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205.

The size, or shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put, is not a trade-mark; nor is the mechanical arrangement of bottles in boxes in which they are packed by the manufacturer capable of protection as such. *Hoyt v. Hoyt*, 143 Pa. St. 623. In this case, *Williams, J.*, said: "As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products."

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, the court refused to enjoin defendants from imitating the peculiar method of packing and labeling chewing gum used by plaintiffs, it not appearing in evidence that complainants, by so doing, had established a reputation in the market for their goods.

In *Adams v. Heisel*, 31 Fed. Rep. 279, *Welker, J.*, said: "In this case the complainants could not obtain a trade-mark for the form of the sticks of chew-

ing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes."

A strip of leaf tobacco placed as a wrapper around the mouth-piece or end of a cigarette was denied registration, the leaf serving a mechanical and useful, more than a distinctive, purpose. *In re Gordon*, 12 Pat. Off. Gaz. 517.

There can be no trade-mark in any method of arranging various packages of merchandise in the receptacle containing them. *Davis v. Davis*, 27 Fed. Rep. 490.

Nor can there be a trade-mark in a piece of tin, regardless of its color, shape, or inscriptions, used as a tag on tobacco, although by the use of such device, said tobacco may have acquired a reputation in the market as "Tin Tag Tobacco." *Lorillard v. Pride*, 28 Fed. Rep. 434; *Blodgett, J.*, observing: "It seems to me it would be as reasonable to assume that the complainants could have adopted paper or wood, or a piece of cloth or leather, as a badge or indicia of their goods, as that they could have taken a piece of tin. . . . A person may appropriate any word, figure, or emblem as a trade-mark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved."

A covering for soap consisting of tin foil with a blue band around it, cannot be exclusively appropriated as a trade-mark. The court, by *Rapallo, J.*, said: "There is nothing peculiar about it, and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade-marks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label, and exclude everyone else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes,

-V. DOCTRINE OF ORIGIN AND OWNERSHIP—1. In General.—A trade-mark is protected by the courts of equity, on the broad ground that every honest manufacturer and trader who, by careful work, and the expenditure of time, labor, and money, has built up for

packages of chewing tobacco, perfumery, canned goods, and other small articles, and the color or style of labels which every dealer, according to his taste, adopts or selects from those in use, would afford food for litigation, sufficient to give constant occupation to the courts." *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294, *reversing* 23 Hun (N. Y.) 632; 57 How. Pr. (N. Y.) 121.

See *Enoch Morgan's Son's Co. v. Schwachofer*, 5 Abb. N. Cas. (N. Y.) 265, where the court says that "the plaintiffs cannot have an exclusive right to use tin foil or ultramarine blue-colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes." This case was, however, decided against the defendants on the ground of unlawful imitation.

A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color" cannot be registered as a trade-mark for flour packed in barrels similar to that represented in the picture, because in such application it is descriptive, not, indeed, of the quality of the flour itself separated from its package, and, therefore, not in marketable form, but of the marketable commodity, the barrel of flour. But when applied to sacks of flour, or to barrels of flour having staves all of one color, it is an arbitrary symbol and is registrable as a trade-mark. *Ex p. Halliday Bros.*, 16 Pat. Off. Gaz. 500.

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, it was held that a registration trade-mark for plug tobacco, consisting of one longitudinal line dividing the plug into equal parts, and a series of transverse lines crossing the plug at right angles with the longitudinal line, and at equal distances from each other, will not prevent the use of a trade-mark for tobacco, consisting of a series of seven Greek crosses stamped on the center of the surface of the plug at equal distance from each other, and a series of half crosses on the margin opposite the full crosses, as guides for cutting the plug into pieces. Complainant's tobacco became known in the trade as "Cross Bar Tobacco,"

while that of defendants was put upon the market as "Army and Navy Plug Tobacco." Here the court said: "One of the principles running through the law of trade-marks is that there need be no utility attached to the trade-mark, that is, it shall have no useful purpose in connection with the goods further than to show the origin or manufacture."

The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with collars, cannot be claimed as a trade-mark. In *Harrington v. Libby*, 14 Blatchf. (U. S.) 128, *Johnson, J.*, said: "The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until someone, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property."

Galvanized iron hoops, placed on a liquor barrel of dark color, were refused registration as a trade-mark, as not an original appropriation, and not sufficiently distinctive. *In re Kane*, 9 Pat. Off. Gaz. 105.

Plaintiffs, carpet manufacturers, rolled their carpets upon peculiarly formed sticks, made in two pieces, and with the ends shaped into octagonal rings, which were visible in the center of the roll when made up. This stick had been registered as their trade-mark. Defendants began to use similar sticks for the same purpose. There was evidence that plaintiff's carpets were known to the public by these projecting octagonal rings. An injunction was granted. *Lowell Mfg. Co. v. Larned, Codd*, Dig. 341; *Cox's Man. of Trade-Mark Cases* 428.

A barrel of peculiar form, dimensions, and capacity, irrespective of any marks or brands impressed upon, or connected with, it, cannot become a lawful trade-mark or a substantive part of a lawful trade-mark, although it may be of use, as auxiliary to the trade-mark proper, in making out a case of unlawful imitation. *Moorman v. Hoge*, 2 Sawy. (U. S.) 78.

himself a good reputation, so that goods which are known to emanate from him are accepted by the public with confidence as to their character and quality, reliance being placed upon the maker or vendor and his guaranty of their genuineness and quality, or those who resort to his place of business are assured of the service they will receive, is entitled to have such good reputation protected as one of the most sacred and valuable rights which a man can possess, and that this right, when embodied in a definite form, such as a trade-mark, is treated as property in the hands of the owner of the mark, which equity will protect by injunction and an award of damages for its injury.¹

1. In *Gillott v. Esterbrook*, 48 N. Y. 374; 8 Am. Rep. 553, Lott, C. C., said: "A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market, and thereby secure to himself the profits arising from the fact that they are of his manufacture, and he is entitled to the protection of a court of equity in the exclusive use of the peculiar marks or symbols, appropriated by him, designating or indicating the true origin or ownership of the article to which they are affixed against the adoption or imitation thereof by another, so as to mislead the public as to such origin or ownership, and thus affect the sale of his goods as those of the party whose trade-mark is so adopted or imitated."

In *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Cox's Man. of Trade-Mark Cases* 302, Carpenter, J., said: "The office of a trade-mark is to designate the true origin or ownership of the article or fabric to which it is affixed. When any mark, symbol, or device is used merely to indicate the name, quality, style or size of an article, it cannot be protected as a trade-mark. The object or purpose of the law in protecting trade-marks as property is two-fold: first, to secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; second, to protect the community from imposition, and furnish some guaranty that an article, purchased as the manufacture of one who has appropriated to his own use a certain name, symbol or device as a trade-mark, is genuine."

In *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76; *Cox's Man. of Trade-Mark Cases* 296, Sanderson, J., said: "By the common law, the manufac-

turer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his, and be distinguished from other like goods manufactured or sold by other persons. The owner of such peculiar marks, provided they are original with him, will be protected in their exclusive use by the courts; but only so far as such marks serve to designate the true origin or ownership of the goods to which they are attached. He will not be protected in the use of figures, or symbols, or combinations of words which serve merely to indicate the name, kind, or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin or ownership. *Petridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Stokes v. Landgraff*, 17 Barb. (N. Y.) 608. This rule obviously follows from the admitted policy upon which the law in relation to trade-marks is founded, which is two-fold: to protect purchasers from the fraud and imposition of persons who may seek, by false representations, to dispose of inferior goods of their own manufacture as those of a superior quality and established reputation, manufactured or sold by other parties; and to secure to every manufacturer the merited fruits of his own industry and inventive skill, without, however, creating a monopoly or interfering with the right of everyone to manufacture or sell the same kind of goods."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropri-

The first and critical question always is—Does the trade-mark, for which protection is sought, stand for this valuable thing, the reputation of the honest dealer? Does it carry to the world his personal guaranty of the character and quality of the goods upon which it is used? Does it indicate the origin and ownership of the goods? If it does not, then there is no good name or reputation to be protected, and the court will not interfere.¹

ated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose."

1. Origin and Ownership.—In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; 5 P. & S., *Am. Trade-Mark Cases*, Johnson, J., said: "A trade-mark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates. An invention of structure, a patent for the invention secures; a design is secured by a patent for that. Apart from these, anyone may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person. Any other doctrine is impossible to be maintained; for otherwise all the colors, all the unessential forms, could be monopolized as trade-marks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility and subject to no control but the will of the adopter."

In *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233, Folger, J., said: "There is no principle more firmly settled in the law of trade-marks, than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by anyone to his exclusive use. . . . Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words

must express only the latter. . . . Even when the sole purpose of the one who first uses them is to form of them a trade-mark for himself, expressive only of origin with himself, if they do in fact show forth the quality and composition of the article sold by him, he may not be protected in the exclusive use of them."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; 1 Pat. Off. Gaz. 279, Strong, J., said: "The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. . . . The reason of this is, that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. . . . The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association."

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, Currier, J., said: "The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it; that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves."

In *Ferguson v. Duvall Mills*, 7 Phila. (Pa.) 253, Allison, P. J., said: "Whenever, therefore, the question is presented whether property has been acquired in a trade-mark and the party claiming it is entitled to the protection of the law in its exclusive use, we turn to the case as it is presented for judgment,

If it does, then there is the further question, can the mark be upheld as the exclusive property of one without interfering with the rights or property of others?¹

It has been suggested in some cases that, in order that a trade-mark may indicate ownership and origin, it is necessary that it shall have been used for a sufficient length of time for the trade, to which the particular goods belong, to have learned, by use and association, to know the goods upon which the mark appears as those of the manufacturer or vendor who claims the mark, and that, in the absence of proof of this character, the court cannot say that the mark, no matter how unobjectionable it may be, does in fact indicate ownership and origin, and hence cannot be protected.² But it is thought that this proposition is only a

and endeavor to ascertain whether the letter, name, or device was first appropriated by the claimant, and was intended to designate, and does in fact point out, the article to which it is affixed as sold, or owned, or made by him, or the place of its manufacture or sale. If it does, it is a trade-mark within the true intent and meaning of the term; if it does not, and nothing more is expressed by it but kind, character, and quality, or if it be a name, and is suggestive of no idea with reference to the article to which it is affixed, then the claim must be rejected. In the latter event, it is not declaratory of ownership or origin, nor does it serve to distinguish an article as the production of a particular individual or the place of his business, and if it does not answer this purpose, it does not contain the essential element of a trade-mark. . . . The simplest case of a trade-mark is the name and address of the claimant, and it is absolutely requisite that a device or symbol should perform the office of a finger board; should indicate the name and address of the manufacturer, to invest it with the attributes and entitle it to the protection of a trade-mark."

In *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Upton* 198; *Cox's Man. of Trade-Mark Cases* 187, the court said: "It seems to be assumed that the rule is, that every existing word can be appropriated as a trade-mark, and that the exceptions are those expressing mere quality or kind, whereas the true rule is—that no words can be used by themselves, without other devices, as a trade-mark, except such as point out ownership or origin, and those which have no reference, in any possible way, to any other attribute of the article."

In *Upton* (1860), p. 102, the court said: "The simplest case of a trade-mark fulfilling the condition of the law, and thereby entitling him who adopts it, to protection in its exclusive use, is the name and address of the manufacturer. It is precisely to the extent that any name, device, or symbol, adopted as a designation for merchandise, is effectual in performing the office of the name and address of the manufacturer, that it complies with the essential requisite to the acquisition of an exclusive right to its use." At page 136 it is said: "That a trade-mark, adopted by a manufacturer or merchant, for his goods, to be clothed with the attributes of property, entitling the proprietor to protection in its exclusive use, must, by word, letter, sign, figure or symbol, designate the true origin or ownership of the goods."

1. See *supra*, this title, *What May Constitute a Trade-Mark; What May not Be a Valid Trade-Mark*.

2. In *People v. Fisher*, 3 N. Y. Supp. 786; 50 Hun (N. Y.) 552, *Bradley, J.*, said: "The only recognized indication of a trade-mark is the source, origin, or ownership of the article of merchandise on which it is placed. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233. This means that the mark is calculated to distinguish the articles which bear it from those of other makers or vendors. It need not indicate any particular person as maker, manufacturer, or vendor, or give the name or address of either. When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer, or seller of a certain quality of goods, it will be a sufficient indication of the origin or ownership, within the rule requisite to its protection as such,

subtle deduction of some judges who were rather seeking for a reason for denying the relief asked, than for the logical basis upon which the law of trade-marks rests. We take it that, where it is shown that a reputable manufacturer or vendor has adopted a trade-mark for his goods, which is unobjectionable on the well-settled principles of law as to what may and what may not be a trade-mark, and has applied that mark to his goods, accompanied by his name and address, and has sold his goods thus prepared in the

although purchasers may not, from the work or otherwise, be able to tell who is the particular maker or seller of the article. *Godillot v. Harris*, 81 N. Y. 263; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; abstractly, and apart from its application and use, a trade-mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives to it the character of property. It is then a symbol of reputation or good-will. *Derringer v. Plate*, 29 Cal. 292; *Bradley v. Norton*, 33 Conn. 157; 87 Am. Dec. 200."

In *American Solid Leather Button Co. v. Anthony* (R. I. 1886), 2 N. Eng. Rep. 630; 177 P. & S., Am. Trade-Mark Cases, *Stiness, J.*, said: "But it by no means follows, as a rule of law, that marks indicating style or quality may not also indicate origin, and thus be a subject of trade-mark. A person has the right to affix to his goods any device, symbol, or name, which he may invent, to distinguish such goods from those made by other people. When the symbol becomes known in connection with his name, it serves as a sign and pledge of the origin of the goods."

In *Burton v. Stratton*, 12 Fed. Rep. 696; 103 P. & S., Am. Trade-Mark Cases, *Brown, D. J.*, said: "The difficulty is in distinguishing cases where the property has acquired a generic name, as indicating the quality of the article, rather than its origin or ownership. . . . The only satisfactory rule we have been able to gather from the authorities is that in each case it is a matter for the court to determine, not alone from the mark itself, but from the testimony whether the words have become so well known as to stand in the public eye as denoting the character and quality of the article, and not its origin or ownership. . . . But if the primary object of the trade-mark be to indicate the origin or ownership, the mere fact that the article has ob-

tained such a wide sale that the mark has also become indicative of quality, is not of itself sufficient to debar the owner of protection, or make it the common property of the trade."

In *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; 79 P. & S., Am. Trade-Mark Cases, *Fenner, J.*, said: "There are authorities holding that it is essential to the validity of a trade-mark that it should indicate the name or address of the manufacturer or seller of the articles, in such manner as to distinguish them as the goods made or sold by the parties claiming the benefit thereof. We consider, however, that the latest and best authorities establish that such particular designation is not essential; but that when a particular form of words or device, otherwise valid as a trade-mark, has been first employed by a particular maker or seller, and has been used by him upon his goods, so long and so exclusively, as to have acquired, by association, an understood reference to such maker or seller as the originator or seller of articles so marked—this will be a sufficient compliance with the law, and will entitle the party to protection."

In *Sheppard v. Stuart*, 13 Phila. (Pa.) 117; 33 P. & S., Am. Trade-Mark Cases, *Finletter, J.*, said: "How is a mark or device to indicate 'true or original ownership,' or to indicate the name and address of the manufacturer? In and by itself alone, this is impossible. It is only by use as the device of him, who distinguishes his goods by it, in order that they may be known as his, that it can ever indicate 'true origin or ownership.' . . . In other words, the evidence must show the first appropriation of the device by the claimant, its application by him to his goods or business; and that the trade or public recognize the article or business by that device as made or sold by him, or belonging to him. In no other way can a mark or device indicate 'true origin or ownership.'"

open market, he is entitled to protection, on the ground that the first sale to an intelligent purchaser gives to the mark its meaning, and such purchaser, after having once bought the goods bearing the mark, and having recognized the fact, as he must be presumed to have done, that the trade-mark stood for and represented the name of the article as made by the particular manufacturer, will ever after, so long as he remembers the article at all, carry in his mind the trade-mark of the vendor, as the sign and seal of its origin and ownership.¹

We think the better distinction, and the only one which can serve any useful purpose in these cases—provided, of course, that the trade-mark is unobjectionable—is, Can a mark, by use, indicate ownership and origin, and was it adopted with that intention, and has it been used for that purpose? If this is found to be the fact, and its use in the regular course of trade proven, then the

1. In *Cigar-Makers' Protective Union v. Couhaim*, 40 Minn. 243, Gilfillan, C. J., said: "The theory on which the right to it (trade-mark), as property, is based, is, that a man may have acquired a reputation for excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected, as he ought to be, and is, in the advantages of the good-will of a business established by him; and so that the purchasing public may know the origin of such articles when offered for sale, and that they are of his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others upon similar articles, which, by such adoption, and by use in connection with his articles, comes to be known as representing that the articles on which they are placed are made or prepared by him, just as his signature to a business paper is an assurance to others that he executed it. It has, indeed, been likened to his business autograph."

In *Menendez v. Holt*, 128 U. S. 514, in upholding "La Favorita" as a trade-mark for flour, Fuller, C. J., said: "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co., to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence."

In *Stachelberg v. Ponce*, 152 P. &

S., *Am. Trade-Mark Cases*, 23 Fed. Rep. 430, Colt, J., said: "A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprietor, not only as a matter of justice, but to prevent imposition on the public. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218."

In *Avery v. Meikle*, 117 P. & S., *Am. Trade-Mark Cases*; 81 Ky. 73, Hargis, C. J., said: "It must not be overlooked, however, in these exclusions, that a trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for in all cases the trade-mark, in indicating the origin by necessary implication, represents the quality of the article, which is the true source of its reputation in the market. There is no abstract right in a trade-mark. It is property only when appropriated and used to indicate the origin or ownership of an article or goods, and its real value consists in the confidence and patronage of the public, secured through its instrumentality in acquainting them with the origin and ownership of an article which thus gains reputation for its superior qualities. Of this reputation its owner cannot be deprived without his consent, either by the use of forbidden means or the illegal employment of things otherwise lawful."

property right in the mark should be sustained, as it would be in a commercial signature, which would be protected against forgery the very day of its adoption and use, entirely independent of whether it had become known to the public or not.¹

2. Acquisition of Title—*a*. INSTANT ACQUISITION.—The question of how title to a trade-mark can be acquired, has generally been answered by the simple statement—by legal adoption and use. But this is not sufficient. It has been stated in many cases, that property right in a trade-mark can be acquired only by legal adoption, meaning, a mark which is legally capable of exclusive appropriation, and which has not previously been used by others for the same class of merchandise or business, and which has been applied to goods and a use in trade, in such circumstances as to publicity

In *Larrabee v. Lewis*, 89 P. & S., Am. Trade-Mark Cases; 67 Ga. 562; 44 Am. Rep. 735, Crawford, J., said: "A trade-mark which designates the true origin or ownership of the article manufactured or sold, will be protected, but words which have no other relation to the origin or ownership of the goods than merely to indicate the name or quality, will not be protected."

The numerals "5 2 3," in connection with the device of an eagle and wreath, may indicate origin as well as quality, and when so intended will be protected as a trade-mark for underwear. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325; 37 Am. Rep. 362. In this case Colt, J., said: "It has been said that there can be no exclusive right to use marks, figures, and letters which are intended merely to indicate the quality of the fabric manufactured, as distinguished from those marks which are intended to indicate its origin, because one has no right to appropriate a sign, or symbol, or mark which, from the nature of the fact it is used to signify, others may use with equal truth, and therefore have an equal right to employ for the same purpose. . . . These considerations would be decisive, if the plaintiff here claimed the exclusive right to the numerals '5 2 3,' when used only to indicate the quality, and not with reference to the origin, of the goods. But such is not the plaintiff's position. Its claim is that the purpose of using these figures, in connection with the other parts of its trade-mark, was to aid the buyer in distinguishing its goods from similar goods made and sold by others."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Field, J., said: "Every-one is at liberty to affix to a product

of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. . . . The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose, either to the manufacturer or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article."

1. In *Ransom v. Graham*, 51 L. J. Ch. 897, Bacon, V. C., said: "The law relating to trade-marks has been established by decisions extending over centuries, and although its application has been somewhat modified by the recent statutes relating to trade-marks, and thereby adapted more conveniently to modern usages, the law has undergone no change in its essential principle. That principle may be stated thus: A manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark, by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is thenceforth called his trade-mark."

and length of use, as to show an intention to adopt it as a trade-mark for a specific article.¹

This rule is a very good one, where the facts will allow of its application, and in cases where it is possible, the proof should fully come up to its requirements; but the rule contains an element of uncertainty for which there does not seem to be sufficient reason. How long must the trade-mark be used? How much goods sold under it? How many people must know the mark as belonging to the vendor of the goods? And why should any of these questions be raised? It is thought that the more logical and useful rule, and one for which there is ample authority, is, that the instant a vendor adopts a valid trade-mark to indicate his goods, and applies it to his goods with his name and address, and

1. "Under the English cases, there must be something more than a mere adoption and application of a trade-mark to create an exclusive right at common law. The American cases, however, would seem to be to the effect that, as soon as the mark is applied, it becomes the property of him who is the first to formally make the application." *Cox's Man. of Trade-Mark Cases* 459, note; *Browne on Trade-Marks*, § 52.

In *Robertson v. Berry*, 50 Md. 599, *Miller, J.*, said: "Without noticing at length many other allegations of the bill, the facts thus stated show that the complainants have acquired a property right in the devices, emblems, and title pages in question by adoption and user."

In *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327, *Dyer, J.*, said: "As is well shown by a writer who has with evident care collated the authorities on the subject, vol. 7, *Central Law Journal* 143, the foundation of title to a trade-mark is priority of adoption and actual use in trade, and it neither in application nor discovery necessarily possesses the elements of originality, novelty or invention."

In *Swift v. Peters*, 11 Pat. Off. Gaz. 110, *Doolittle, Acting Commissioner*, said: "From this it will be seen that it is of no consequence whatever who was first to suggest and urge the adoption of the trade-mark; but the point is, who was first to actually adopt and use the same for the purpose of indicating the ownership or proprietorship of the articles to which the mark is applied."

"For a mark to have been used before the act (1875) it was sufficient for a vendable article to have been actually in the market, bearing the mark in

question; it was not necessary for this to have been the case for any length of time, so long as there was some user. There was for some time a doubt as to the circumstances under which one person could acquire a sufficient right to a trade-mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the defendant's intentional fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the plaintiff) had acquired for the mark indicating his manufacture such a reputation as would raise a presumption that the defendant, in adopting a similar mark, had done so with the intention of availing himself of that reputation to divert to himself the plaintiff's custom; or, at all events, that the plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired." *Sebastian on Trade-Marks* 9.

Lord Westbury, in *McAndrews v. Bassett*, 4 De G. J. & S. 380, said: "But when it came to be recognized that there was a right of property in a trade-mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Sir J. Romilly, M. R., 'the interference of a court of equity could not depend on the length of time the manufacturers had used it' (*Hall v. Barrows*, 32 L. J. Ch. 548), but that 'from the time of their commencing the user of their trade-mark, they became entitled to the protection of the court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs.'" See also *Orr-Ewing v. Grant*, 2 Hyde 185.

"The question as to what constitutes a sufficient length of user to give the plaintiff an exclusive right to a trade name or designation not registered under the act, may be resolved by reference to a judgment in *Hall v. Barrows*, 32 L. J. Rep. 551, in which a decided opinion was expressed that the interference of a court of equity does not depend on the length of time the name has been used, and that, although it might not have been adopted a week, and might not have acquired any reputation in the market, still the right to use it would be protected." Slater on Trade-Marks 238.

In *Hall v. Barrows*, 32 L. J. Ch. 548, the Master of Rolls said: "It has sometimes been supposed that a manufacturer can only acquire such a property in a trade-mark as will enable him to maintain an injunction against the piracy of it by others, by means of a long use of it, or, at least, such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a court of equity cannot depend on the length of time a manufacturer has user of it. If the mark or brand be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but provided it has been originally adopted by a manufacturer, and continuously and still used by him to denote his own goods when brought into the market and offered for sale, then I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbor cannot use that mark. Were it otherwise, and were the question to depend entirely upon the time the mark had been used or the reputation of it had been acquired, a very difficult, if not insoluble inquiry would have to be opened in every case; namely, whether the mark had acquired in the market a distinctive character denoting the goods of the person who first used it."

In *Cope v. Evans*, L. R., 18 Eq. 143, Sir Charles Hall, V. C., said: "The plaintiffs, from the time of their commencing the user of their trade-mark, became entitled to the protection of this court against any other persons using the same, so as that purchasers might be induced to purchase the goods of other persons as the plaintiff's goods. And it

is not an answer to an application for an injunction to restrain the user thereof by another person, for such other person to say and prove that he adopted the trade-mark without knowing that it already belonged to the plaintiff."

In *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125, Breese, J., said: "It is the actual use of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property." Citing *Upton on Trade-Marks* 179.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., dissenting, said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture, of a symbol or device, not in actual use, to designate articles of the same kind or class, . . . and the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agent. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use."

In *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151, the court said: "On the contrary, it is distinctly laid down by the authorities that it is only the actual use of the mark, device or symbol, by the dealer which entitles him to it, and gives him the right to be protected in the enjoyment of it."

In *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194, Beck, J., said: "The exclusive right in a trade-mark is acquired by its use, which the law does not require shall be continued for any prescribed time."

In *Royal Baking Powder Co. v. Sherrill*, 59 How. Pr. (N. Y. Supreme Ct.) 17, Van Horst, J., said: "In such a case the word itself becomes property, to the extent above indicated, to the one who first distinctly appropriates it to his use. . . . Prior in time, prior in right."

In *Schneider v. Williams*, 44 Pat. Off. Gaz. 1400, it is said: "Actual use of a mark upon goods put on the market and sold by the adopter is necessary to create ownership. Three things are necessary:

"*First*.—Adoption of a mark not used by another to designate goods of the same kind on market.

"*Second*.—Application of a mark to an article of traffic.

sells his goods in the open market in the regular course of trade, at that instant his title becomes complete and established, and, while subsequent use is necessary to maintain it, still no amount of subsequent use or reputation which the mark may acquire can increase his rights or give him any better standing in a court of equity than his original adoption and use. We cannot see any good reason why this rule should not be followed, as it is the most simple and easy of application, simplifying the evidence and lightening the burdens of the court; without danger to the accomplishment of substantial justice.¹

"Third. — Article bearing trade-mark must be put on market by owner."

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, the court said: "The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69. If the absolute right belonged to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred and . . . the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514."

In *Whitfield v. Loveless*, 64 Pat. Off. Gaz., p. 442, the court said: "The court finds, then, that the word 'Columbia,' is a fanciful name; that the person first selecting it is entitled to its use, for the reason that by its selection and exclusive use no monopoly is created, and on the further broad legal ground that that which is prior in time is first in right."

"What time is required for the perfection of title? That is, how long does it take to adopt it? The answer is obviously this: the moment one who has selected a symbol to indicate his merchandise applies the mark to his goods, the act is complete. The avowal of his intention to adopt, his registration of the mark, and notice to the whole world, do not constitute adoption; but apply the mark to the articles for sale, and, *eo instanti*, the act is complete. In *McAndrew v. Bassett*, the right of the plaintiff was disputed because of his recent appropriation of the symbol to stamp his licorice, just as a claim based upon mere prescription might be challenged. The lord chancellor said, that he had been much pressed by the defendants' counsel to declare that there was not sufficient time, between the termination of the month of July and the

15th of September following, for the plaintiff to acquire a right of property in the particular trade-mark. The substance of the argument of defendants is this: that, supposing the court interfere upon the ground of property in a trade-mark, that property must be regarded as the offspring of such an antecedent user as will be sufficient to have acquired, for the article stamped, general notoriety and reputation in the market; and that the property cannot be held to exist until the facts of such user, notoriety, and public reputation have been proved. The plaintiff won." *Browne on Trade-Marks* 58-59.

1. In *Kohler Mfg. Co. v. Beeshore*, 53 Fed. Rep. 262, Butler, J., said: "The plaintiff claims ownership of a common-law trade-mark in the words 'One Night Cough Cure,' used as a label on medicine, which it manufactures. Granting that a trade-mark may be acquired in this collocation of words, the plaintiff, to sustain its claim, must show that the words have been used in the connection stated, so uniformly and so long as to have become familiar to the public as a sign of this article of its manufacture. To show merely an adoption of the words, without such continuous use and public familiarity and understanding, would amount to nothing. The use, even for a brief period, in connection with occasional sales, would amount to little if anything more. To establish a proprietary right in the language, it is necessary that the public understanding respecting the purpose of its use shall be fully proved. . . . There is no sufficient evidence that the plaintiff had acquired a trade-mark. . . . The occasional use of the written label prior to the fall of 1891 was unimportant. It was insufficient to make any public impression; and the period between the fall of 1891 and February following, when suit was

commenced, was too short, in the most favorable view of the evidence, to have established or fixed the label (whatever it was) in the public mind as a known sign or indicia of the plaintiff's manufacture of cough medicine." This judgment was affirmed on appeal, Shiras, J., saying: "Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is that he who first adopts a trade-mark, acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572. Cited in *Richter v. Reynolds*, 59 Fed. Rep. 577.

See *Richter v. Reynolds*, 59 Fed. Rep. 577, where the opinion by Dallas, J., deals with the character of the use which is requisite to the acquisition of title to a trade-mark, and also with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods.

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, no relief was granted, it not appearing that complainants had first established a reputation for their device before defendants simulated it. See also *Robinson v. Berry*, 50 Md. 599.

In *U. S. v. Steffens*, 100 U. S. 82, Miller, J., said: "The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than sudden invention. . . . The exclusive right grows out of use and not from mere adoption."

In *Wheeler v. Johnston*, L. R., 3 Ir. 284, the vice chancellor said: "But in-

dependently of the operation of the statute, it is necessary for me to consider, in this case, how the right of a trade-mark may be acquired. In the first place, it is not necessary that it should be used for any definite length of time; there is no statute of prescription applying to trade-marks; and all that is necessary is that the article shall be placed in the market in connection with the desired trade-mark, and that it shall be known in the market for a sufficient time to lead the public dealing in that article to connect the trade-mark with that particular article. If goods so marked and known have acquired a reputation which leads people to ask for such goods so marked, that is sufficient to entitle the vendor or producer to complain of any infringement."

In *Seltzer v. Powell*, 8 Phila. (Pa.) 296, Leg. Int. 308, Paxson, J., said: "Where, as here, a party claims to have recently adopted a trade-mark, composed in part of certain words which do not in themselves designate the origin or ownership of the merchandise, and which trade-mark has not been used to a sufficient extent, or for a long enough period to be known to the trade, and another party shortly thereafter, in entire ignorance of the fact of its existence, uses the same words as part of his trade-mark, without there being any other imitation, or any apparent design to sell his goods as and for the goods of the party who claims to have first adopted it, a court of equity will not interfere in a summary way by injunction, but will remit the parties to a court of law, there to settle the question of the original appropriation of the trade-mark by the verdict of a jury."

In *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115, Giles, J., said: "A purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation and subsequent use, become a trade-mark. . . . The same might be said of a symbol or sign, such as a cross, a star, or lion, which, when stamped upon a particular article, may become its distinctive mark, and will be upheld as such so soon as the article becomes known and distinguished by that mark."

In *Edelsten v. Vick*, 11 Hare 78, the Vice Chancellor said: "It was contended that the plaintiffs were not the patentees, and that they had no

One important element in the acquisition of title is that the mark appropriated shall be such a one as is legally unobjectionable and is susceptible of exclusive appropriation, for unless the mark can become the exclusive property of the adopter and user, it cannot be a valid trade-mark.¹

3. Class of Merchandise.—Elsewhere in this article it is stated that the basis of trade-mark protection is the right which an honest and skillful dealer has in his good reputation.

The recognition of this right has led to the recognition of a property right in a trade-mark, when applied to goods made or sold by the owner of the mark.

The courts have gone even further than this; they have held that the honest dealer who has created a good and valuable reputation for his goods and consequently for himself, is entitled to all the benefit which he can in any legitimate way derive from that good reputation. The application of this rule has led the courts to hold that where a manufacturer is making and selling one or several varieties of goods, all belonging to the same class, and all within his particular line of business, and has applied to these goods a trade-mark indicating their ownership and origin, he has such a right in the trade-mark, as representing his good reputation, as will entitle him to enjoin the use of the same upon goods not made by him, but belonging to the same class of merchandise. This rule is based upon the clearly reasonable and equitable ground, that the public cannot know how many varieties of goods belonging to the same class the owner of the trade-mark makes and sells under the mark, and when they see any one or more of the general class of goods bearing the mark, which they know as the mark of the man with whom they have been in the habit of dealing, they will at once conclude that the goods are of his manufacture, and if this is not the case they will be deceived thereby, and the owner of the mark exposed to danger of injury, because he cannot control the quality of the

title to the label; but it is not the patent, but the continuous use of the label for a certain period of time, which confers the right to protection; and the length of time during which this use by the plaintiffs and those to whose rights they have succeeded existed, is a sufficient title."

In *Purser v. Brain*, 17 L. J. Ch. (U. S.) 141, the Vice Chancellor said: "Then the question arises, whether the court can say certainly that the user of the plaintiff's patent is so clear that the injunction ought to be continued. Upon this point, I feel that it is very possible a jury may think there has not been so long a user by the plaintiff of his title as to enable him to sustain an action at law."

In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that 'the article to which it is attached is the manufacture or production which is generally known in market under that denomination.' *Walton v. Crowley*, 3 Blatchf. (U. S.) 440."

1. *New York, etc., Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 277. See *supra*, this title, *Geographical Terms*, where the question is discussed.

goods not made by him and thus sold under his trade-mark. There is still another excellent reason for the rule; if a second manufacturer were to adopt and use the mark of another, within the same class of merchandise, he would, by so doing, acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line within the class, he would find himself in the position of being unable to employ his own trade-mark, which is equivalent to his own name, upon his own goods; he would thus be deprived of a very important part of his own valuable reputation, and seriously injured. These consequences are obviated by extending the rights of a trade-mark owner to the whole class of merchandise, within reasonable limits. What the limits of the class will be, will in every case be a question for judicial determination.¹

1. See *supra*, this title, *Doctrine of Origin and Ownership*. "The commissioner of patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trade-mark appropriate to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last mentioned trade-mark as to be likely to deceive the public. But this section shall not prevent the registry of any lawful trade-mark rightfully in use on the eighth day of July, eighteen hundred and seventy." *United States Rev. Stat.*, § 4939.

In *White Co. v. Miller*, 50 Fed. Rep. 277, plaintiffs were the users of "Miller's Chicken Cock Whisky," as a trade-mark for "straight" whisky in barrels, and defendants began the use of "Miller's Game Cock Rye" on barrels and bottles for "blended" whisky. At the suit, defendants contended that the difference in application justified the similarity. Colt, C. J., said: "But it surely cannot be said, that a person having a valid trade-mark, which he uses upon one form of package, another person can adopt the same mark upon the same form of package, and is justified in its use because he also puts it upon another form of package. Nor is it very material whether the barrels have one or two stamps upon them, or

whether one kind of whisky is straight and the other blended, or the price of one is a little greater or less than the other."

Complainants, whose trade-mark for canned salmon was "Epicure," sued to restrain defendants, who had previously used the same mark for canned fruit, from extending it to salmon. Coxe, D. J., said: "The reasoning of some of the authorities would indicate that the defendants had a right to use the brand in connection with other fruits and vegetables, analogous to tomatoes and peaches; but to assert that they have the right to use it on all canned goods is carrying the doctrine far beyond any reported case. . . . The fact that the defendants have subsequently extended their business so as to include fish and other like articles of food, does not avail them, neither would the fact, if it existed, that, at the time they adopted the word 'Epicure' they intended in the future to embrace these articles. . . . It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it." *George v. Smith*, 52 Fed. Rep. 830.

Plaintiffs, whose trade-mark for condensed milk was "Milk-Maid," sued to restrain defendant from using the same mark for similar articles. The court determined that the registration of the defendant's trade-mark must be confined to substances other than condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee; allowing it for butter,

butterine, and eggs. *Anglo Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. Div. 454.

In *Edwards v. Dennis*, 30 Ch. Div. 454, Cotton, L. J., said: "Now, what was done in the present case? There was a registration by Mr. Edwards' predecessors in title for Class 5, 'unwrought and partly-wrought metals used in manufacture.' That was registration in respect of all goods which come under Class 5, a class which includes a vast number of things. It is not exhaustive in its terms; it only gives examples of the articles included in it, for it says 'such as' iron and steel, iron rough, iron rails, iron sheets, and so forth. The registration in the present case has been for the entirety of that class. In my opinion that is wrong. . . . In my opinion it is not the intention of the act (1875) that a man registering a trade-mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in that class. . . . The vice chancellor allowed the registration to stand for all the goods in Class 5 except iron wire; but I think the proper course is to let it stand for unwrought and partly-wrought metals consisting of galvanized iron sheeting. This would show what are the goods in respect of which he claims to use his trade-mark." And he further says: "Now it appears that the real defendants, Messrs. Felten and Guilleaume, have been carrying on business for many years, and are and have been confining themselves to the manufacture and sale of wire. On the other hand, the plaintiff is and has been selling only sheet iron. Can it be said that by placing this label or mark of which the plaintiff claims on their bundles of wire, the defendants are passing off their goods as those of the plaintiff, when the plaintiff is not selling that class of goods at all? If they had been using it as a trade-mark upon the same description of goods as those manufactured by the plaintiff, that might have led people to believe that those goods were the plaintiff's manufacture; but when we find that the goods are so distinct as they are in this case, I should say, as a judge of fact, that the defendants are not doing anything to mislead people into thinking that their goods are the goods of the plaintiff. . . . In the course of the argument it was asked, what is to be done if a

man extends his business? . . . In my opinion, if a man wishes to extend his business to a new description of goods and to use his trade-mark in connection with the goods, he ought to register it in respect of those goods."

In *Collins Co. v. Oliver Ames Co.*, 20 Blatchf. (U. S.) 542, Blatchford, J., said: "The complaint in this suit alleges that the plaintiff corporation has, from its organization, been engaged in making 'axes, hatchets . . . ' that it has always used as its trade-mark the name of 'Collins & Co.' but has placed and now places that name upon such goods only as have obtained a high standard of excellence; that said trade-mark name was intended to, and did inform purchasers that the goods upon which it appeared were of the manufacture of the plaintiff exclusively. . . . Clearly, those who purchased shovels made by Ames & Sons, and stamped 'Collins & Co.,' would believe that such shovels were made by the plaintiff, for there was no other Collins & Co. than the plaintiff. This was an unlawful appropriation of the plaintiff's trade-mark. . . . It is strongly urged, on the part of the defendant, that a mark or stamp, to be a trade-mark, must be the mark of an existing trade; that the mark 'Collins & Co.' on shovels, when adopted by Ames & Sons, became the mark of a trade in shovels, carried on by Ames & Sons; that the plaintiff had no trade in shovels at the time; that the mark 'Collins & Co.' thus became the mark of Ames & Sons' trade in shovels, and the property of Ames & Sons in respect to shovels made by them, by prior right; that any use of that mark on shovels afterwards, by the plaintiff, became wrongful as against Ames & Sons or the defendant; and that the plaintiff has no right in the premises which it can enforce against the defendant. This view is specious, but unsound. The plaintiff having, from 1843, the right to make any article of iron, steel, or other metal, and having gone on, from that time, both before and after 1856, extending its manufacture beyond edge tools into digging tools, such as picks and hoes, and having always put the mark 'Collins & Co.' on its best quality of articles, the fact that it did not before 1856 make a digging tool, such as the shovels on which, in 1856, Ames & Sons put the mark 'Collins & Co.,' does not warrant the conclusion that that mark

was not, in 1856, the mark of the plaintiff's trade in respect to such shovels."

In *Carroll v. Ertheiler*, 1 Fed. Rep. 688; 21 Alb. L. J. 503, the application of the words "Lone Jack," the plaintiff's trade-mark for smoking tobacco, to cigarettes, by the defendant, was held to be an infringement; there not being sufficient difference between the two kinds of goods to warrant such use. Butler, J., said: "While the revenue laws, for purposes of taxation, distinguished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draw such a distinction as the defendant sets up. . . . The denominating characteristic of the plaintiff's trade-mark is the name 'Lone Jack.' His tobacco has come to be known and described by this name, throughout the country, to such an extent that the accompanying device has ceased to be important, if it ever was so, doubtless rarely observed, and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack,' and is thus designated as the plaintiff's manufacture by purchasers and sellers. The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 57, Clifford, J., said: "Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class . . . the rule being, that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents. Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the

device. Hence, the use of it on one particular article of manufacture or merchandise will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner."

There being four trade-marks, each consisting of the device of an anchor, registered for different varieties of goods in the same general class, the court refused the application to register a fifth for still another kind of goods in the same general class, in the case of *In re Hargraves' Trade-Mark*, 11 Ch. Div. 669.

In *Sorg v. Welsh*, 16 Pat. Off. Gaz. 910; 38 P. & S., Am. Trade-Mark Cases, Doolittle, Acting Commissioner, said: "Applicants are not compelled to register a trade-mark upon a whole class of goods, but may restrict it to a particular description of goods within that class. The law requires, in fact, that an applicant shall state the particular description of goods comprised in the class to which he applies, or intends to apply, his trade-mark. Different persons may apply the same mark to different sorts of goods in the same class, provided the nature and resemblance of the goods are not so nearly the same as that the identity of the trade-mark would deceive the public as to their origin or ownership."

In *Re Jelley*, 51 L. J. Ch. 639, the application of petitioners, who had been using a certain trade-mark for several kinds of iron, to register it for the whole class of iron, was refused. Jessel, M. R., said: "Although the applicants contend that they have used this mark for twenty-five years in the market, these particular goods have not been known by it. That point was argued by a man who had used a mark for whisky which he thought he could extend to beer, though it was very like Allsopp's mark, but I did not think so. . . . The applicants say that, if they are allowed to use this mark in respect to certain goods, it is hard upon them that they should not be allowed to use it for the whole of their trade; but if they are going to sell goods which they never sold before, the answer is that they can adopt a new mark upon them."

In *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, where defendant sold shirts of "Wamyesta Muslin," it was held an infringement of plaintiff's trade-

mark "Wamsutta" for muslin. Thayer, P. J., said: "As to the point made by the defendants, that the plaintiffs are manufacturers of muslins and the defendants are manufacturers of shirts, and therefore the plaintiffs cannot complain of the use of their trade-mark, or a servile imitation of it by defendants when affixed to their shirts, we do not see the force of such reasoning. It is too plain to require any demonstration that if the defendants manufacture shirts of muslin greatly inferior in quality to the plaintiffs' muslin, and pass them off upon the public as shirts made of the plaintiffs' muslin, the plaintiffs may suffer greatly thereby in their reputation as manufacturers, and consequently in their sales of the muslin which they manufacture."

In *Colman v. Crump*, 70 N. Y. 573. Allen, J., said: "It is an infraction of that right, to print or manufacture, or put on the market for sale, and sell for use upon articles of merchandise of the same kind as those upon which it is used by the proprietor, any device or symbol, which by its resemblance to the established trade-mark will be liable to deceive the public, and lead to the purchase and use of that which is not the manufacture of the proprietor, believing it to be his. . . . The fact that the same device is used upon other articles of merchandise does not take from the plaintiffs their right to its exclusive use on this one article of their manufacture."

In *La Société Anonyme des Mines v. Baxter*, 14 Blatchf. (U. S.) 261, Blatchford, J., said: "The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. . . . So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture."

In *Re Bush*, 10 Pat. Off. Gaz. 164, Duell, Commissioner, said: "Bush & Co. sought to register 'Centennial' as a trade-mark for 'Sparkling Wines,' but

were rejected upon the registration of F. Boehm & Co., of said word for 'wines of which alcoholic spirits is an ingredient.' It is denied, however, by the applicants that the word 'Centennial,' as registered by Frank Boehm & Co., covers the class of merchandise to which they claim the right to apply it, *i. e.*, Sparkling Wines, but is confined to those wines of which alcoholic spirits is an ingredient. Frank Boehm & Co. set forth that their trade-mark is applied to that class of merchandise containing alcoholic spirits, and they include wines in the enumeration of the particular goods comprising such class. All wines contain alcohol, and as they have not expressly limited themselves to such as are compounded with alcoholic spirits, it seems not inconsistent with their registration to say that they really include all such wines as contain alcohol."

In *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 299, Barrett, J., said: "It is not disputed that, so far as the word 'Amoskeag' has been applied by plaintiff to cotton goods actually manufactured and sold by it, the use of such word is its exclusive right. The claim is that, as to any description of cotton goods which the plaintiff has not yet produced, the word 'Amoskeag' is common property and that, therefore, the defendants were at liberty to apply it as their trade-mark, even as against the plaintiff, to prints or calicoes. This claim rests upon the assumption that the word 'Amoskeag' is simply the plaintiff's trade name, that is, a geographical name in which the plaintiff can have no exclusive property, except so far as it has been actually applied. It ignores the fact that the word stands for, and is, in reality, the distinctive part of the plaintiff's corporate name. If the plaintiff had been incorporated, say as 'The Manchester Manufacturing Company,' and had used the word 'Amoskeag,' merely to distinguish its goods, the question whether there could be any property in the name, except as to those classes of goods to which it had actually been applied, would have been presented for consideration. It would then have been similar to the 'I X L' case, where the question was decided in the negative by the examiner in the English Patent Office, but whether correctly or not remains to be judicially determined. The courts have gone no

farther than to say that the property in such marks does not extend to an entirely different line of industry; as if a person does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linens, another person may stamp a lion on iron. *Ainsworth v. Walmsley and Hall v. Burrows*. But when it is considered that the word 'Amoskeag' stamped upon the plaintiff's goods is nothing more or less than an abbreviation, like 'A. M. Co.' or 'A. M. C.', of 'The Amoskeag Manufacturing Company,' a very different question, which is the only one really in the case, is up for judgment. The plaintiff's corporate name was lawfully given to it by legislative action over forty years ago, and there would seem to be no good reason why it should not receive as much protection against the unauthorized use of its name as a natural person. . . . Now, it will scarcely be pretended that the defendants have the right to call their prints 'The Amoskeag Manufacturing Company Prints.' And why not? Is it because the plaintiff has acquired a special and limited property in its own name, by its application to certain articles? Assuredly not. The right is denied, not merely upon the narrow ground of the violation of an ordinary trade-mark, but upon the broad principle that the plaintiff is entitled, under such circumstances, to protection against the unauthorized use of its name. Such a use is conclusive evidence of the wrong which the law undertakes to redress, viz.: 'The sale of the goods of one person as being those of another.' *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. Now, if the defendants have not the right to use the plaintiff's name directly, they certainly have not the right to use it indirectly. For instance, in view of the evidence in this case, the defendants could no more rightfully call their prints 'A. M. Co. prints,' than they could style them 'The Amoskeag Manufacturing Company Prints,' because that would still be a representation, less full, pointed and direct, but none the less fraudulent, that the prints were of the plaintiff's production. 'A. M. Co.' is not merely a trade-mark, but a well-known, long used and thoroughly understood abbreviation of the plaintiff's name. So with the word 'Amoskeag.' It brings before the mind of the dealer in cotton goods, not a mere geographical designation, but 'The Amoskeag Manufacturing Company.'

He sees the full name of the company the moment his eye rests upon the distinctive part of it. To stamp the word 'Amoskeag,' therefore, upon cotton goods is substantially to represent, (and that whether such be the intention or not, which is immaterial in applying the remedy [*Millington v. Fox*, 3 Myl. & Co. 338]), that such goods are manufactured by the Amoskeag Manufacturing Company. It was contended that the plaintiff's claim was practically of a monopoly in the word 'Amoskeag.' But not so. The word is free to those engaged in other and distinct lines of industry, because there its use conveys no such meaning as when applied to cotton goods. . . . The manufacturer of cement, for instance, might apply the word 'Amoskeag' to that article, because when stamped upon cement it would not stand for 'The Amoskeag Manufacturing Company.' In that connection it would be a mere geographical designation and not, in effect, the plaintiff's name. . . . Applied, however, to any and every variety of cotton goods, whether such as the plaintiff has or has not, as yet, manufactured, it could not fail to indicate the plaintiff's name, and that the goods were of its manufacture. . . . The only difference between the parties on this head, is as to the legal treatment of the word 'Amoskeag.' . . . But now suppose that the plaintiff had received from the legislature of *New Hampshire* the name of 'The Amoskeag Baking Company,' and for forty years had been engaged in the humbler, though hardly less useful, avocation of 'manufacturing' almost every variety of bread, roll, muffin, cracker, biscuit, cake and pie, on which articles of food it had invariably stamped its corporate name or some abbreviation thereof, such as 'Amoskeag B. Co.,' or 'Am. Baking Co.,' or 'Am. B. Co.,' or 'Amoskeag.' Suppose, however, that the plaintiff had omitted or had not yet decided to make and vend the single variety known as 'crumpets,' and thereupon a rival baker attempted to sell his crumpets as 'Amoskeag crumpets,' would not any customer, upon seeing the name thus applied, naturally say that the Amoskeag Baking Company had added crumpets to its other varieties of bread? And would not the rival bakery be restrained, upon the plain principle of an unauthorized use of the company's name? The parallel is not

precise, as the printing of calicoes may require some additional machinery. But the difference is only in degree." *Compare Amoskeag Mfg. Co. v. Garner*, 55 Barb. (N. Y.) 151.

In *Smith v. Reynolds*, 13 Blatchf. (U. S.) 458, Shipman, J., said: "The question . . . is, does the registration of a trade-mark for 'paints,' by a plaintiff who had previously acquired the exclusive use of such mark for particular kinds of paints only, enable the plaintiff to restrain the defendant from its use upon another kind of paints, to which kind he had been in the habit of affixing the same mark prior to the registration? . . . By registering this mark in the patent office, and appropriating it to all paints, they cannot, in my opinion, prevent the defendants from the use of the mark upon a class of goods to which they had applied the mark prior to the registration, especially as the plaintiffs have not, since the registration, extended actual use of their mark to that class."

In *Ex p. Boehm*, 8 Pat. Off. Gaz. 319, an application to register a trade-mark for the whole class of "alcoholic spirits" was allowed. Spear, Acting Commissioner, said: "I know of no decision of the courts, nor does the examiner cite any in support of his position, that the law contemplates that different descriptions of the same class of goods should be made the subjects of separate applications. On the contrary, the most recently published decision which has come to my notice, gives the clause of the statute under consideration (section 4937 *United States R. S.*) quite a different interpretation. *Smith v. Reynolds*, 3 Pat. Off. Gaz. 214. . . . It is true that the use of such comprehensive terms is a very bad practice, but the evil results appear to fall on those applicants alone who take the risk. . . . This danger of including within the terms of a registration more than applicants can maintain, will probably serve to restrict the practice of making the descriptions too comprehensive."

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 441, Jessel, M. R.: "Now, as to this class, it is quite immaterial that the maker of the goods to which, what I will call for the sake of shortness the trade-mark, is affixed, did not know that it was a trade-mark, and had not the slightest intention of defrauding anybody. He must not put as a mark on goods, even though he intends to

establish it as his own trade-mark, that which is the known trade-mark of other people, and he would be restrained by injunction, though he thought he himself had invented the trade-mark, and *bona fide* intended it to designate goods of his own manufacture. And the reason is obvious, because the goods pass from hand to hand, and though he may act with the utmost *bona fides*, yet the ultimate purchasers might believe that they were the real goods, that is to say, that they were manufactured by the person entitled to the original trade-mark.

. . . . Consequently, whenever you get to a case of the first class, you have nothing more to do than to show that the trade-mark has been taken. What do we mean by saying that the trade-mark has been taken? . . . What the court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description. I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal (above referred to as anything entirely arbitrary), and put it on carriages, that would not prevent a manufacturer of woolen goods from putting it as a trade-mark on woolen goods. As I said before, you must have regard, not merely to the mark, but to the nature of the goods upon which the mark is impressed."

In *Singer Mfg. Co. v. Kimball*, Ct. of Session Cases, 3d Series XI. 267; 10 Scott L. Rep. 173, it was said: "Now, in the Scotch court, the judges seem certainly to have proceeded upon a general principle, founded upon some expression of Lord Westbury in *Wotherspoon v. Currie*, L. R., 5 H. L. 508, that there is a property acquired in a trade-mark or trade name to this extent, that no one else is entitled to use that mark or name at all as applied to the particular article in connection with which it has been used, even though he does it perfectly honestly and in a way not calculated to deceive; that the man who first used the name is entitled to say, 'You shall not use the name at all applied to goods like mine, it will do me harm if you use it in that way and you shall not use it at all.'"

In *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310, Blatchford, J., said: "In-

4. Affixation.—A trade-mark, in order that it may indicate the origin and ownership of goods, must be affixed to the goods themselves. The use of the mark on advertising matter alone does not create a title.¹

asmuch, therefore, as the defendant is not shown to have used the word 'heliotype,' in connection with prints which are substantially the same description of goods as the prints which the plaintiffs designate as 'heliotype,' or with prints which have substantially the same descriptive properties and qualities as those which the filed statement refers to as the prints which the plaintiffs designate as 'heliotype,' the plaintiffs are not entitled to the relief asked, by reason of any right acquired under the statutory registration set forth in the bill. . . . It is apparent, that the protection given by the statute is to the exclusive use of the trade-mark only so far as regards the particular description of goods set forth in the filed statement, as the particular description of goods to or by which the trade-mark has been . . . appropriated; that the inhibition of the statute is only against the use of substantially the same trade-mark or substantially the same particular description of goods; and that the wrongful use which may be enjoined is only the affixing, by another, of substantially the same trade-mark to goods of substantially the same descriptive properties and qualities as those set forth in the filed statement as the particular description of goods by which the trade-mark has been, or is intended to be, appropriated."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, Strong, J., said: "The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former."

In *Ainsworth v. Walmsley*, 35 L. J. Ch. 352; L. R., 1 Eq. 518, Wood, V. C., said: "This court has taken upon itself to protect a man in the use of a trade-mark, as applied to a particular description of article. He has no property in that mark *per se*, any more than any person has in any fanciful denomination which he may assume for

his own particular use without reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a peculiar species of goods, and when he has caused his goods to circulate with that mark, when that mark has become the known indicium of their being his, the court has said that nobody shall defraud him by using that mark, and passing off the goods of another's manufacture as being the goods of the owner of the trade-mark."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 538, Lord Kingston said: "A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description."

1. "Mode of Application or Use of Mark.—This may be set forth thus: 'by marking each article with blue ink by means of a stencil plate;' 'by printing the mark upon tags to be fixed to the cloth;' 'by branding the top of each box containing the goods with a hot iron;' 'by painting or stenciling the mark upon each article;' or in any other language which will clearly show the mode of affixing the same. Sometimes the articles to be protected are too minute to bear the mark, as needles, when the box will perform that office; or pins, when the paper in which they are fastened will serve the purpose; and so of a myriad of those articles to which the emblem cannot be affixed, except by means of envelopes, wrappers, boxes, and other inclosures." Browne on Trade-Marks, § 305.

In *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, *affirming* 40 Ill. App. 430, Bailey, J., said: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. Browne on Trade-Marks, section 91. There is no evidence, or, if there is any, it is exceedingly

slight, that the words 'Hazelton Boiler' or 'Hazelton' had been actually affixed to said boilers as a trade-mark prior to July 10th, 1884." A bill for relief was dismissed.

In *Jay v. Ladler*, 40 Ch. Div. 649, Kedewich, J., said: "There is one argument which was addressed to me on behalf of the defendant which I must notice in this connection, and that is, that though this trade-mark has been used by the plaintiff, and though it was registered with reference to these trade articles, it has never been affixed to any article, or, at any rate, not proved to have been affixed, and the judgment of Sir George Jessel in *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, was quoted to me, in which he insisted on the necessity of, in that particular case, affixing or impressing the trade-mark. Now, to my mind, there is some fallacy in quoting those expressions in a case like this. There is no statutory provision, but no doubt the court would consider (I think that follows from the case of *Edwards v. Dennis*, 30 Ch. Div. 454), that the trader is bound to connect in some way the articles sold or sought to be protected with the trade-mark which he has registered, and if ever it occurs that a trader comes into court and says, 'I have registered a trade-mark in respect of certain goods, and I have sold those goods, but I have not sold those goods as the goods of that trade-mark,' he would have, at any rate, some difficulty in maintaining his rights. But here Mr. Jay has proved in the witness box, that, at any rate, as regards this particular class of goods, they are either wrapped up in a brown paper wrapper containing the trade-mark, or put into a box with this trade-mark on it, and if there is a label affixed or put upon them at all, it is a label containing this trade-mark; and I am satisfied that he has sold these things from time to time as goods protected by this trade-mark. Therefore I think that that argument fails."

In *Lorillard v. Pride*, 28 Fed. Rep. 434, Blodgett, J., said: "The use of arbitrary terms, as 'Tin Tag' or 'Wood Tag,' by a manufacturer, to indicate goods produced or sold by him, might be allowable if the person so using the name or words branded them upon his goods, or in any way gave the goods the name."

"Trade-marks, properly so called, consist of some description or device

in some way or other affixed to the article sold, and that description or device may be either affixed to, or impressed upon the goods themselves by means of a stamp, or an adhesive label or ticket, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing them. *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 441." Slater on Copyright and Trade-Marks, page 237.

"Such rights as are analogous to those subsisting in trade-marks, are covered by a similar definition, except that the symbol or sign by which the business or goods is or are identified, is not necessarily affixed to the subject-matter." Slater on Copyright and Trade-Marks, p. 233.

In *Wheeler v. Johnston*, L. R., 3 Ir. 284, the Vice Chancellor said: "It is essential that the trade-mark, the use of which is claimed by any party, shall be connected with the articles of sale; of course not necessarily connected by its own nature with the articles, but connected by the act of the party, as, for instance, placing it as a label on his goods which are sold, or advertising his goods in connection with it."

In *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305, Gantt, P. J., said: "The evidence seems to us greatly to preponderate in favor of the conclusion that the plaintiff was the first manufacturer which used the term 'Bell Treble' in its advertisements to distinguish its work. We are also of opinion that the term itself is a combination of words which was capable of appropriation as a trade-mark. The question which has given us serious trouble is whether the plaintiff, which was, as we think, the first manufacturer which attempted to appropriate the term as a trade-mark, ever did anything effectual for the purpose of such appropriation. We have seen that it was never affixed to any work of the plaintiff. Of course, in some cases, the work of manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed. The very term employed seems to require that the article distinguished, or which the manufacturer or salesman

seeks to distinguish, as coming within the designated description, should bear the mark which gives it its character. A trade-mark, which is not in some manner put upon or affixed to the article indicated by it, is almost a contradiction in terms. . . . From the best examination we are able to make of the subject, we are led to the conclusion that, so far as an article of merchandise is concerned, it can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon the article, as the same if offered for sale. The purchaser must be told that the particular thing he proposes to buy is of this or that character, by something connected with the thing itself. He must not be referred to some circular or advertisement for this assurance, nor can he receive it from the representations, by word of mouth, of the manufacturer or salesman. . . . We think that a trade-mark must be annexed to the article offered for sale; and that, if not so annexed, the article cannot be said to have a trade-mark. In the case at bar, the pianos of plaintiff had no such symbol affixed, annexed, stamped, or engraved on them as plaintiff claims to belong to it, and it follows that, in our judgment, the plaintiff was not entitled to the injunction for which it prayed."

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, Jessel, M. R., said: "The cases which have come before the courts, may, I think, be conveniently divided into two classes: the first class, which is the more numerous one, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be, as I said before, description—that is, it may consist of a name or names, or a lengthy description consisting of names with superadded words, and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods. . . . Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, when there are liquids, upon which of course you cannot put a mark,

and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade-marks, whether affixed in the shape of a label on a bottle of liquid, or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars or the string which encircles them; they are in some way or other attached to the goods and go along with the goods on sale."

In *Rowly v. Houghton*, 2 Brew. (Pa.) 303, Ludlow, J., said: "No right can be absolute in a name, as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark."

In *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457, Bookstaver, J., said: "The plaintiffs claim that the defendants have produced and sold labels bearing the words 'Henry Lee,' in violation of their rights. . . . It is apparent from an inspection of both labels that they are designed to be used by cigar-box makers and the manufacturers of cigars, and that they are valueless for any other purpose and could not be used by or sold to the public generally. Plaintiffs do not seek to stop a cigar dealer or the public from using the name 'Henry Lee,' but ask that they be protected against interference with their trade by rival manufacturers of labels, and claim that labels are an article of merchandise. . . . The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or on which it is impressed, and to give notice who was the producer—in other words, to authenticate the article to which it is affixed, or on which it is impressed, as the product of the owner of the trade-mark, and is a representative of or substitute for the owner's signature. From the nature of the case these labels cannot in any way perform that office. Although this question has not been decided in this country, it was directly passed upon in *France (Annales de la Prop., etc., tome 5, p. 248)*, in the case of *Lalande v. Appel*. In that case the plaintiffs, who were lithographers, complained that the defendants had counterfeited the designs upon tickets or labels intended to be sold to vendors of liquors and cosmetics, to be placed by them upon

5. Who May Acquire a Trade-Mark.—Any person, whether manufacturer, selector, seller, shipper, commission merchant, carrier, or trader, may adopt any legal symbol or name as a trade-mark to indicate the origin and ownership of the goods manufactured, selected, sold, carried, or handled by him, and will be protected by equity in the exclusive right to use the same for the purpose of designating the particular class of merchandise handled by him, or the particular business in which he is engaged; but a trade-mark cannot be acquired at common law unless the owner is a maker or selector of an article of traffic which he himself places upon the market and sells as his, using the trade-mark to indicate its origin and ownership, or to indicate a particular business or place of business, or company doing a particular business.¹

flasks or bottles. In deciding the case, the court held that the plaintiff's claim was ill-founded, because the tickets in question were the special objects of their commerce, and therefore could not be regarded as trade-marks; that the trade-mark regulated by the law of the 25th of June, 1857, is the characteristic sign by means of which the public distinguishes the products of commerce or objects of commerce; that the mark itself cannot be an object of commerce; that by the use which a merchant makes of a ticket in applying to a vase containing the product of his manufacture, it is possible that the ticket may become for him a trade-mark, subject to the fulfillment of all legal formalities, for it may be then, as to him, a sign or distinctive seal of his products, without being the very object of his commerce; but as to the plaintiffs, the tickets can be nothing but the special objects of their industry. I therefore conclude that labels such as these cannot be the subject of a trade-mark."

In *Hazleton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494, Bailey, C. J., said: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. Browne on Trade-Marks, § 91."

1. It has been frequently held, that dealers in goods, who exercise their skill and fidelity in the selection thereof, are entitled to protection for their trade-marks which indicate this fact, as fully as a manufacturer who makes the goods. A commission merchant who handles the goods of several factories may also acquire a trade-mark to indicate the goods sold by him; a carrier may adopt a trade-mark to indicate his line of transportation, which

symbol, if used by another, would mislead the public in the shipment of goods, and cause them to be carried over a different route from that of the original adopter of the mark, contrary to the intention of the shipper, and to the loss and injury of the trade-mark owner.

A voluntary association of cigar-makers which is not engaged in the business of manufacturing cigars, and as an association has no property in the business, may yet devise and be protected in the use of a trade-mark label to designate the result of their labor. *People v. Fisher*, 50 Hun (N. Y.) 552, following *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197. Bradley, J., saying: "The fact that their work is not performed under a single employment, but under many different employers, in as many widely separated shops, may go to the value of the mark in its application to the cigars made by them, rather than to the right to its protection as such."

But see *Schneider v. Williams*, 44 N. J. Eq. 391, where a demurrer to a bill was sustained on the ground that it "does not show that the complainants have applied their mark or label to a vendible commodity, of which they are the owners or in which they trade, and that they have put such commodity, marked with their mark, on the market."

See also *Cigar-Makers' Protective Union v. Couhain*, 40 Minn. 243, where the label of the "Cigar-Makers' International Union of America" was held not a valid trade-mark, two justices dissenting.

In *Allen v. McCarthy*, 37 Minn. 349, the court was equally divided on the question. See also *Blöte v. Simon*, 19

Abb. N. Cas. (N. Y.) 88; and Carson v. Ury, 39 Fed. Rep. 777, where it was held that although such a label is not a technical trade-mark, yet where special damage is shown and the imitation of it fraudulent, equity will grant relief.

In the late case of Wener v. Brayton, 152 Mass. 101, the decision is that such a label is not a trade-mark. So, also, is the still later case of McVey v. Brendel, 144 Pa. St. 235. See also State v. Hagan (Ind. 1893), 33 N. E. Rep. 223.

The terms "Lamville," "Green Mountain," etc., applied to scythe stoncs by the manufacturers, do not indicate quality alone, but a certain selection and care in manufacturing. Pike Mfg. Co. v. Cleveland Stone Co., 35 Fed. Rep. 896. See also Lichtenstein v. Goldsmith, 37 Fed. Rep. 359, where it was said that the fact that the owner of a trade-mark for cigars allows boxes of cigars to be labeled with the names of the dealers to whom they are sent, does not amount to deception which invalidates the trade-mark.

A manufacturing company may appropriate a trade-mark. Atlantic Milling Co. v. Robinson, 20 Fed. Rep. 217.

Plaintiff painted its cabs yellow, with a peculiar device, and the name "New York Cab Co. Limited." Defendant painted his cabs the same color with a similar device, and used the words "New York Cab, Ltd." Lawrence, J., said: "I do not mean to say that the plaintiff is entitled to any exclusive property in color or in words, but I am clearly of the opinion that it has so far established a trade-mark in the words, and colors, and device, as they are combined and used upon its cabs, as to entitle it to call upon a court of equity for protection against imitations designed to mislead the public and to deprive the plaintiff of its profits." An injunction was granted. New York Cab Co. v. Mooney, 15 Abb. N. Cas. (N. Y.) 152.

Seemle, that a manufacturer may legally remove the trade-marks from articles made by another manufacturer and purchased by himself, and place his own trade-marks thereon. Johnson v. Raylton, 7 Q. B. Div. 438. Sebastian says in this connection: "The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guaranty implied by its presence on them. The purchaser, by substituting his own mark, undertakes the re-

sponsibility for the quality of the goods, which are in effect selected and guaranteed by him." Sebastian on Trade-Marks, p. 130, citing Hirsch v. Jonas, 3 Ch. Div. 584.

In Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946; 39 Am. Rep. 286, Fenner, J., said: "A corporation is entitled to have its trade-mark, as well as a private individual, and may sue for its infringement," and "the seller is as much entitled to protection in his trade-mark as if he were the manufacturer."

A trade-mark may indicate the bleacher of goods manufactured by another. *In re Sykes' Trade-Marks*, 43 L. T. 626.

A merchant may adopt a trade-mark to designate goods "manufactured for him, and under his direction, and sold by him." Conrad v. Uhrig Brewing Co., 8 Mo. App. 277.

Every manufacturer, and every person for whom goods are manufactured, has a right to distinguish the goods he manufactures or sells, by a peculiar mark or device, that they may be known as his in the market, and he is entitled to protection of the same, irrespective of the fact that similar goods are manufactured or sold by others; and this right extends to a vendor who merely sells, and has no direct relation to the manufacturers. Godillot v. Hazard, 44 N. Y. Super. Ct. 427; 49 How. Pr. (N. Y.) 5; *affirmed* in Godillot v. Harris, 81 N. Y. 263; 63 P. & S., Danforth, J., saying: "It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached. It may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied, upon the market."

In McLean v. Fleming, 96 U. S. 245, Clifford, J., said: "In such cases the question is not whether the complainant was the original inventor or proprietor of the article made by him, and on which he puts his trade-mark, nor whether the article made and sold under his trade-mark by the respondent is equal to his own in value or quality; but the court proceeds on the ground that the complainant has a valuable interest in the good-will of his trade or business, and, having adopted a particular label, sign, or trade-mark, indicating to his customers that the article bear-

VI. REGISTRATION OF TRADE-MARKS UNDER UNITED STATES STATUTES—1. In General.—The Acts of Congress of August 14th, 1876, and March 3d, 1881, constitute the national trade-mark law of the *United States*, and under the latter act, provision is made for the registration of trade-marks in the *United States* Patent Office.

The registration of trade-marks under this latter act is limited to such marks as are used in commerce with foreign nations or Indian tribes. No trade-mark used solely in interstate commerce, or in trade within a state, can be registered under it.

The registration of a trade-mark within the provisions of this act, is *prima facie* evidence of ownership, which will be sustained by the courts until overthrown by proof on the part of a defendant.

The protection afforded citizens of the *United States* for their trade-marks, under the common law, by the courts of the *United States*, is ample, hence the national registration law is little used except for the purpose of creating a permanent record of the date of adoption and use of the trade-mark, and to give jurisdiction to the *United States* courts. Section 7 of the act

ing it is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers, by using such labels, signs, or trade-mark without his knowledge or consent."

A trade-mark may be acquired to indicate that the goods have been selected and approved by one who had a reputation for so doing. *Hirsch v. Jonas*, 3 Ch. Div. 584.

In *Ford v. Foster*, L. R., 7 Ch. 611, note; 27 L. T. N. S. 219; 20 W. R. 311, 818; 41 L. J. Ch. 682, *Bacon, V. C.*, said: "The meaning and use of a trade-mark is that some person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that."

In *Winsor v. Clyde*; *Stetson v. Winsor*, 9 Phila. (Pa.) 513, it was held that title to property in the name "Key-stone Line," acquired by many years certain exclusive appropriation and use by shippers of merchandise, who did not own, but had the entire management of the vessels employed by them, while in their port, will be protected in equity; *Finletter, J.*, saying: "Prop-

erty in the terms, names, and devices of trade and business has become as well established as property in any other matter or thing."

A trade-mark may be acquired by those who do not manufacture, but simply print cloths manufactured by others. *Amoskeag Mfg. Co. v. Garner*, 55 Barb. (N. Y.) 151; 6 Abb. Pr. N. S. (N. Y.) 265.

An agreement by the proprietor of a hotel to permit another to place the name of the hotel upon his coaches, is a valid contract; and both proprietor and his licensee may claim the protection of the court for any violation of his individual rights by a third person. *Deiz v. Lamb*, 6 Robt. (N. Y.) 535.

In *Walton v. Crowley*, 3 Blatchf. (U. S.) 440, *Betts, J.*, said: "The person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark as the manufacturer himself."

An organization or establishment formed for the purpose of amusement, just as one formed for the purpose of trade, can acquire a trade-mark or trade name, and will be protected in its use; *e. g.*, "*Christy's Minstrels*." *Christy v. Murphy*, 12 How. Pr. (N. Y. Supreme Ct.) 77.

In *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, *M.* made an agreement with *S.*, the lessee of a hotel, by which the former was to transport passengers to and from the hotel of *S.*

provides that "any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act," etc., shall be liable to an action in "any court having jurisdiction over the person guilty of such wrongful act, and the courts of the *United States* shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy."

This provision gives to the courts of the *United States* jurisdiction of trade-mark controversies arising between citizens of the same state, provided the suit be brought upon a registered trade-mark used on goods intended to be transported to a foreign country or in lawful commerce with an Indian tribe. This jurisdiction is not very valuable, for the reason that when a suit is brought upon the registration, the courts are bound by the terms and limitations of the registration, and have no such latitude as they generally exercise in common-law cases in equity.

There is one important function of the national trade-mark registration law: most of the countries of *Europe*, before they will afford protection to the trade-marks of our citizens, require that they shall be registered under their laws, and in almost every case require that this registration shall be based upon a registration at home.

to the station, and was authorized to put the name of the hotel, the "Revere House," on his coaches, and the caps of his drivers. A similar contract had formerly existed between S. and B., and after its termination B. still continued to use the name of the hotel on his coaches and the caps of his drivers. The court, in holding that an action would lie against B. at the suit of M., said: "The plaintiffs may well claim that they had the exclusive right to use the words 'Revere House' to indicate the fact that they had the patronage of that establishment. . . . The ground of action against the defendants is . . . that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of, the lessee of the Revere House, in violation of the rights of the plaintiffs."

Plaintiffs had agreed with A., the proprietor of a hotel, to pay him for the privilege of using the name of A. and his hotel, on coaches of the plaintiffs used to convey passengers to and from the hotel of A., and on certain badges of plaintiffs' drivers. Defendants began to use the same on their coaches and the badges of their drivers. An injunction was granted. *Stone v. Carlan* (N. Y. Super. Ct.), 13 Monthly L. Rep. 360.

In *Amoskeag Mfg. Co. v. Spear*, 2

Sandf. (N. Y.) 599, Duer, J., said: "Every manufacturer and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them."

In *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281, the court said: "The court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent."

The aforesaid case is cited with approval in *Colladay v. Baird* (4 Phila. (Pa.) 139), and the above passage quoted.

The omnibuses of the London Conveyance Company were painted, and their servants clothed, in a particular

In a recent case in the circuit court of appeals of the *United States*, the rule is announced that foreigners have no common-law rights in a trade-mark in the *United States*, by virtue of a use of the trade-mark abroad, and it is intimated very strongly that if foreigners desire to protect their trade-marks in the *United States*, they should do so as provided by the *United States* statute.¹ The right of foreigners to register in the *United States* is the result of treaty and convention entered into for the purpose of creating mutual rights in trade-marks on the part of the citizens of the *United States* and those of other countries.²

2. Interference.—An interference is a proceeding created by section 3, of the act of 1881, and the rules of practice established by the Commissioner of Patents pursuant thereof, for the purpose of trying the question of priority of adoption and use between two rival claimants for registration of the same mark, or between one who has already registered and one who is seeking to register a particular mark. The application under the rules of practice is required to state all of the material and essential facts necessary to be proved in an interference proceeding, and must be under oath. The proceeding simply consists, therefore, in the production of

way. Defendants began to run omnibuses similarly painted and marked, and with servants similarly clothed. An injunction was granted to restrain defendants from imitating plaintiffs' line of omnibuses. It was said that nearly all the railroads at the present day have trade-mark symbols by which they and their property are known, and shipping orders of the customers are given in accordance with these marks. *Knott v. Morgan*, 2 Keen 213.

1. *Richter v. Reynolds*, 59 Fed. Rep. 577.

2. Trade-Mark Treaties with Foreign Nations.—The following is a list of the governments with which conventions for the reciprocal registration and protection of trade-marks have been entered into by the *United States*, with the dates of the respective conventions. For the full text of those which have been published in the Official Gazette, reference is made thereto. For others, to the volume and page of *United States Statutes at Large*. The laws of *Switzerland* and the *Netherlands*, being so framed as to afford reciprocal privileges to the citizens or subjects of any government which affords similar privileges to the people of those countries, the mere exchange of diplomatic notes, giving notice of the fact, accomplishes all the purposes of a formal convention. The reference to the Offi-

cial Gazette opposite these nations gives the full text of their trade-mark laws.

COUNTRY.	DATE.	REFERENCE.
Austria-Hungary	June 1, 1872	Stat., 17, p. 917
Belgium	July 30, 1869	Stat., 16, p. 765
do	July 9, 1884	O.G., 29, p. 452
Brazil	Sept. 24, 1878	Stat., 21, p. 639
France	Apr. 16, 1869	Stat., 16, p. 771
German Empire	June 1, 1872	Stat., 17, p. 921
Great Britain	July 17, 1878	O.G., 14, p. 233
Italy	Mar. 19, 1884	O.G., 27, p. 304
Russia	June 27, 1868	Stat., 16, p. 725
Servia	Dec. 27, 1882	Stat., 22, p. 956
Spain	Apr. 19, 1883	O.G., 25, p. 98
Switzerland	May 16, 1883	O.G., 23, p. 2237
The Netherlands	Feb. 16, 1883	O.G., 23, p. 1324
International Convention	Mar. 20, 1887	{ 39 O. G. 600, 26 U. S. Stat. at large, 1370

The declaration with *Great Britain* is drawn so as to confer mutual trade-mark rights upon the subjects and citizens of each of the contracting parties throughout the dominions and possessions of the other. Citizens or residents of British colonies are therefore permitted to register their trade-marks under this treaty whenever it is satisfactorily shown that in the respective colonies, similar protection is afforded to citizens of the *United States*. See *infra*, this title, *Trade-Mark Treaties with Foreign Nations*.

evidence to substantiate the claim of the application, and the submission of this evidence to the Examiner of Interferences in conformity to the Rules of Practice of the *United States* Patent Office. An appeal lies from the decision of the Examiner of Interferences to the Commissioner of Patents, without fee, and since the act of 1893, from the Commissioner of Patents to the circuit court of appeals for the *District of Columbia*, and from that court to the Supreme Court of the *United States*, without regard to the amount in controversy.¹

3. Effect Upon Common-Law Rights.—The Trade-Mark Statute (Act, March 3d, 1881, 21 Stat. 502, § 10), provides "that nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed."

This language has, ever since the act of 1870,² in which it first appeared, been understood to save undiminished, and in full force and effect, all the common-law rights of both citizens and foreigners, and to prevent any injurious influence to those rights by the act of registration under the Act of Congress. This was believed to be true for the reason that the common-law rights of both citizens,³ and foreigners,⁴ independent of registration, had been fully recognized and enforced long prior to the act, and the sole purpose of the act was to supply an additional means of securing protection for trade-marks, not to curtail any of the rights which previously existed, and it was for this very purpose, and to make this point clear that this section was incorporated in the act. But in several recent cases this clause has been construed, and the fact of registration held to operate as a limitation

1. Sec. 3. In an application for registration, the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the *United States* in analogous cases.

RULES OF PRACTICE.

Sec. 13. In case of conflicting applications for registration, or in any dispute as to the right to use which may arise between an applicant and a prior registrant, the office will declare an interference, in order that the parties may have an opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents; but each applicant

and registrant will be held to the date of adoption alleged in the statement filed with his application. On the petition of any party dissatisfied with the decision of the Examiner of Interferences, the case will be reviewed by the Commissioner without fee. The decision of the Commissioner of Patents is final.

2. Act 1870, July 8th, 16 Stat. 198, ch. 2, tit. 60, §§ 4937-4947 of Rev. Stat.

3. See *supra*, this title, *History*.

4. As to rights of foreigners in *Great Britain*, see *Collins Co. v. Brown*, 3 K. & J. 423; *Collins Co. v. Cohen*, 3 K. & J. 428; 5 W. R. 676; *Pisani v. Lawson*, 6 Bing. N. Cas. 90; 37 E. C. L. 293; and in the *United States* see *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1; 3d Act of Treaty with Eng. 1794; *Brown v. Maryland*, 12 Wheat. (U. S.) 447; *Taylor v. Carpenter*, 3 Story (U. S.) 458; *Fils v. Sarrazin*, 15 Fed. Rep. 489.

upon common-law rights which, but for the act, would have been sustained.¹

4. Importation of Foreign Goods Bearing Domestic Trade-Mark.—Section 7 of ch. 1244 of the Act of Congress, Oct. 1st, 1890, provides as follows: "That on and after March first, eighteen hundred and ninety-one, no article of imported merchandise which shall copy or simulate the name or trade-mark of any domestic manufacture or manufacturer shall be admitted to entry at any custom-house of the *United States*. And in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer who has adopted trade-marks may require his name and residence and a description of his trade-marks to be recorded in books which shall be kept for that purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the department fac-similes of such trade-marks; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of the customs." This act permits the registration with the Secretary of the Treasury of any trade-mark used by a citizen of the *United States*, free of charge, subject to such regulations as the Secretary may prescribe.

1. Richter v. Anchor Remedy Co., 52 Fed. Rep. 455; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572; *La Republic Francaise v. Schultze*, July, 1893. These first two cases are pertinent because they cover the two phases of the question. The first is a case where a foreigner registered his marks in this country, and for some reason, but certainly with no purpose of destroying his common-law rights, made a claim which was more limited than his common-law rights. It was held that he had no common-law rights in this country until he had established them by selling his goods here, and also that, having made a limited claim in his registration to a symbol of a "red anchor inclosed in a circle," he had abandoned his claim to the "anchor" broadly.

The second case, *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, is that of a citizen who had sold several articles, designating them as "One Night Cough Cure," "One Night Corn Cure," etc., and who registered the words "One Night Cure" as a trade-mark to be used in association with such other words as he might desire to indicate the particular malady to be relieved. This registration was held to operate as an abandonment of all common-law trade-mark rights which the registrant had previously acquired

in the words "One Night Cough Cure," and that the use of those words associated with the name of the defendant was not an infringement of the registered trade-mark. We cannot think that either of these cases should be followed. However desirable it may be to establish a uniform system of registration for trade-marks, and to have all trade-marks registered, this should certainly not be done at the cost of injuring that elaborate and equitable system of law, which affords such ample and salutary protection to the reputation of an honest trader, under the form of trade-marks and trade names, and the suppression of unfair competition in business, which requires the exercise of an equitable jurisdiction that no system of registration could provide for. It is thought that the better rule, and one which will ultimately be adopted by the courts, is that the registration of a trade-mark under the *United States Statutes*, creates rights, but destroys none. It gives to the registrant the benefit of the act for the mark registered, in addition to such rights as he may previously have had, without in the slightest degree affecting any other rights which he would have enjoyed had he not resorted to the act and registered his trade-mark.

In *Richter v. Reynolds*, 59 Fed. Rep.

Section 6, of the same act, requires that all foreign goods coming into this country shall be plainly marked in English with the country of origin, as "Made in *France*," "Made in *China*," etc. These two sections are directed to the protection of domestic manufacturers, first, by requiring that the country of origin shall be plainly marked upon all imported goods, and that all imported goods which bear the trade-marks of domestic manufacturers or traders, which are registered with the Treasury Department, and which are not made for and imported by the domestic owners of the mark, shall be confiscated by the custom officers. This act does not apply to foreigners, and does not require that domestic trade-mark owners shall register their trade-marks in the *United States* Patent Office before registering them with the Secretary of the Treasury.¹

5. State Statutes.—The absence of satisfactory federal legislation relative to trade-marks, and particularly of a criminal remedy for infringement of a trade-mark registered under the *United States* Statutes, has led the states to adopt trade-mark laws of greater

577, Dallas, J., said: "The case of *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, deals with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods. The court said: 'Moreover, while we do not think it necessary to hold that mere registry in the Patent Office of the *United States*, of a trade-mark for a specific article of manufacture would, of itself, prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant. The judgment in *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, is conclusive, also, as to the effect of the registry made by the complainant in this country. As late as July 7th, 1885, he registered as his trade-mark an accurately and definitely defined design, the "essential feature of which" (as he then discloses), "is the representation of a red anchor in the oval space." As evidence tending to show what was really claimed, or had been intended to be appropriated, the court below was clearly right in taking this into consideration, and in our opinion it was right, also, in concluding therefrom that the complainant's intention was to confine his claim of trade-mark to the specific device designated and described, and which he further declared to be the one which he had

"adopted." Upon both the grounds which have been discussed, the complainant's claim to the word "Anchor" and to the symbol of an anchor, irrespective of its being red and inclosed in an oval space, were properly rejected."

1. Regulation of Treasury Department for Registration of Trade-Marks.—"Applications for the recording of names or trade-marks in this Department will mention the name and residence of the domestic manufacturer, and furnish a description of the mark and the names of the ports to which the fac-similes should be sent. No such name or trade-mark will be received unless accompanied by the proper proof of ownership, which must consist of the affidavit of the owner, or one of the owners, certified by a notary public or other officer entitled to administer oaths and having a seal. On the receipt by a customs officer of any such fac-similes, with information from the Department that they have been recorded therein, he will properly record and file them, and will exercise care to prevent the entry by the custom-house of any article of foreign manufacture copying or simulating such mark. No fees are charged for recording trade-marks in the Department and custom-houses. A sufficient number of fac-similes should be forwarded to enable the Department to send one copy to each port named in the application. O. L. SPAULDING, "Assistant Secretary."

or less scope and value. The provisions of these statutes differ in many particulars; some are limited to citizens or those doing business in the particular state; some require registration, some do not; some provide a criminal remedy, some do not. Their multitudinous and varying provisions are the strongest arguments which can be advanced for the passage of a comprehensive federal trade-mark law, making the infringement of a trade-mark a crime.¹

6. Treaties with Foreign Nations; International Convention. — Many treaties have been made from time to time between the *United States* and foreign countries, for the protection of the

1. *Alabama*—Acts of *Alabama*, Nos. 319, p. 700, Feb. 14th, 1891, §§ 1, 2, 3, 4, 5, 6. *Arizona*—Revised Statutes of *Arizona* (1887), vol. 1, p. 717; Penal Code, §§ 574, 575, 576, 577, 578, 579. *Arkansas*—Digest of the Statutes of *Arkansas*, vol. 1, §§ 6447, 6448, 6449, 6450, 6451, 6452, 6453, 6454, 6455. *California*—Codes and Statutes of *California*, 2 vols. and Supplement 1877–1878, 1880; ch. vii., art. iii., §§ 3196, 3197, 3198, 3199, 5655 (Civil Code, Div. Second Part 1, tit. 1), 5991, 6772, 13350, 13351, 13352, 13353, 13354. Act Mar. 31st, 1891, ch. 194, p. 217, §§ 1, 2, 3, 4, 5, 6. *Colorado*—Act April 13th, 1891; Laws 1891, p. 46; Laws 1891, pp. 396, 397, 398. *Connecticut*—General Statutes of *Connecticut* (1888), vol. 1, §§ 3956, 3957, 3958, 3959, 3960, 3961, 3962, 3963, 3964, 3965. *Florida*—Revised Statutes of *Florida* (1892), vol. 1, §§ 2481, 2482. *Georgia*—Code of the State of *Georgia* (1882), vol. 1, § 3181. *Illinois*—Act May 8th, 1891; Laws 1891, p. 202. *Indiana*—Revised Statutes of *Indiana* (annotated edition), 1888, with Supplement to 1892, 3 vols.; vol. 2, ch. 99, §§ 6522, 6523, 6524; Revised Statutes of *Indiana* (Supplement), Supplement to Jan. 1st, 1892; vol. 3, ch. 99, p. 848; §§ 8812, 8813, 8814, 8815, 8816, 8817, 8818, 8819, 8820, 8821, 8822, 8823. *Iowa*—Act March 26th, 1892; Laws 1892, ch. 36, p. 63. *Kansas*—Act March 11th, 1891, Laws 1891, ch. 213, pp. 363, 364, 365. *Kentucky*—General Statutes of *Kentucky*, vol. 1, ch. 29, Act XXII., p. 444, §§ 1, 2, 3, 4; pp. 493, 494, 496; Acts 1889–1890, p. 99, ch. 823, April 16th, 1890, §§ 1, 2, 3, 4. *Maine*—Act March 28th, 1893; Laws 1893, ch. 276, p. 330. *Maryland*—Laws of *Maryland* (1892), ch. 262, p. 354. *amending* §§ 201, 202, 203, 204, 205, 206 of Article 27, of the Code of Public Gen-eral Laws (1888); Laws of *Maryland* (1892), ch. 357, p. 500, §§ 1, 2, 3, 4, 5, 6. *Michigan*—Act April 24th, 1891, Public Acts 1891, pp. 39, 40, 41. *Minnesota*—Act April 17th, 1893; General Laws 1893, ch. 24, pp. 126, 127, 128. *Mississippi*—Annotated Code of *Mississippi* (1892), vol. 1, §§ 1306, 1307, 1308. *Missouri*—Act March 20th, 1893; Laws 1893, p. 260, etc.; Act March 31st, Laws 1893, pp. 256, 257, 258, 259. *Nebraska*—Act March 31st, 1891; Consolidated Statutes, §§ 2083 to 2087, inclusive. *Nevada*—General Statutes of *Nevada* (1885), vol. 1, §§ 4918, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, 4930. *New Jersey*—Revision of *New Jersey* (1709–1877), Supplement 1877–1886, § 186, p. 259; Appendix A, p. 1336, §§ 1, 2, 3. *New Mexico*—General Laws of *New Mexico* (1882), vol. 1, p. 306. *North Carolina*—The Code of *North Carolina* (1883), 2 vols; vol. 1, § 1040. *Ohio*—Revised Statutes of *Ohio* (1892), 3 vols., §§ 7069, 7072, 7073, 7096, 7098, 7120, 7121. *Oregon*—Hill's Annotated Laws of *Oregon* (1887), 2 vols., §§ 4192, 4193, 4194, 4195, 4196, 4197, 4198, 4199. *South Dakota*—Act March 7th, 1890; Session Laws 1890, ch. 153, p. 321. *Tennessee*—Code of *Tennessee* (1884), vol. 1, § 5626. *Utah*—Compiled Laws of *Utah* (1888), 2 vols., § 4551, vol. 2, p. 603; §§ 4552, 4553, 4554, 4555. *Vermont*—Revised Laws of *Vermont* (1880), vol. 1, §§ 4163, 4164. *Virginia*—Acts of Assembly 1889–1890, p. 53, ch. 71, as amended by the Act Feb. 12, 1892 (Acts of Assembly) 1891, Laws of 1891–1892, ch. 204, p. 326, §§ 1, 2, 3, 4, 5, 6, 7. *Washington*—Act of Feb. 21st, 1891; Laws 1891, ch. 16, pp. 29, 30. *Wisconsin*—Act April 16th, 1891; Laws 1891, ch. 280, p. 353. Vol. 2, Sanborn & Berryman, Annotated Stat. (*Wisconsin*), 1889, §§ 4463, 4464, 4470a, 1, 2, 3, 4.

trade-marks of the citizens of each country in the other, but on March 20th, 1887, an International Convention was entered into by the *United States* with *Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, Switzerland, Great Britain, Luxemburg, Mexico, Norway, Paraguay, Roumania, Sweden, Tunis, Uruguay, the Dominican Republic*.¹

The International Convention repealed and abrogated all previous treaties entered into between these countries.²

1. Some question has arisen as to the right of a foreigner to bring suit in the courts of the *United States* for the infringement of a trade-mark, without registering his trade-mark under the *United States* Statute. This question is suggested in the case of *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455. One phase of the question was decided by Townsend, J., in the *United States* circuit court, Southern District of *New York*, July 1st, 1893, in the case of *La Republique Francaise v. Schultz*.

In *Trade-Mark Record*, Aug. 16th, 1893 (The *Vichy Case*), the court says: "In the Industrial Property Treaty of 1887, these three expressions are used: 'Marque de Fabrique,' translated, 'Trade-Mark;' 'Marque de Commerce,' translated, 'Commercial Mark;' 'Nom Commercial,' translated, 'Commercial Name.' The treaty provided that every 'trade-mark or commercial mark regularly deposited in the country of origin, shall be admitted to deposit, and so protected in all the other countries of the union.' 26 U. S. Stat. at Large, art. 6, p. 1376. And the final protocol on page 1380, paragraph 4, is as follows: Paragraph 1, of art. 6, is to be understood in the sense that no trade or commercial mark shall be excluded from protection in one of the states of the union by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this state, provided that it does satisfy in this regard the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception, which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each state shall receive its due application. Art. 8, of the treaty is as follows: 'The commercial name shall be protected in all the countries of the union without

obligation of deposit, whether it forms part or not of a trade or commercial mark.' The court held the term "Vichy" to be a commercial name not requiring registration by express operation of the convention, but left undecided the question whether either trade-marks or commercial marks require registration.

2. The purpose of the convention was to form a union of the governments assenting thereto. The original articles were adopted on the 20th of March, 1883, at Paris, and acceded to by *Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland*, the latter state being assigned the position of Intermediary, through whom those adhering to the union were to communicate with other states in relation to the union. Subsequently, other states gave their adhesion and became members of the union, viz.: *Great Britain, Luxemburg, Mexico, Norway, Paraguay, Roumania, Sweden, Tunis, Uruguay, and the United States*. The ratification of the convention and protocols on the part of the *United States* was advised by the Senate, and the President ratified the same March 29th, 1887. Article 2 provides that the subjects or citizens of each of the contracting states shall enjoy, in all the other states of the Union, so far as concerns . . . (1) trade, or (2) commercial marks, and (3) the commercial name, the advantages that the respective laws thereof accord to subjects or citizens; in consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state. For full text of the articles and protocols see 39 Pat. Off. Gaz. 960; 26 U. S. Stat. at Large 1376.

The important nations which have not joined the International Convention are: *Germany, Denmark, Russia, Austria, Turkey, Egypt, Greece, China, Japan, Chili, Peru, Argentine.*

VII. ASSIGNMENT AND TRANSFER—1. General Rule.—A trade-mark is assignable by the act of the parties owning it, or by operation of law, subject to certain limitations. The primary function of a trade-mark is to indicate ownership and origin, and unless this is truthfully done, the trade-mark becomes a means of fraud upon the public and will not be protected. It therefore follows that, if a trade-mark is a personal one, designating a particular person, and his personal reputation and skill, it cannot truthfully be used by any other person, and consequently cannot be assigned.¹ For the same general reason, a trade-mark which has been used to designate the origin and ownership of a particular article, or the products of a particular establishment or business, which is not personal in its nature, cannot be applied to any

1. In *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, Casody, J., said: "The mere fact that each and all of the Fishes withdrew from that business, did not prevent the words mentioned from continuing to point to the old place of business and the old firm of Fish Bros. and Fish Bros. & Co., at Racine, as the true source and origin of their particular make and style of wagon and vehicle, to which the plaintiff company succeeded, and continued to manufacture at Racine. It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words 'Fish Bros.' and 'Fish Bros. & Co.' partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned."

In *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149, Allen, J., said: "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and, in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and

for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public." *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name, and that all that purchasers would reasonably understand is, that goods bearing the trade-mark are of a certain standard, kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark. . . . *Kidd v. Johnson*, 100 U. S. 617. See also *Warren v. Warren Thread Co.*, 134 Mass. 247; *Sohier v. Johnson*, 111 Mass. 238; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, 4 De G. J. & S. 352, 369, 370."

In *Matter of Swezey*, 62 How. Pr. (N. Y. C. Pl.) 215, Van Hoesen, J., said: "Now the question here is, whether or not the trade-mark in question owes its value to the personal skill of Mr. Darst as a manufacturer. If it does, it does not pass by assignment, for the

public must not be deceived into buying goods which, though bearing his trade-mark, are not the product of his peculiar skill. If, however, it is the machinery, the factory, which has produced superior goods, the trade-mark goes with the machinery. In other words, the trade-mark is inseparable from the particular thing which gives it its value."

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "The first question therefore, is, whether a trade-mark which consists of the name of a third person is such a species of property that it can be disconnected from the business with which such person was formerly connected, and sold from man to man. The second is, whether the use of the name of the third person in such a way does not involve such a fraud upon the public as will prevent a court of equity from protecting it. . . . The principle on which all cases on the subject of trade-marks unite is, that one man will not be permitted, by imitating the distinctive name or mark used by another person to designate articles of the latter's manufacture, to impose articles of his own manufacture upon the public as the articles of the former. The cases so holding rest upon two considerations: First, that it would be a fraud on the rights of the former person thus to permit his trade-mark to be imitated; Second, that it would also be a fraud on the public. See *Gilman v. Hunnewell*, 122 Mass. 139; *McLean v. Fleming*, 96 U. S. 245, 251; *Coleman v. Crump*, 70 N. Y. 573; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Devlin v. Devlin*, 67 Barb. (N. Y.) 290; 25 Am. Rep. 173; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 297; *Curtis v. Bryan*, 2 Daly (N. Y.) 312; 36 How. Pr. (N. Y.) 33; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 607; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394; *Howe v. Howe Machine Co.*, 50 Barb. (N. Y.) 236; *Sykes v. Sykes*, 3 B. & C. 541; 10 E. C. L. 176; *Burgess v. Burgess*, 3 De G. M. & G. 896, 904; *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204; *Emerson v. Badger*, 101 Mass. 82; *Ellis v. Zeilin*, 42 Ga. 91; *Lord Kingsdown*, in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 538; *Perry v. Truefitt*, 6 Beav. 66; *Walton v. Crowley*, 3 Blatchf. (U. S.) 448; *Dixon Crucible Co. v. Guggenheimer*, 1 Cox's Man. of Trade-Mark Cases 559. . . . There

are some *quasi* proprietary rights, such as the elective franchise, which are incapable of assignment. But it would be obviously unjust so to restrict the right to use a trade-mark. The advantages which accrue from the use of a particular trade-mark or advertising device are often the result of a lifetime of integrity, skill, perseverance, and business capacity. Ought it to be held that a right so valuable should die with the person who created it, it being incapable of assignment, when, by reason of age, or other considerations, he might desire to cease using it? The custom of trade, which solves many questions in advance of the courts, has declared that this should not be; and the courts, in adopting the view that the right to use a trade-mark is assignable, did no more than declare a result which followed from the concession that it was property; for the *jus disponendi* is embodied in the very idea of property. It is hence settled law that the right to use a trade-mark is not a mere personal privilege, but that, within certain limits, it is capable of being bought and sold as other property. 'A trade-mark,' says Strong, J., 'like the good-will of a store or manufacturing establishment, is a subject of commerce, and it has been many times held entitled to protection at the suit of vendees.' *Fulton v. Sellers*, 4 Brew. (Pa.) 42. See also *Bury v. Bedford*, 33 L. J. Ch. 465; *Hall v. Barrows*, 33 L. J. Ch. 204; *Glenn, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Peltz v. Eichele*, 62 Mo. 171. . . . But where the trade-mark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public. Thus, if an author were to assign to another the privilege of publishing books with his name upon their title-page, or if a painter were to sell to another the privilege of placing the former's signature on pictures painted by the latter, it cannot for a moment be supposed that any court

would protect such a supposed right, even as against the original assignor. This point is absolutely clear, both upon principle and authority. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 534; *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88."

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "A person may acquire the right known as the good-will in a business from its being established in a particular place, from which he has derived, or may derive, profit, and where there is attached to the business a name indicating to the public where, or in what manner, it is carried on; and this is a right which will be protected in a court of equity, even where he removes the business to another place. (61 N. Y. 232; 3 L. T. N. S. 547; 3 Sandf. (N. Y.) 725; 12 How. Pr. (N. Y.) 77.) The proprietary interest which a person has in his name, so far as any pecuniary value arises from the use of it, which a court of equity would protect, or which may be transmissible by assignment, is necessarily connected with some business, trade-mark, or other interest, through which a pecuniary value has become attached to it. The proprietary right which a man has acquired in a trade-mark, or in the use of his name, or in any name, general or otherwise, which designates a particular business established and carried on by him, involving what has been previously described as the good-will of the business, is, being in the nature of property, transmissible by assignment or bequest. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 230; 19 Am. Rep. 278; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 142; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 57 Barb. (N. Y.) 526; 45 N. Y. 291; 6 Am. Rep. 82; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *Hitchcock v. Cohen*, 6 Ad. & El. 438, 449; 33 E. C. L. 98; *Howe v. Searling*, 6 Bosw. (N. Y.) 354; *Churton v. Douglas*, 1 Johns. 176; *Ainsworth v. Walmsley*, 44 L. J. R. 242; *Derringer v. Plate*, 29 Cal. 292; *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Croft v. Day*, 7 Beav. 84; *Bradbury v. Dickens*, 27 Beav. 53; *McLean v. Fleming*, 96 U. S. 250, and will pass with the sale of the business to which the name or trade-mark is attached; or under a general assignment for the benefit of the creditors, which by its terms transfers all the insolvent's property for the payment of his debts, although

it may not be specified in the schedule annexed to the assignment, or which, under our statute, is subsequently made out and filed. *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Bury v. Bedford*, 33 L. J. Ch. (N. S.) 465; *Edlesten v. Vick*, 11 Hare 78; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Couch v. Delaplaine*, 2 N. Y. 397; *Cram v. Union Bank*, 1 Abb. App. Dec. (N. Y.) 461; *Miller v. Halsey*, 4 Abb. Pr. N. S. (N. Y. Supreme Ct.) 333. When, however, the whole pecuniary value of the name, in its connection with an article of merchandise, or a manufacture, or a business, is derived solely from the personal qualities of the one to whom the name belongs, such as his skill, special knowledge and experience, or from the fact that the article is produced under his personal supervision, which imparts to it an especial value; then the right to the name is not transmissible. It is then purely personal; and this is equally so with a trade-mark used and recognized, as denoting that the article or product is made by a particular person, whose skill, experience, or other personal quality, or whose personal experience, in the fabricating, preparation or production of it, gives to it a peculiar value, which is distinguishable from a trade-mark used as a brand of quality, or of texture, fineness, or other characteristics; or to indicate that it is made in a particular establishment or manufactory, or where a name simply denotes an established business, with whatever advantages may accrue from its long establishment, the fact that it is generally or widely known, and the confidence it inspires from its duration. *Hall v. Barrows*, 4 De G. J. & S. 156-158; *Bury v. Bedford*, 33 L. J. N. S. Ch. 465; *Carmichel v. Lattimer*, 11 R. I. 395; 23 Am. Rep. 481. . . . It has been decided in several cases, that where a man has introduced a new medical preparation and given it a title, a component part of which is his own name, as indicative of the true origin and ownership of the article, and not used simply to designate the article itself, and assigns to another all his interest in it, with the sole right thereafter to manufacture and vend it, the transfer carries with it the right to use the name by which it has become known. . . . But it has been held, that if the assignee, who has acquired the right to manufacture an article which was manufactured at a particular place,

other article of different origin, without falsely stating the origin of that article. Hence, it is held that a trade-mark cannot be assigned except in connection with the particular business in which it has been used, and for continued use upon the same article or class of articles to which it was first applied and used by its original adopter.¹

manufactures it at another place, but continues to use the former trade-mark, which states where the article was manufactured, and that it had certain qualities, some of which the assignee omitted in his manufacture of it, that no right existed in such a case to use the former trade-mark, for the reason that what was upon it was then untrue. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 542."

1. In *McVeagh v. Valencia Cigar Factory*, 32 Pat. Off. Gaz. 1124, Morgan, J., said: "The sole question in the case is whether such arbitrary sign or trade-mark can be assigned or sold, no matter what the consideration may be, or be transferred as a bare sign, as a bare trade-mark, a word, a fanciful term, to some other person, regardless of the question whether that person is engaged in the business of manufacturing the article in connection with which the term has been used, or regardless of the fact whether that person takes the good-will of the business, buys out the entire business, and takes the business in connection with which the sign or arbitrary trade-mark has been used. There is no case that can be found, none cited by counsel at all, which in any manner supports the proposition that a bare trade-mark, aside from the property, can be assigned, sold, or a good title given to it, upon the transfer of a bare fanciful term or word in connection with the scroll and device that was used by Louis Cohn & Son, to a person for that person to sell and use, as if it were his property. It might as well be sold to a doctor as to be sold to a man carrying on the grocery business. The transfer of it to a physician or surgeon or to a livery-stable keeper, would pass it just as completely as it can possibly pass in an assignment by such a contract. It is not necessary in this opinion, for the court to say whether the defendants have any trade-mark or not. That is outside of this case, and it is of no consequence. The point is whether there is any trade-mark now in existence that is the subject of property to

to any person which can be protected by any operation of a court of chancery. If there is any such property, it is not in these assignees."

In *Julian v. Hoosier Drill Co.*, 78 Ind. 408, Morris, C., said: "The second paragraph of the complaint alleges that on the 27th day of February, 1877, the said Ingells transferred and assigned to the appellant all of said letters patent, by an instrument in writing, duly executed by him, and also all the right to and property in said trade-mark which he then had or owned, and the exclusive right to use said trade-mark upon grain drills. . . . It is then averred, that, from the time the appellant purchased said letters patent and said trade-mark, she had the right to manufacture and sell grain drills with said trade-mark affixed thereto and inscribed thereon, and the exclusive right to use the same.

. . . . It seems also to be agreed, that a party may have a property in a trade-mark, and that his right to and property in it may be transferred and assigned. . . . This assignment and transfer carried with it to the assignee the exclusive right to manufacture and sell the grain drill specified in the letters patent, and to carry on the business of making and selling the same. It was a transfer to appellant of the right to carry on the business in which Joseph Ingells had been engaged, and in connection with which he had used said trade-mark. As incident to the right thus transferred to the appellant, Joseph Ingells might, as he is averred to have done, assigned to her his right to and property in said trade-mark. The assignment and the right to make it did not, in any way, depend upon the time at which the appellant might engage in business. Nor was it necessary to the validity of the transfer of the trade-mark, that the place of business or drills actually manufactured should be transferred. It was enough if the right to engage in the business was assigned; as incident to the assignment of this right, it was quite competent to assign the right to the

trade-mark;" citing *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Croft v. Day*, 7 Beav. 84.

In *Weston v. Ketcham*, 51 How. Pr. (N. Y. Super. Ct.) 455, Sedgwick, J., said: "Mrs. Pepper did not succeed to any business of her husband's which, continuing, a trade-mark belonging to it might continue. Her husband left no such business, and there is no such thing as a trade-mark in 'gross,' to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon or in regard to specific articles. And she in no way disclosed by the evidence—and I do not see how any could possibly exist—became possessed of the right to transfer to anyone the right to use her deceased husband's name."

In *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44, Robinson, J., said: "The appellees contend that a trade-mark, being a mere device or symbol to designate the manufacture of an article by a particular person, or at a particular place, there is no such thing as a right of property in such trade-mark, apart from the article to which it is affixed, and which it has been used to designate, and that a purchaser, therefore, can acquire no right of property, by the bare sale of the trade-mark itself. Conceding this to be so, it is equally well settled, that where a trade-mark is used to designate the place, and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. Since the cases of *Banks v. Gibson*, 34 Beav. 566; *Hall v. Barrows*, 10 Jur. N. S. 56; *Bury v. Bedford*, 33 L. J. Ch. 465, and *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, this can no longer be considered an open question.

... The mere sale of a trade-mark apart from the article to which it is affixed, confers no right of ownership, because no one can claim the right to sell his goods, as goods manufactured by another. To permit this to be done, would be a fraud upon the public. But where, as in this case, the trade-mark is assigned to the person who manufactured the tobacco to which the trade-mark was affixed, there is no false representation to the

public, because the tobacco is still manufactured at the same place, and by the same person. It is, in fact, the same article."

In *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, Paxson, J., said: "Not only may a man be enjoined against using the trade-mark of another, but he may be restrained from using his own name. Bâjou was prevented, as we have seen, from stamping his own name upon his own gloves; and we are not without authority to the same point in this country and in *England*. . . . If there is no such property in a trade-mark as is capable of assignment, or will pass to a man's family or legal representatives after death, it is quite time the principle was thoroughly known and understood, in order that persons may not buy, and pay large amounts of money for a thing which possesses no value whatever beyond the life of the purchaser, or his ability to use it. . . .

Property in trade-marks may be obtained by transfer from him who has made the primary acquisition. (Upton on Trade-Marks 52.) The true rule to be deduced from these cases would appear to be this: That the property, or right to a trade-mark, may pass by an assignment or by operation of law, to anyone who takes at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representative." See also *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88; 24 Barb. (N. Y.) 163; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281; 1 How. App. Cas. (N. Y.) 547; *Howe v. Searing*, 10 Abb. Pr. (N. Y. Super. Ct.) 264; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723.

In *Rowley v. Houghton*, 2 Brew. (Pa.) 303, Ludlow, J., said: "The complainant, however, has purchased those rights; he is the owner of the original trade-mark; he has an undoubted legal right to use it; and he has seen fit to add to that name the letters 'ine,' and to establish in the market a value to the new trade-mark. These facts being admitted, the defendant is driven to the position that he is entitled to this peculiar trade-mark because he sug-

A trade-mark may sometimes contain the name of a person

gested the name to the complainant. The law, as settled, will, however, hardly sustain the claim of the defendant. It was demonstrated in *Colladay v. Baird*, 4 Phila. (Pa.) 139, that no right can be absolute in a name, as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark."

In *Ainsworth v. Walmsley*, L. R., 1. Eq. 518, Wood, V. C., said: "And inasmuch as the court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property."

In *Hall v. Barrows*, 4 De G. J. & S. 150, the Lord Chancellor said: "The distinction between a name and a trade-mark must be observed. If a name impressed upon a vendible commodity passes current in the market as a statement or assurance that the commodity has been manufactured by a particular person, it may be true that this court would not sell and transfer to another person the right to use the name simply and without addition; but if it sold the business or manufacture carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in business of the first maker, and in that manner use the name. . . . But it is unnecessary to pursue this further; for I am of opinion that these initial letters, surmounted by a crown, have become and are a trade-mark, properly so called—that is, a brand which has reputation and currency in the market as a well-known sign of quality; and that, as such, the trade-mark is a valuable property of the partnership as an addition to the Bloomfield Works and may be properly sold with the works, and, therefore, properly included as a distinct subject of value in the valuation to the surviving partner. It must be recollected that the question before me is simply whether the right to use the trade-mark can be sold along with the business and iron works, so as to deprive the surviving partner of any right to use the mark, in case he should set

up a similar business. Nothing that I have said is intended to lead to the conclusion that the business and iron works might be put up for sale by the court in one lot, and that the right to use the trade-mark might be put up as a separate lot, and that one lot might be sold and transferred to one person and the other lot sold and transferred to another, the case requiring only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works and as a valuable right, and if it might be so sold, it must be included in the valuation to the surviving partner."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, the Lord Chancellor said: "But suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the name has gained currency and credit in the market (there being no secret process or invention); could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm carrying on the same business in a different place? Suppose a firm of A. B. & Co., to have been clothiers in Wiltshire for fifty years, and that broadcloth marked A. B. & Co., makers, Wilts., has obtained a great reputation in the market, and that A. B. & Co., on discontinuing business, sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire; would the latter be protected by a court of equity in their claim to an exclusive right to use the name and mark of A. B. & Co.? I am of opinion that no such protection ought to be given. It is true that a name or the style of a firm may by long usage become a mere trade-mark, and cease to convey any representation as to the fact of the person who makes, or the place of manufacture; but where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion, which is false, I think no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

who was the founder of a business, and it may be assigned with his business, coupled with a contract on the part of the party himself not to use his own name upon a similar article,¹ or the proper name may by use have lost all of its personal nature and become only a designation of a particular establishment, character

1. In *H. A. Williams Mfg. Co. v. Noera*, 158 Mass. 110, Holmes, J., said: "On February 28th, 1890, the plaintiff purchased the stock in trade and goodwill of Francis Draper & Co., including the possession of their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. . . . We infer that Draper & Co. acquired a right to be protected to the usual extent in the use of the word 'Draper,' and we see no sufficient reason to doubt that, in view of the continuity of the business, the name was capable of assignment by Draper & Co. to the plaintiff. *Russia Cement Co. v. LePage*, 147 Mass. 209; *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149; *Bury v. Bedford*, 4 De G. J. & S. 352."

In *Jennings v. Johnson*, 37 Fed. Rep. 364, Colt, J. said: "The plaintiff in this case is the owner of a remedy known as 'Johnson's Anodyne Liniment,' and this suit is brought to enjoin the defendant from putting up and offering for sale a liniment of his own manufacture, in a form so closely resembling that of the plaintiff's article that the public are liable to be deceived thereby, and a portion of the plaintiff's business unlawfully taken away. The liniment was first prepared by Abner Johnson, about the year 1810. In 1846, he took his son, Thomas Johnson, into partnership. In 1848 the business was conducted by Thomas Johnson and his brother, I. S. Johnson, the father having died that year. In 1849, Thomas Johnson died, and the business was then carried on by I. S. Johnson until 1866, when he sold a part of his interest to the complainant. This continued until 1876, when the complainant bought out the entire interest of I. S. Johnson, and became the sole proprietor of the business. Upon the evidence, I think the complainant has shown such a proprietary right to this business, and to the use of the bottles, labels, and wrappers with which this medicine has been associated and identified, as entitles him to maintain this action against this defendant, and

therefore the first defense of want of sufficient title in the complainant falls to the ground. . . . The plaintiff Jennings was one of the firm of I. S. Johnson & Co. In stating on the label that the liniment is prepared by I. S. Johnson & Co., he merely retains the name of the firm of which he was a member. I cannot see how the public are deceived or injuriously affected by such a course. It is not uncommon, under such circumstances, to retain the old firm name. The facts in the case of *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, were quite different. In the present case I am satisfied that a decree should be entered for the complainant, and it is so ordered."

In *Burton v. Stratton*, 12 Fed. Rep. 696, Brown, D. J., said: "But the cases are numerous in which it has been held that a party may lawfully assign and sell, not only a trade-mark indicative of origin in himself, but even the right to use his own name in connection with a particular business."

In *Probasco v. Bouyon*, 1 Mo. App. 241, Bakewell, J., said: "The names of 'Oakes Candy,' 'Oakes Pure Candies,' etc., were, it appears, first used and applied by Probasco & Oakes to candies flavored with fruits, and made and sold by that firm, and under that name acquired a reputation and sale. These names pointed out the origin and ownership of the manufacture. By the dissolution of the firm, and Oakes' sale to Probasco, the latter acquired the rights of the firm to this name. Oakes could so sell his name as to deprive himself of the right to use it for his own manufacture, and give that right to another, under the circumstances of this case, as detailed above. *Young v. Stonebreaker*, 33 Mo. 117. . . . So, in like manner, whatever rights other men may have to the name of Oakes, this particular Oakes, the defendant in this case, will not be permitted to use the name of Oakes in the manufacture and sale of candy, at least in this locality, where the name has a peculiar signification and a business value, and where he is bound by a valid agreement to abstain

of goods, or business, in which case an assignment of the establishment, the exclusive right to make the particular character of goods or the business, will transfer to the purchaser a right to use such name as a trade-mark in continuing the same business.¹

from the use of his name. If it is claimed that Oakes has a right to use his own name, the answer is that he has no right to use it in this way, if he has sold that right, and if, as we hold, it was a right which he could sell and which plaintiff could acquire. . . . Oakes may still make and sell candy, but not under the name the use of which he has for this purpose sold. He may make and sell the very same candies, and is not obliged to conceal the fact that they are made by him; but he may not, in St. Louis, advertise them, either by sign over his shop door, or by label on the boxes in which they are packed, or in any other general and public way, as 'Oakes' Candies.'"

1. *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149. In *Dant v. Head*, 90 Ky. 255, Lewis, C. J., said: "The defense that the distiller's brand was not a subject of sale and transfer, and therefore formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid; for it is well settled that a trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment."

In *Pepper v. Labrot*, 8 Fed. Rep. 29, Matthews, C. J., said: "The defendants claim that the use of the name (Old Oscar Pepper Distillery) by the complainant as a brand for their whisky, manufactured elsewhere, would be a fraud on the public, as well as on the defendants. . . . Tried by these principles, it would seem that the trade-mark claimed by the complainant cannot be sustained as a designation of whisky manufactured by him without reference to the place of its production, and that it is not, therefore, a lawful trade-mark at all, in the proper sense of that term. It is rather the trade name of the distillery itself, of which he was at one time the proprietor, but which now is the property of the defendants. Neither by its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied

by him, with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the produce. If a trade-mark at all, in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford County. *Hall v. Barrows*, 4 De G. J. & S. 157; *Motley v. Downman*, 3 Myl. & C. 1; *Kidd v. Johnson*, 100 U. S. 617."

In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "The medicine has become well known, mainly through the efforts of Dr. Filkins to introduce it to the public, has quite a large sale among druggists, and has been a source of profit. It is now made by the plaintiffs substantially according to the original formula which was furnished by Dr. Blackman, and the plaintiffs have never abandoned the use of the original name. The name of the inventor, 'J. Blackman,' is the distinctive part of the name or title of the medicine, and gives to the title its peculiar value. Newton M. Blackman, who is the son of Jonas Blackman, has engaged in the manufacture of the same medicine, which is put up in bottles encircled with labels closely resembling those which are used by the plaintiffs, and containing the same title or name, 'Dr. J. Blackman's Genuine Healing Balsam.' The defendant states, in his affidavit, that his father has sold him the formula, and the right to manufacture the medicine, and to use the father's name. The question in the case is whether or not the plaintiffs now have a clear and exclusive continuing right, under the contract which was entered into between Jonas Blackman and Morgan L. Filkins, to the use of the name which was originally given to the medicine by the inventor, and whether or not, therefore, the plaintiffs held the right, at the time of the registration of the

trade-mark, to its exclusive use after January 1st, 1876. The following general principles in regard to the assignment of the exclusive use of trade-marks are applicable to this case. The name, 'Dr. J. Blackman's Genuine Healing Balsam,' which was originally given to the medicine by the inventor, 'points out distinctly the origin or ownership of the article to which it is affixed,' and the words 'were appropriated as designating the true origin or ownership of the article or fabric to which they are attached.' *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. The name, as a whole, was his trade-mark, which he had the exclusive right to use, and the exclusive use of which would pass, by assignment, to any one who had lawfully obtained from the inventor the exclusive right, also, to manufacture and sell, and who did sell, that particular article compounded according to the original formula. 'The property or right to a trade-mark may pass, by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives.' *Dixon Crucible Co. v. Guggenheim*, Am. Trade-Mark Cases, 559. . . . The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached. It is not, however, necessary that an article to which a trade-mark, personal in its inception, was originally affixed, should always be manufactured at the same place where it was originally made. This particular trade-mark, being the name of the inventor, was personal to Dr. Blackman, in its inception, but has been permitted by him to be applied, and to be appropriated, to the same article when manufactured by Filkins Bros. Under the circumstances in which the medicine has been manufactured and sold, the use of the trade-mark does not imply that the medicine was manufactured by Jonas Blackman, but that it is the same article which he originally invented and manufactured. *Bury v.*

Bedford, 10 Jur. N. S. pt. 1, 503; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S. 513."

In *Sohl v. Geisendorf*, 1 Wilson (Ind.) 60, Rand, J., said: "The authorities establish the proposition that a trade-mark may be devised and adopted by the party himself, or he may acquire it by purchase from his predecessor. The mode by purchase is as effectual as any other, and courts will go as far to protect such trade-mark as if the party devised and adopted it. . . . I know no reason why a party cannot purchase a part of a trade-mark, and devise and adopt the balance. See *Millington v. Fox*, 3 Myl. & C. 338; *Dixon Crucible Co. v. Guggenheim*, 3 Am. L. T. 288; *Croft v. Day*, 7 Beav. 84; *Tilly v. Fossett*, 17 Am. Law Reg. 402; *Coffeen v. Brunton*, 4 McLean (U. S.) 516."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, Lord Cranworth said: "But I further think that the right to a trade-mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise, where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufactory formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser in continuing the use of the original trade-mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case

I see nothing to make it improper for the purchaser to use the old trade-marks, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased." In the same case Lord Kingsdown said: "With respect to the use of the words 'J. R. & C. P. Crockett, manufacturers,' the question is involved in more difficulty. Though a man may assign his business and the use of his firm name and of his trade-mark as belonging to it, that proceeds, in my opinion, upon the ground which I have stated, that the use of the name of the firm is not understood in trade to signify that certain individuals, and no others, are engaged in the concern. Though a man may have a property in a trade-mark in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, it does not follow that he can in all cases give another person a right to use it, or to use his name. If an artist or an artisan has acquired, by his personal skill and ability, a reputation which gives to his works in the market a higher value than those of other artists or artisans, he cannot give any other persons the right to affix his name or mark to their goods, because he cannot give to them the right to practice a fraud upon the public. The reference to the Crocketts, in the words to which I have adverted, is obviously not used as representing the name of the plaintiff's firm, for that is stated in the circle of the trade-mark. Can it be understood as meaning only that the plaintiffs have succeeded to, and are entitled to use, the name of that firm? I think that it cannot, and that it must be understood to mean that those individuals personally, are concerned in the manufacture of the goods so stamped. This is a circumstance calculated, if true, to give an increased value to the goods, and being untrue, it seems to me to amount to an imposition upon the public."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, the Lord Chancellor said: "The question then arises, what amounts to a material false representation? Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of

successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered without any doubt in the negative; for it is competent by the law of *England* to a partnership, to adopt any style or firm which does not involve a claim to incorporation or the assumption of what belongs to others, and the practice of the trading community in this respect is so common and general that no misleading of the public can result from it."

In *Hall v. Barrows*, 4 De G. J. & S. 150, the Lord Chancellor said: "The master of the rolls is of opinion that the right to use local trade-marks may be sold with the manufactory or works to which such marks refer; but that the right to use personal trade-marks ought not to be sold, because the use of them by any other person than the person directed by the mark would be a false representation to the public. But it must be borne in mind that a name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. . . . In the present case it appears to me to be clear that the brand introduced by the original partnership in 1836, and which has ever since been used, consisting of the letters B. B. H. surmounted by a crown, has become and now is a mere trade-mark or symbol, and is no longer regarded or passes current in the market (if it ever did) as a guaranty or representation that the goods so marked are the manufacture of the original partnership of Bradley, Barrows & Hall. If it were not so, the firm of Hall & Barrows would not be entitled to use these initials, which they have done as a matter of right, and this case must be determined upon the

If, however, the trade-mark is of a general nature, indicating the place of manufacture or the business, or the character and quality of the goods upon which it is used, as being the same as that of the goods upon which it has always appeared, without being descriptive, it will be considered as property, and will be assignable with the business or factory or article.¹

2. *Trade-Mark not Assignable Apart from Business or Article.*—The general doctrine announced in the previous section imposes an absolute prohibition upon the assignment of a trade-mark, except for use in the same way, and for the same purpose as that for which the trade-mark in question was originally adopted. The trade-mark must always tell the truth, and tell the same truth. It can have but one meaning, and it must always truthfully represent that meaning to the public. The meaning of the trade-mark to the public will determine the question of how far such trade-mark is assignable. If it means that the personal skill of a particular individual was exercised in the manufacture or selection of the goods upon which it is used, then it cannot be assigned at all, because it can never be truthfully used by another.²

assumption that their partnership was so entitled."

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, Wood, V. C., said: "It is said that the Messrs. Taylor have retired, and they no longer manufacture these pins, the plaintiff having succeeded to their trade. That is so; and for the good-will and right to use the labels and machinery for stamping them, the plaintiff has paid £2,600. I do not think that the want of title to use the label, which was urged by the defendants against the plaintiff's application, can prevail. If the plaintiff, or those under whom he claims, has used the label continuously for a certain space of time, that is enough to enable him to prevent others from using it, and making a profit out of the reputation which the label has acquired in the market. But then it is said that the use of this label by the plaintiff is a fraud . . . because it holds out that the article is manufactured by Taylor, when it is, in point of fact, manufactured by the plaintiff, Taylor having ceased to have anything to do with the business. But to take the last point first, the firm of Taylor & Co. having originally made this article, and it being now made by the persons who have *bona fide* acquired the business, they are quite justified in using the name of the old firm. It would be going too far to say that this is a misrepresentation by the plaintiff,

when he only uses the name which he has bought the right to use."

1. In *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340, Daniels, J., said: "It is probably needless to add that the fact of the plaintiff deriving its right to use the wrapper by assignment from the successors of Kinney Brothers is sufficient to entitle it to the protection applied by the courts to cases of this description. This was so held in *Merry v. Hoopes*, 111 N. Y. 415."

In *Warren v. Warren Thread Co.*, 134 Mass. 247, Morton, C. J., said: "Whatever may be the law as to a trade-mark which is strictly personal, it is the settled law that the right to use a trade-mark in connection with the business in which it has been used is property which will be protected by the courts, and which may be sold and transferred. *Emerson v. Badger*, 101 Mass. 82; *Gilman v. Hunnewell*, 122 Mass. 139. In *Sohier v. Johnson*, 111 Mass. 238, the right to use such a trade-mark was recognized as property which would pass to an assignee, as an incident, under a transfer of the business and good-will."

2. In *Cotton v. Gillard*, 44 L. J. Ch. 90, Jessel, M. R., said: "This person became bankrupt. His trustee of course did not know the secret of the sauce any more than the man himself. But the trustee purported to sell to the plaintiffs . . . the trade-mark, that is, the right to affix the words 'Licensed

If, on the other hand, it means that the goods are the product of a particular establishment or spring, into which the location enters as an essential element, then the mark can only be assigned together with the particular establishment, spring, or other local business.¹

Victualler's Relish' to something. But to what? To the thing sold, I suppose, because it is the trade-mark of something; but they seemed to have thought they could purchase a trade-mark generally, and a right to affix it to anything they chose to manufacture that might be somewhat similar in taste to the thing of which they did not know the composition; so as to induce the public to believe that the thing they were selling with a similar label was the real thing. . . . He consequently had no right to use the labels except by license from the defendant."

In *Mattingly v. Stone* (Ky. 1889), 12 S. W. Rep. 467, Holt, J., said: "Between the time of the sale of the distillery by Stone to Mattingly & Lancaster and the making of the contract of March 10th, 1882, Stone became a bankrupt. It is therefore urged that, if the right to use his name, as a part of the whisky brand, did not pass with the sale of the distillery, then it passed to his assignee in bankruptcy; and there was, therefore, no consideration for the contract of March 10th, 1882. It will be noticed that the words composing the brand, save the name of the appellee, are those of common use; and the right of using his name merely was a personal one to the appellee, and did not, therefore, pass to his assignee, any more than would the skill acquired by a merchant from experience in his business. *Helmbold v. Helmbold Mfg. Co.*, 17 Am. L. Reg. N. S. 169."

1. *Ainsworth v. Walmsley*, L. R., 1 Eq. 518; *Dant v. Head*, 90 Ky. 255; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340; *Warren v. Warren Thread Co.*, 134 Mass. 247; In *Kidd v. Johnson*, 100 U. S. 617, Field, J., said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manu-

factured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of a trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of Lord Cramworth in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S. 513. See also *Ainsworth v. Walmsley*, 44 L. J. 355, and *Hall v. Barrows*, 10 Jur. N. S. 55."

In *Chadwick v. Covell*, 151 Mass. 190, Holmes, J., said: "What is the plaintiff's position when she seeks to prevent the defendant from selling his medicine by the name of 'Dr. Spencer's Queen of Pain?' She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plant, and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public any more than hers does as to the maker, the place of manufacture, or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does, and certain goods are manufactured, and of being transferred for value or by gift from person to person irrespective of goodwill, special right to make the goods, place of manufacture, or fraud of any kind upon the public, the plaintiff cannot prevail. . . . If the nature and foundation of the right is what we suppose, then the reason why, and the limits within which, a grantee will be protected, are plain. The most usual case is when a trade-mark means that goods come from a certain manufactory and the manufactory and mark change hands together; *e. g.*, *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep.

If it means that the goods are of the same character and quality as have been theretofore produced by a particular person, firm or corporation, where the element of personal skill does not enter, but only that of honesty and fair dealings, the mark may be assigned together with the business and the right to make the article or articles to which the mark has been applied; but such a transfer does not necessarily involve a transfer of the exclusive right to manufacture the article in question.¹

149; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Kidd v. Johnson*, 100 U. S. 617, 620. The use of the mark by a third person would be as much a fraud upon the grantee as it would have been upon his grantor; therefore the grantee will be protected. *Singer Mfg. Co. v. Loog*, 8 App. Cas. 17; *Jenning v. Johnson*, 37 Fed. Rep. 364. But our decisions have gone no further. *Sohier v. Johnson*, 111 Mass. 238. See *Cotton v. Gillard*, 44 L. J. Ch. 90; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 302; 6 Am. Rep. 82; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. 339."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, *Colt, J.*, said: "There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is property sold with the firm property. *Browne on Trade-Marks*, §§ 360, 361; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmesley*, 44 L. J. 252; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 57 Barb. (N. Y.) 526; 4 Am. Law. T. 168; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Walton v. Crowley*, 3 Blatchf. (U. S.) 440, *Betts, J.*, said: "Bills of this description are not maintainable upon the ground that the plaintiff has a right of property in the trade-mark. The relief is given because the mark is a sign or representation, importing, and so understood and acted upon by the public, that the article to which it is attached is the manufacture or production which is generally known in

market under that denomination. *Coffeen v. Brunton*, 4 McLean (U. S.), 516. The owner of the goods which bear the indicia is considered to be prejudiced in his interests if others can be permitted to come into the market with the same representation, and thus delude purchasers by vending inferior articles, or diminish the owner's business by acquiring sales to themselves under color of his reputation. The party, then, whose interests are directly affected by the wrong, is entitled to proceed in his own name to procure its suppression; and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark, as the manufacturer himself. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 614; 42 Am. Dec. 114. The plaintiff was not the inventor of this label or trade-mark, nor the one who originally adopted it; but he is the assignee of it, and of the good-will of the trade. He stands, thus, in the same relation to the defendant as his assignor would, and whatever privilege the law accorded to James Walton, in the possession and use of the trade-mark, passed to and can be enjoyed by the plaintiff under the assignment."

1. In *Oakes v. Tonsmierre*, 49 Fed. Rep. 447; 4 Woods (U. S.) 547, *Bruce, D. J.*, said: "The case falls within another principle, which is that a name may be used as a mere adjective of description or quality, which the public do not understand as any warranty that the person whose name is used is the maker of the article; and in these cases the right to use the name may be sold with the right to manufacture and vend the goods without reference to the question as to what person or persons actually manufacture them." See also *Julian v. Hoosier Drill Co.*, 78 Ind. 498; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v.*

3. Assignment, What Constitutes—*a.* IN GENERAL.—Any writing or act of the parties from which the clear intention can be gathered to assign an assignable trade-mark or a business with which it is inseparably connected, will suffice to pass title: as, for example, a writing signed by the parties, expressly mentioning the trade-marks, or a writing transferring the whole property in a particular business in which the trade-marks have been used, without mentioning the trade-marks, or a sale of the business by the sheriff, or by a trustee in insolvency, or by the parties who are owners, by simply delivering possession to a purchaser without mention of trade-marks. In these cases care must be taken to distinguish between a sale of a factory, or a business, and of an exclusive right to manufacture a particular article.

The sale of a factory will not carry the right to trade-marks used upon goods made therein, unless the trade-marks necessarily designate the particular factory as the place of origin, and the factory is associated in the mind of the public with the trade-mark. The factory might be entirely severed from the business, while the business was held intact and conducted elsewhere, in

Billings, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; Croft v. Day, 7 Beav. 84.

In *Huwer v. Dannenhoffer*, 82 N. Y. 499; 72 P. & S., Am. Trade-Mark Cases, Earl, J.: "There was no finding and no evidence that the defendants intended by their sale to the plaintiff to divest themselves of their property in this trade-mark. This property did not pass as incident to what was sold. It was no necessary part of what was sold. The trade-mark was not in its nature local. It did not import that the goods upon which it was placed were manufactured or produced in any particular locality. It could truthfully be used upon goods manufactured anywhere, and in these respects it was unlike the trade-mark under consideration in the case of *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82. Under the circumstances of this case, it was incumbent upon the plaintiff to show that the exclusive right to use the trade-mark was actually, by agreement, vested in him, and this he failed to show."

In *Carmichel v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481, *Durfee, C. J.*, said: "I think, however, there is little reason to doubt that purchasers who are looking for Stillman & Co.'s linseys get what they are looking for when they get the linseys manufactured by the plaintiffs. The firm of Stillman & Co. has ceased to exist, and, conse-

quently, Stillman & Co.'s linseys, manufactured by Stillman & Co., can no longer be procured; but the plaintiffs are their successors, by purchase, in the use of their firm name, and continue the same manufacture with improvement, and, therefore, I am reluctant to hold, that a continuance of the old name upon their labels is intrinsically any fraud upon the public, who are interested to get the same or a better manufacture, but who, so long as they do get it, can have little care whether it comes from the original manufacturers or their successors. And see *Edleston v. Vick*, 18 Jur. 7; *Fulton v. Sellers*, 4 Brew. (Pa.) 42; *Dale v. Smithson*, 12 Abb. Pr. (N. Y. C. Pl.) 237; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, *Folger, J.*, said: "A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. *Upton on Trade-Marks* 52. And it may also pass, by operation of law, to any one who, at the same time, takes that right. *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 335. And see *Brooks v. Gibson*, 34 Beav. 566."

which case the sale of the factory would not affect the ownership of the trade-marks.

If the trade-mark be one which is used to designate the origin and ownership of all the classes of goods made and sold by a particular manufacturer, the sale of the business will carry the trade-mark. If the trade-mark be used to designate only one article, then the sale of the right to manufacture that article is necessary to carry the trade-mark.

b. ACT OF PARTIES.—An assignment in writing signed by the parties, owners of the trade-marks, transferring the factory, business and trade-marks, or business without mention of trade-marks, or the exclusive right to make and sell a particular article without mention of trade-marks, will pass the title to the trade-marks and give to the assignee the right to manufacture the same article or articles formerly sold under the trade-mark, and to mark them with the same trade-mark, provided in doing so no misrepresentation is made with reference to the real origin and ownership of the goods.¹ If a trade-mark says to the public, "The article on which I appear is made by John Smith at Philadelphia, *Pennsylvania*," the use of this same trade-mark by an assignee, without appropriate words indicating that fact, will be a falsehood and a fraud upon the public, and a court of equity will not support a trade-mark so used. An assignee should always accompany the trade-mark, when used by him, by words appropriate to convey to the public, the knowledge that the trade-mark is employed to indicate that the goods on which it appears are of the same kind and quality as were formerly made by the adopter of the trade-mark, but are now made and sold by his assignee.²

1. See *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249; 60 Hun (N. Y.) 83.

In *Merry v. Hoopes*, 111 N. Y. 415, Peckham, J., said: "If the brands in question were trade-marks, so that they indicated that the iron upon which they were placed was of the manufacture of the plaintiff, or of the firm of which he had been a member, or that it had been galvanized by him or his firm, or specially sold by him or them, we think the right to exclusively use them on iron galvanized by the plaintiff, passed to him by virtue of the written papers signed by the parties at the time of the dissolution."

2. In *Symonds v. Jones*, 82 Me. 302, Emery, J., said: "We think, however, it is the duty of the complainants to the respondent, as well as to the public, to refrain from using the labels in such manner and form, as might lead the public to suppose that the goods packed by them were packed by the re-

spondent. They should strike from their letter-heads, circulars, and labels any words indicating that the goods were prepared by John Winslow Jones, and, if they use his name, should add such words as clearly indicate that the goods are not prepared by him, but by them as his successors."

In *Stachelberg v. Ponce*, 23 Fed. Rep. 430; 152 P. & S., Am. Trade-Mark Cases, Colt, J., said: "Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser. *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588. Otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. If these complainants have any right of action against the defendant, it is upon the ground that, by copying the trade-mark, 'La Normandi,' in substance, he

is misleading the public by false representations into the purchase of his cigars as those made by A. Bijur, the original proprietor of the trade-mark. Delaware, etc., *Canal Co. v. Clark*, 13 Wall. (U. S.) 311. The supreme court, in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, declare that, the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use, otherwise a deception would be practised upon the public; and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer."

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; 53 P. & S., Am. Trade-Mark Cases, Daly, C. J., said: "In *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588, it was held, that every assignee or purchaser who uses the trade-mark of the original proprietor without indicating that he is the assignee or purchaser, practises an imposition upon the public. 'I do not deny,' says Chief Justice Wilson, in delivering the opinion of the court, 'that the right to use the trade-mark of the original proprietor passes with the good-will, by operation of law, to the executor and to the assignee of a bankrupt, and that it may pass to an assignee by express agreement between the parties; but I insist that in such cases, in order to receive the aid of a court of equity, the parties must add to the original trade-mark words indicating the authority for, and the right to its use, as executor, assignee or successor of the original proprietor, as the case may be. Assignees of trade-marks have no special privilege of sailing under false colors, and if they will persist in doing so, prudence would dictate that they give courts of equity a wide berth.' . . . My conclusion in this case is, . . . that those who have acquired through the sale under the assignee, and by subsequent conveyances, all that remained of the assets, interests, rights or property of the insolvent firm of Hegeman & Co., have the right to use that business, and the trade-mark with it, if they so use it as to express the fact that they are successors to, and not the original firm. That if they abandon

their present mode of styling themselves Hegeman & Co., and upon their signs, labels, stamps, advertisements, etc., etc., declare themselves to be, what they really are, successors to Hegeman & Co., they will be entitled to the equitable aid of the court to restrain J. Nevin Hegeman and Ferrier from holding out to the public that the business they are carrying on is a continuation of that of the old firm, and of making use of its trade-mark, business name, etc., to the detriment of those who have acquired whatever interest there is in the trade-mark and name."

In *Fulton v. Sellers*, 4 Brew. (Pa.) 42, Strong, J., said: "It is also the obvious meaning of the agreement between Dr. Lindsay and the plaintiff that the latter should acquire thereby, not only the right to manufacture and sell the article or medicinal compound, but also whatever property the vendor had in the trade-mark. They were to have all the vendor's 'right, title, and interest in the article known as J. M. Lindsay's Blood-Searcher,' and a right to take his name and all his interest, so far as is necessary, 'to the successful and perfect preparation of the above-named Blood-Searcher for market and sale.' The vendor also covenanted not to offer or sell any interest in it to any other party, and not to put up or cause to be put up, or sell any article similar to it which would be likely to interfere with the successful sale of the Blood-Searcher. The right to use his name and all his interest must include the right to the use of the trade-mark. That was an interest of the vendor, he had a property in the trade-mark. . . . Nor do we think the position tenable that the complainants are not entitled to relief because they are only assignees of the trade-mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it without giving notice that they are not the original owners of it, can be a fraud upon the public, of which the defendant can avail himself. A trade-mark, like the good-will of a store or manufacturing establishment, is a subject of commerce, and it has many times been held entitled to protection at the suit of vendees."

"A trade-mark should not be protected in the hands of an executor, assignee, or other person claiming through its first adopter, unless such person

c. OPERATION OF LAW.—Whenever a trade-mark does not indicate the personal skill of an individual, but a particular house or stage-line, etc., or that the goods upon which it has been used are made at a particular establishment in the way usually employed there, or are the product of a particular business house, or are of a specific character and quality either known or believed to be peculiar, and indicated by the trade-mark, the sale and transfer of the house, stage-line, etc., factory, business, good-will, all assets, or exclusive right to make and sell the particular article, will necessarily carry with it by operation of law the exclusive right to use the trade name or trade-mark, for the reason, that he who owns the theater, hotel, factory, stage-line, steamboat-line, business, or the exclusive right to make the goods, is the only person who can state truthfully the particular facts formerly stated by the trade-mark, hence, he must necessarily have the exclusive right to use the trade-mark for this purpose.¹

added to it words indicative of the relation between himself and the first adopter of the mark, since otherwise a fraud would be committed on the public." *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588; *Cox's Man. of Trade-Mark Cases* 263.

See *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278.

1. See *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 40 Ill. App. 430.

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249; 60 Hun (N. Y.) 583, Daniels, J., said: "The facts supporting the conclusion that the label or trade-mark was intended to and did pass as an incident to the property itself, are certainly as cogent as they were in *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, and there it was held that by purchasing the property supplying the water, with the right to proceed with the business, the plaintiff acquired the right to the trade-mark, 'to designate the article upon which this business was carried on.' *Id.* 302. And it is further sustained by *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169; *Kidd v. Johnson*, 100 U. S. 617; *Pepper v. Labrot*, 8 Fed. Rep. 29; and *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217."

In *Symonds v. Jones*, 82 Me. 302, Emery, J., said: "What is known as the 'good-will' of the business is recognized by the law as a proper subject of sale or contract, in connection with a transfer of a business plant. An established business, with plants and products well known to the trade, has a

money value often far above that of its mere plant, and this is often the controlling motive for the purchase. Labels, trade-marks, particular words and phrases devised or used to distinguish or identify the product of the plant, and associated with such products in the public mind, are in like manner usually transferred with the plant, and are regarded as valuable acquisitions for the purchaser. They are, equally with the good-will, proper subjects of such sale and contract. The name or initials of the originator or owner of the business, when used on labels and as trade-marks in the business, may thereby have a value and so may be included in a sale of the business, so far, at least, as to prevent the vendor afterwards using them in like manner on other similar products to the detriment of his vendee."

In *Merry v. Hoopes*, 111 N. Y. 415, Peckham, J., said: "They were brands which had been designed by the plaintiff while a member of the firm of John Merry & Co., and had been used by that firm, and we think had passed to the firm composed of the plaintiff and the defendant's testator. Although the words 'good-will' were not mentioned in the papers (other than in Exhibit F, which was not signed by the parties, and which the defendant does not recollect even to have seen), yet it is evident, from an inspection of the papers which were signed by him, that it was meant to pass, and when defendant denies it, he merely denies a conclusion of law, as the intention to pass it is derived from the documents signed

by the parties. *Shipwright v. Clements*, 19 W. R. 599; *Hudson v. Osborne*, 18 W. R. Ch. Dig. 44, paragraph 15; 39 L. J. R., N. S. 79. The effect of the transaction between the parties, as evidenced in the papers executed by them, was a sale of the business, its good-will and its trade-marks, to the plaintiff by the defendants' testator."

In *Hill v. Lockwood*, 32 Fed. Rep. 389, *Dyer, J.*, said: "There are trade-marks to which the characteristic of personal proprietorship attaches, because they assert to the public that some particular person has given his special skill to the production or selection of the articles they cover. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 544; *Hoxie v. Chaney*, 143 Mass. 593; 58 Am. Rep. 149; *Holt v. Menendez*, 23 Fed. Rep. 869. There is another class of trade-marks, which assert for the articles they designate some particular place of origin. In such case the trade-mark is inseparable from the place. It passes as an incident with the sale of the place. *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 302; 6 Am. Rep. 82; *Matter of Swezey*, 62 How. Pr. (N. Y. C. Pl.) 219; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 218."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, *Colt, J.*, said: "There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. *Browne on Trade-Marks*, §§ 360, 361; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmesley*, 44 L. J. 252; *Kidd v. Johnson*, 100 U. S. 617; *Waltton v. Crowley*, 3 Blatchf. (U. S.) 440; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 57 Barb. (N. Y.) 526; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, *Wallace, J.*, said: "The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and

sell the commodity which it has been appropriated to designate as the product or article of the proprietor. It may be abandoned if the business the proprietor is abandoned. It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor. A trade-mark of this description is of no value to the original proprietor, because he cannot use it without deception, and therefore would not be protected in its exclusive enjoyment. Such a trade-mark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business, because such an implication is consistent with the character of the transaction and the presumable intention of the parties. *Dixon Crucible Co. v. Guggenheim*, 3 Am. L. T. 228; *Hudson v. Osborne*, 39 L. T. Ch. 79; *Shipwright v. Clements*, 19 W. R. 599."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113; 133 P. & S., *Am. Trade-Mark Cases*, *Colt, J.*, said: "If a trade-mark is an asset, and it is, there is no reason why it should not pass under the term 'assets' in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage is to say that the most valuable part of the partnership property is not covered by the words 'assets and effects of every kind and nature.'"

In *Pepper v. Labrot*, 8 Fed. Rep. 283 P. & S., *Am. Trade-Mark Cases*, *Matthews, C. J.*, said: "That distillery having now become the property of the defendants by purchase from the complainants, can they deny the right of using the name by which it was previously known? Can the prosecution of the business operating it, and of describing the whisky made by them as its product? Can the complainant be permitted to use the brand or mark formerly employed by him, to represent whisky made by him elsewhere as the actual product of this distillery? Both these questions, in our opinion, must be answered in the negative. . . . It is a fair inference from these authorities that when, as in the present case, the

mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached to the manufactured article as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it previously acquired, in connection with its own manufacture at the same place as of a similar article, by operation of law. For that proposition, the case of *Spring Co. v. High*, 19 N. Y. 291; 6 N. Y. Rep. 82, is a direct authority. See also *Mfg. Co. v. Hall*, 61 N. Y. 299; 19 Am. Rep. 278; *Carmichael v. Mer*, 11 R. I. 407; 23 Am. Rep. 481; *Jarrett*, 52 How. Pr. (N. Y. 1880) 169; *Julian v. Hoosier Drill*, 78 Ind. 498; 91 P. & S., Am. Trade-Mark Cases; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. (Pa.) 408. The property thus conveyed, and which the plaintiffs 'and their assigns' could have and hold 'forever,' included the signs upon the building containing the words 'Established A. D. 1780,' and the labels, bill-heads, letter-heads, etc., which contained similar language." In *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169, Van Brunt, J., said: "The plaintiff claiming that by the use of the name of 'Booth's theater' the public will be misled into believing that he is still the manager of this theater, and that they will be deceived into going to the theater, supposing that plaintiff still acts there, and that he will be injured thereby, brings this action to restrain the defendants from the use of the name of 'Booth's theater.' I am unable to see how the injunction asked can be granted. The plaintiff has built a public building and christened it 'Booth's theater.' He has acquired for that under that name a reputation as a place of public amusement. Having thus increased the value of the premises by that reputation, he has mortgaged and leased them under the name he had given them, and there is no doubt, from the manner in which the premises are described in the lease to Junius B. Booth, that one of the inducements to the lease was the public reputation which Booth's theater had acquired as a place of public amusement. The defendants have succeeded to all these rights, and one of them seems to me to be the name by which the plaintiff has conveyed these premises. It is to be borne in mind that there is no attempt upon the part of the defendants to conceal the fact that they are the lessees and managers of this theater. What, under these circumstances, does the use

goods of the latter as those of the former. . . . Entertaining these views, which seem to me very simple and clear, if the question before me was new, I should find no difficulty in deciding that the successors in business to the old firm of Caswell, Hazard & Co. own, and are entitled to use, the words which distinguish both their general business and their specific preparations. Their right, however, so to do rests upon many cases. See, among others, *Glen*, etc., *Mfg. Co. v. Hall*, 61 N. Y. 232; 19 Am. Rep. 278; *Sohier v. Johnson*, 111 Mass. 238; *Shipwright v. Clements*, 19 W. R. 599; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. (Pa.) 408. . . . The property thus conveyed, and which the plaintiffs 'and their assigns' could have and hold 'forever,' included the signs upon the building containing the words 'Established A. D. 1780,' and the labels, bill-heads, letter-heads, etc., which contained similar language."

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by the parties. *Shipwright v. Clements*, 19 W. R. 599; *Hudson v. Osborne*, 18 W. R. Ch. Dig. 44, paragraph 15; 39 L. J. R., N. S. 79. The effect of the transaction between the parties, as evidenced in the papers executed by them, was a sale of the business, its good-will and its trade-marks, to the plaintiff by the defendants' testator."

In *Hill v. Lockwood*, 32 Fed. Rep. 389, Dyer, J., said: "There are trade-marks to which the characteristic of personal proprietorship attaches, because they assert to the public that some particular person has given his special skill to the production or selection of the articles they cover. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 544; *Hoxie v. Chaney*, 143 Mass. 593; 58 Am. Rep. 149; *Holt v. Menendez*, 23 Fed. Rep. 869. There is another class of trade-marks, which assert for the articles they designate some particular place of origin. In such case the trade-mark is inseparable from the place. It passes as an incident with the sale of the place. *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 302; 6 Am. Rep. 82; *Matter of Swezey*, 62 How. Pr. (N. Y. C. Pl.) 219; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 218."

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, Colt, J., said: "There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright; but in connection with the article produced it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. *Browne on Trade-Marks*, §§ 360, 361; *Hall v. Barrows*, 10 Jur. N. S. 55; *Ainsworth v. Walmesley*, 44 L. J. 252; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 57 Barb. (N. Y.) 526; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321."

In *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, Wallace, J., said: "The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and

sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment, rather than of the proprietor. A trade-mark of this description is of no value to the original proprietor, because he could not use it without deception, and therefore would not be protected in its exclusive enjoyment. Such a trade-mark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business because such an implication is consistent with the character of the transaction and the presumable intention of the parties. *Dixon Crucible Co. v. Guggenheim*, 3 Am. L. T. 228; *Hudson v. Osborne*, 39 L. T. Ch. 79; *Shipwright v. Clements*, 19 W. R. 599."

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trade-mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article, by operation of law. For that proposition, the case of Congress, etc., *Spring Co. v. High Rock, etc.*, 5 Spring Co., 45 N. Y. 291; 6 Am. Rep. 82, is a direct authority. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 229; 19 Am. Rep. 278; *Carmichel v. Latimer*, 11 R. I. 407; 23 Am. Rep. 481; *Booth v. Jarrett*, 52 How. Pr. (N. Y. C. Pl.) 169; *Julian v. Hoosier Drill Co.*, 78 Ind. 498; 91 P. & S., Am. Trade-Mark Cases; *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Croft v. Day*, 7 Beav. 84; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; 53 P. & S., Am. Trade-Mark Cases."

In *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1; 17 P. & S., Am. Trade-Mark Cases, *Westbrook, J.*, said: "When the co-partnership between the plaintiffs and the defendant Caswell ended, in 1876, it is evident that the right to use the words 'Established 1780,' or 'Established A. D. 1780,' belonged to the business, and passed to the successors of the firm. . . . If the successor to the business of the manufacture of one compound or one article, has a right to the continued and sole use of the name or mark by which the public recognizes its genuineness, so the successors in business to those who placed upon the market many compounds, all marked and designated by certain well-known words, are entitled to the continued and sole use of such words which distinguished the preparations. And what is true in regard to articles manufactured by predecessors in business, and continued by successors, is also true in regard to new compounds. The fact that a business is a continuation of one long established, when communicated to the public, is of actual value to its owners. . . . Very clearly, a man's name could not be used by another, without the consent of its owner, to impose upon the public under that disguise, the business or

goods of the latter as those of the former. . . . Entertaining these views, which seem to me very simple and clear, if the question before me was new, I should find no difficulty in deciding that the successors in business to the old firm of Caswell, Hazard & Co. own, and are entitled to use, the words which distinguish both their general business and their specific preparations. Their right, however, so to do rests upon many cases. See, among others, *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 232; 19 Am. Rep. 278; *Sohler v. Johnson*, 111 Mass. 238; *Shipwright v. Clements*, 19 W. R. 599; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. (Pa.) 408. . . . The property thus conveyed, and which the plaintiffs 'and their assigns' could have and hold 'forever,' included the signs upon the building containing the words 'Established A. D. 1780,' and the labels, bill-heads, letter-heads, etc., which contained similar language."

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of the name 'Booth's theater' indicate to the public? Nothing more, I imagine, than that this theater was built by the plaintiff; that this is the theater which he named upon its construction 'Booth's theater,' and the place of amusement which had become known to the public under that name. . . . It seems to me that the plaintiff, by his acts, has affixed his name to the theater, so that his grantees and their successors have the right to call this building 'Booth's theater,' the name which he has given it."

In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278, Dwight, C., said: "The case at bar, properly considered, is a species of 'good-will' analogous to a trade-mark. . . . It does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, etc. It means every advantage, every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business. . . . In other words, the name of the business could be severed from the place where it was transacted, and while thus separated could be treated as an object of property, so as to prevent third persons from attaching it to their business, and thus depriving the owners of a legitimate profit which they might reap elsewhere under the same name. It seems plain that if a banking-house had acquired a name, such as that of Baring Brothers, though there were no partner of the name of Baring, it would, on general principles of law, and independent of a statute preventing the use of fictitious names, have a property in such name, without reference to the particular place where the business was carried on. Though the name might be inseparable from the business, it would be separable from the premises; so that the business might, for example, be carried on on the opposite side of the street. These doctrines find further support in *Partidge v. Menck*, 2 Barb. Ch. (N. Y.) 103; 47 Am. Dec. 281; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394; *Howard v. Henriques*, 3 Sandf. (N. Y.) 725; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Christy v. Murphy*, 12 How. Pr. (N. Y. Su-

preme Ct.) 77; *Hudson v. Osborne*, 39 L. J. Ch. 79; and other cases in *Browne on Trade-Marks*, ch. 12."

In *Sohier v. Johnson*, 111 Mass. 238, Morton, J., said: "The plaintiffs contend that the trade-mark 'was a property incident and attached to the' Provision and Soap and Candle Establishment 'at Cambridge,' but we do not think it can be regarded as a local trade-mark, attached as incident to the real estate at Cambridge. It is obvious that if the parties in interest had at any time seen fit to sell that real estate and continue the business at some other place, it would have had no effect upon the character or fitness or value of the trade-mark, but it would remain attached to the good-will and business, wherever carried on."

In *Congress, etc., Spring Co. v. High Rock, etc., Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82, Folger, J., said: "A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. Upton on Trade-Marks 52. And it may also pass, by operation of law, to any one who, at the same time, takes that right. *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 335. And see *Brooks v. Gibson*, 34 Beav. 566."

The plaintiffs purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it—the exclusive right to preserve its water in bottles, as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors; for the plaintiffs owning the spring, no one else could carry on the business. And, under the rules above stated, they acquired, by assignment or operation of law, the right to the trade-mark before that, in use to designate the article upon which this business was carried on. See also *Hall v. Barrows*, 10 Jur. N. S. 55."

In *Shipwright v. Clements*, 19 W. R. 599, Malins, V. C., said: "The sale of a business is a sale of the good-will. It is not necessary that the word 'good-will' should be continued. The defendant sold the business, and with it everything producing profit. His proposition that he is entitled to sell the 'Zingare bouquet,' after having

The sale by the sheriff, of a hotel, factory, stage-line, etc., or a business, or the exclusive right to make an article with which the trade-marks are necessarily associated, will operate to transfer the trade-marks, whether they are mentioned at the time of sale or not.¹ A distinction must be noted between technical trade-

disposed of the right to do so to the plaintiff, is untenable. In the sale of a business a trade-mark passes, whether specially mentioned or not. As the plaintiff desires the injunction, he is entitled to have it."

In *Mossop v. Mason*, 18 Grant Ch. (Up. Can.) 453, Draper, C. J., said: "The name of the particular hotel would therefore be of value as connected with the good-will of the business carried on therein, and that passed to the respondents to the extent of the appellant's right to possession as tenant, which was only for two years."

In *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, Paxson, J., said: "The true rule to be deduced from these cases would appear to be this: That the property or right to a trade-mark may pass by an assignment or by operation of law, to anyone who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." See *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88; 24 Barb. (N. Y.) 163; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101; 47 Am. Dec. 281; 1 How. App. Cas. (N. Y.) 547; *Howe v. Searling*, 10 Abb. Pr. (N. Y. Super. Ct.) 264; *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723; *Bury v. Bedford*, 33 L. J. N. S. Ch. 465; *Cooper v. Hood*, 26 Beav. 293.

2. In *Milliken v. Dart*, 26 Hun (N. Y.) 24, Davis, P. J., said: "That is, in substance, that the defendant Dart, one of the assignors, has, since the making of the assignment, used and claimed to own a trade-mark which should have been assigned. In respect of that it is enough to say, that if the trade-mark was assignable property, it is assigned by the assignment, and the title to it is wholly vested in the assignee. A subsequent use of it by Dart, under a claim that it is not as-

signable, is no evidence of a disposition of property with intent to defraud. If his claim be correct, the property is tangible and in reach of his creditors, and not disposed of. If the claim be not well founded, the assignee may take possession and dispose of it for the benefit of the creditors. It is, to say the least, a disputable question, whether property in a trade-mark is the subject of attachment or levy under execution. See *Hegeman v. Hegeman*, 8 Daly (N. Y.) 6."

In *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 453, Westbrook, J., said: "It is not denied that Henry T. Helmbold could, by voluntary sale and assignment, transfer the right to use his knowledge and name, but it is not seen how the right to use his own knowledge and name can be taken from him by any judicial proceeding whatever. If they can be, then the merchant who has become unfortunate, but who has still a knowledge and a name with which to begin business anew, must, if he has been adjudged a bankrupt, be content to leave with his assets his brains and his character. . . . The property which he had acquired belongs to his creditors, but the name and whatever of character, good or bad, belonging to it, and which he has himself made, are his, and must so continue to be until he voluntarily parts with them. He has the right to make any extract he pleases, and to tell the public by the use of his own name that the preparation is his, and not that of another, and neither the plaintiff nor any other person can place that name upon a preparation not his, against his will, and deprive him of the use thereof."

In *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278, Dwight, C., said: "A trade-mark, or a designation of one's trade, may thus be sold by order of the court, whether it be attached to a new business or to one long existing. In such case, 'good-will' and trade-marks are governed by similar rules. In *Bradbury v. Dickens*, 27 Beav. 53, on the dissolution of a partnership, the title of a magazine, 'House-

marks and the proper names of individuals; the former will as a general rule pass; the latter will not, without express contract.¹

hold Words,' was, by order of the court, put up at auction and sold. The court said that property in a literary periodical like this is confined purely to the mere title, and that forms part of the partnership assets and must be sold for the benefit of the partners, if of any value. The decree ordered the sale of the right to use the name of the periodical and the right to publish under the same name and title, any periodical or other work, whether in continuance of said periodical called 'Household Words,' or otherwise, as the purchaser might think fit."

1. In *Hazelton Boiler Co. v. Tripod Boiler Co.*, 142 Ill. 494, Dailey, C. J., said: "All the witnesses agree that in the negotiations which led to the execution of said assignment, no mention whatever was made of the subject of trade-marks, trade names, or the good-will of the business as a portion of the assets within the contemplation of the parties. None of these matters were discussed or apparently thought of, and the present contention is based solely upon the claim that the term 'assets' of said business is sufficiently broad to include all possible property rights to which Hazelton, as a member of said firm, was in any way entitled, and so must be deemed to have included trade-marks and trade names, if the firm, as a matter of fact, had, up to that time, become entitled to any such. . . . The transfer of the exclusive right to the use of said name is sought to be made out from the mere fact that said instrument assigned all the assignor's interest in the assets of the business, and trade-marks and trade names, if such there were, are claimed to have been a part of the assets assigned. The right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed, but must be clearly shown. Where it is so shown, the transaction will be upheld. But it will not be sustained upon doubtful or uncertain proof. All the circumstances surrounding the execution by Hazelton of the assignment of his interest in the business tend to negative the assumption that any property in a trade-mark or a trade name was within the

contemplation of the parties, and the evidence, to say the least, leaves it doubtful whether the firm, at the time said assignment was made, had any property rights of that character. We therefore think that the intention on the part of Hazelton to divest himself of the right to use his own name in any business in which he might see proper to engage, is not shown with such clearness and certainty as would justify the courts in undertaking to enforce it."

In *Thyme v. Shove*, 45 Ch. Div. 577, Stirling, J., said: "This, then, is a case in which upon the sale of the business there was no express assignment of the right to use the name of the former owner of it. . . . He has assigned the good-will of his business to the defendant; and by virtue of that assignment the defendant, in carrying on the business, has the right to use the name of the assignor for the purpose of showing that the business is the business formerly carried on by the assignor; and he has the full right so to use it, subject to this: that he must not exercise that right so as to expose the assignor to any liability by holding him out to be the real owner of the business. That is the only limit of the defendant's right to use the plaintiff's name."

In *Mattingly v. Stone* (Ky. 1890), 14 S. W. Rep. 47, Holt, J., said: "A trade-mark proper is of value, and a subject of commerce. It therefore passes to the assignee of a bankrupt owner. But a distinction is to be taken, it seems to us, between such a case, and the use of a person's name, merely, which may be valuable on account of his honesty or skill. He may, by voluntary sale or transfer, assign the right to use his knowledge or name; but we are at a loss to know how his right to use them can be taken from him by a judicial proceeding. They remain to the bankrupt as his capital for a new beginning."

In *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, Mulkey, J., said: "The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business. *Gillis v. Hall*, Cox's Am. Trade-Mark Cases 596; *Witt v. Corcoran*, Cox

Man. 423; *Charlton v. Douglas*, Cox Man. 172; *Ayer v. Hall*, 3 Brew. (Pa.) 509; *Probasco v. Bouyon*, 1 Mo. App. 241; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440."

In *Levy v. Walker*, 10 Ch. Div. 436, Hall, V. C., said: "It seems to me that the question whether 'good-will' does ordinarily include the right to use the name of a living person, should receive one general answer, viz.: that it does not."

In *Scott v. Rowland*, 20 W. R. 508, Wickens, V. C., said: "That even assuming the good-will had been effectually assigned to the defendant, it would be a question whether that would give him the right of using the plaintiff's name; as expressed in *Churton v. Douglas*, Johns. 174."

In *Hudson v. Osborne*, 39 L. J. Ch. 79, James, V. C., said: "It has been settled that there is no implied covenant of any kind in the sale by an individual himself of the good-will of his business; but it seems to be settled that a trader, whose business and the good-will of whose business has been sold by himself or by any person deriving title under him, has no right to represent himself as carrying on that identical business; he has no right to use the trade-marks, which were the marks of that business, or by the use of the name, or of a title of the firm, to represent himself as being the continuer of that identical business which was sold. I think that a man, who has sold the house which is known as Osborne House, and the business which is known as the Osborne House business, has no right to resume that name, which can only be resumed for the purpose of deceiving the public into the belief that his present business is the same business as his former one. He has no right to use the words 'Osborne House.' I think that hardly lies in the mouth of these defendants to say, it was their own name; the house was sold; if Osborne had sold it himself, with the brass plate, then I don't think he would have had a right to complain of the continuance of the ornaments of the house, and there was no obligation on the part of the purchaser to remove that brass plate with the word 'Osborne' upon it. It could not have been done without some expense, and it is not by any means an uncommon thing for persons buying a business to continue the name they find there."

In *Howe v. Searing*, 10 Abb. Pr. (N. Y. Super. Ct.) 264, Hoffman, J., said: "The first and the most important question in the cause is, what right passed to Baker, under the sale and transfer to him, in January, 1852, of the leasehold premises, stock, and trade, with the 'good-will of the business of baking, now or heretofore carried on by me in the city of New York.' The authorities referred to, do in general describe the good-will of a trade 'as a probability that the old customers will resort to the old place.' . . . The judgment in *Crutwell v. Lye*, 17 Ves. 346, distinctly admits, that, although you may set up a similar business, you are not entitled, when you have sold the good-will of the business, to represent that you are continuing the identical business; not to say that you are the owner of that which you have sold." In the foregoing case it was said by Moncrief, J., *dissenting*: "Whether or not the term 'good-will,' under all circumstances, includes the name under which the business originated or was continued, or became a thing of specific value, is not in the present instance necessary to determine. . . . The plaintiff adopted, appropriated, and used the words or name 'Howe's Bakery,' and by that name his establishment became known, and was extensively patronized, and was a thing having specific value. The plaintiff so avers in his complaint. . . . The name or words, 'Howe's Bakery,' was nothing but a trade-mark, and as such, is now sought to be protected by the plaintiff. The name or trade-mark passed by the assignment and transfer of the 'good-will,' and if it was not the thing itself, it was an integral part of it."

In *Churton v. Douglas*, 1 Johns. 174; 28 L. J. Ch. 841, Wood, V. C., said: "There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-mark. But the question of trade-mark is in fact the same question. The firm stamps its name on the articles. It stamps the name on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition

4. Assignment for Benefit of Creditors.—A general assignment for the benefit of creditors of all the assets of a trade-mark owner, will operate to transfer the trade-marks, provided they are not of such a personal nature as to be inseparably attached to the owner, and necessarily indicate his personality and skill, and provided, also, that the business which comes into the hands of the assignee can be sold as a going business, so that the trade-mark may be used by the purchaser to indicate to the public the same facts as formerly. But the trade-mark cannot be sold as an abstract right disassociated from any particular business or goods.¹

which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that. That the name is an important part of the good-will of a business is obvious, when we consider that there are at this moment large banking firms, and brewing firms, and others, in this metropolis, which do not contain a single member of the individual name exposed in the firm. That being so, it appears to me that, when the defendant parted with the good-will of this business to the plaintiffs, he handed over to them all the benefit that might be derived from holding themselves, not as the persons interested in that particular business, which business had been identified as being carried on by the particular firm. When once that sale had taken place, no person other than the plaintiffs could have any right to describe himself as 'late John Douglas & Co.' Certainly the defendant could have no such right. The name of the firm, 'John Douglas & Co.,' had become a name well known. The business was identified by that name. And the defendant, having assigned all his share in the good-will of the business identified as that formerly carried on by John Douglas & Co., was not entitled to represent himself to the world as carrying on that business. He parted with all right so to represent himself when he sold all his share in the good-will. It is not as if he were calling himself 'John Douglas' alone, and carrying on a similar business under that name, and endeavoring to attract the custom to himself under that name by his own ability; but he represents himself as carrying on the identical business; and by so doing he is attracting to himself that custom which emphatically must be meant by the

term 'good-will,' namely, the custom which is drawn to the business, in the belief that it is in continuation of the business established under the name of John Douglas & Co. The constant repetition, on the outside of shops, of the words 'old established business,' 'established in such and such a year,' and the like, shows there is a considerable degree of attraction in a long-continued firm. And the words now in question, 'late John Douglas & Co.,' amount in effect to a declaration, 'This is the business established so long ago under the firm of "John Douglas & Co.,"' and we are the persons who carry on that business."

1. In *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, Cassoday, J., said: "It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words 'Fish Bros.' and 'Fish Bros. & Co.' partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers, respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned. . . . Upon the facts in this case, as found in the foregoing statement, and the law applicable, we are constrained to hold that the plaintiff acquired the good-will of the business, including the right to use the picture and words mentioned as trade-marks, notwithstanding they were not specifically named in any of the transfers or conveyances to the plaintiff. *Menendez v. Holt*, 128 U. S. 514. To the same effect, *Merry v. Hoopes*, 111 N. Y. 415; *In re Wellcome's Trade-Mark*, 32 Ch. Div. 213; *Hoxie v. Chaney*, 143 Mass. 592; 58

Am. Rep. 149; Witthaus v. Braun, 44 Md. 303; 22 Am. Rep. 44; Morgan v. Rogers, 19 Fed. Rep. 596."

In Warren v. Warren Thread Co., 134 Mass. 247, Morton, C. J., said: "The demurrer raises the question whether, notwithstanding the insolvency proceedings, the plaintiff retains the exclusive right to the use of the trade-marks. It is apparent upon inspection that these are not mere personal trade-marks, the use of which by any other person than the plaintiff would operate as a fraud upon the public. His name does not appear upon any of them except one, and in that it is a subordinate part of the trade-mark. They are all designs or symbols designating the place or the establishment at which the thread is manufactured, and not implying any peculiar personal skill in the plaintiff as the manufacturer, or importing necessarily that it is manufactured by him. . . . Upon the authorities, and upon principle, it is clear that, before his insolvency, the plaintiff had a property in his trade-marks which would be protected by the law, and which he had the right to sell and assign, at least in connection with his business and establishment. The insolvent law provides that 'the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed.' Gen. Sts., ch. 118, § 44. Under this statute, all the plaintiff's property which he could assign passed to his assignee. It includes, *ex vi termini*, his manufacturing establishment, machinery, tools and fixtures, manufactured goods, and the right to use the trade-marks in connection with the establishment and goods. It necessarily follows that he has no exclusive right to use these trade-marks, and no ground for maintaining this bill."

In Pepper v. Labrot, 8 Fed. Rep. 29, Matthews, C. J., said: "The complainant having, upon his own petition, been declared a bankrupt, filed the required schedule of his assets and liabilities, in which he described the tract of land inherited from his brother as including the 'Old Oscar Pepper Distillery,' and as such it was known at the time the title became vested in the defendants (who purchased from the assignee in bankruptcy). . . . Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 322. . . . Neither by

its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied by him with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the produce. If a trade-mark at all in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford county." See also Hall v. Barrows, 4 De G. J. & S. 157; Motley v. Downman, 3 Myl. & C. 1; Kidd v. Johnson, 100 U. S. 617.

In Matter of Swezey, 62 How. Pr. (N. Y. C. Pl.) 215, Van Hoesen, J., said: "The examination is, as I understand it, to ascertain whether or not certain property, called a trade-mark, belongs to the assigned estate. That can only be determined by learning the facts which give the trade-mark its value. If, as Chief Justice Daly said in the Hegeman case, this trade-mark is made valuable simply because the public believes that Dart's personal skill, experience, and peculiar knowledge impart to the fabric a perfection which it would not possess if made by any other person, it does not belong to the assigned estate. If, on the other hand, the trade-mark indicates a certain fineness or quality in the goods, and does not owe its value to the public belief in the peculiar skill of the manufacturer individually, it will be part of the assigned estate, and will go to those who buy the factory which has heretofore produced the fabric. . . . A trade-mark may be, and often is, transferred *in invitum* by proceedings in bankruptcy."

In Hudson v. Osborne, 39 L. J. Ch. 79, James, V. C., said: "I think this case is governed by the case of Churton v. Douglas, Johns. 174. I take it that in substance there is no distinction between a sale by a man himself of his business and the good-will of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind. His business and the good-will of that business become vested in his

assignees, and could be properly sold by them for the purpose of making good, so far as those assets go, the debts which he owes to his creditors, and they have a right to sell everything which he himself could sell."

In *Bury v. Bedford*, 33 L. J. N. S. Ch. 465, Turner, L. J., said: "That whatever interest the defendant, John Bedford, had in the mark, or in the use of it (whether as partner during the continuance of the partnership, or during his life after its determination, or after the deaths of the partners, if, as contended on his part, he was then alone entitled to it), passed to the trustees under the creditors' deed, for by that deed, not only the joint estate of the partners, but the separate estate of each of them, was passed to the trustees."

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, Wood, V. C., said: "But, whether the plaintiff himself ever had any interest in the letters-patent or not, it appears that Taylor, when he left the concern, made over to his partner, Shuttleworth, along with the business, and included in the price, the right to use, not the patent by name, but the name of the business. Shuttleworth and Taylor had been joint owners of the letters-patent. Shuttleworth, under that assignment, carried on the business alone under the name of Taylor & Co., up to his bankruptcy in 1839. His assignees do the same thing for a time, and then they make over to the present plaintiff, for value, the right of carrying on the trade, and of using a variety of plates and engravings and drawings relating to the trade and trade-marks, and which were in the custody of the assignees; and the plaintiff has accordingly carried on such business and used the plates, etc., ever since, for a period of more than eleven years. He has, therefore, clearly established his right to this particular form of engraving upon the wrapper and the interior sheet."

In *Crutwell v. Lye*, 17 Ves. 336, Eldon, Lord Chancellor, said: "It is necessary first to consider, whether the sale under bankruptcy of lot No. 1, and the good-will belonging to those premises, or the trade established upon them, would, if there was nothing more, upon any principle, prevent the bankrupt's immediately, by the assistance of his friends, again setting up the trade from Bristol to London, by

the very same road; and I cannot say, that any of those interests, which a bankrupt is supposed to have by the effect of his certificate, or in the surplus of his estate, after payment of his debts, form a principle, upon which he should not be permitted to engage again in the like trade; which, in this sort of case, is materially distinguished from the same trade. In *Hogg v. Kirby*, the defendant's magazine, being published as a continuation of the plaintiff's, was the same. Supposing the bankrupt, therefore, not to have had any other interest, there is no principle upon which this court could hold, that he should not engage in the direct trade, by the same road. . . . The bankrupt advertises, that he is reinstated in the carrying business; and, though that expression may have a tendency to misconception, yet he is, in a fair sense, reinstated, if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade; and has set it up, as the like, but not the same, trade with that sold; taking only those means, which he had a right to take, to improve it; and there is no fact, amounting to fraud, upon the contract made with the plaintiff. The question whether, under the circumstances, the plaintiff is to carry the agreement into execution, if the assignees have taken from him actively the benefit of that contract, is very different; but, whatever opinion may be held upon this transaction, in that view of it, I do not see the fraud, upon which, as a judge in equity, I can lay my hand; and I dare not, from this place, so deal with it."

In *Longman v. Tripp*, 2 Bos. & P. N. R. 67, Sir James Mansfield, C. J., said: "As to the question, whether the right to this newspaper passed under the assignment, can any case be found in which it has been held, that property of this description would not pass under a commission of bankrupt? I remember a case before Lord Mansfield, in which the advantage of a new-walk was held to be assets upon a plea of *plene administravit*, and I dare say that such an interest has often been sold under commissions of bankrupt. If the interest in question did not vest in the assignees, then the right is not gone, and the sale of the assignees is of no consequence. Perhaps the reason why no case upon the subject is to be

5. Succession by Inheritance.—A trade-mark may pass by inheritance to the heirs at law of the original owner, provided they are his successors in business. The legal successor in business in any case will take the trade-mark, whether by survivorship among partners, or by transfer or succession of the business, by any legal method. The executors of a deceased trade-mark owner will also succeed to the right to employ the trade-marks, provided they continue to conduct the business formerly carried on by the owner of the marks, and in winding up the estate they may sell the business and transfer the marks with it, provided the marks are not of a personal nature, and are susceptible of being used by the successor without misrepresentation.¹

6. License to Use Trade-Mark.—As a general rule, a valid license cannot be granted for the use of a trade-mark. This rule is based upon the principle that a trade-mark must indicate the ownership and origin of the goods, and having once become associated with the product of an individual or person, to permit the use of the same mark by several persons, even by authority of the owner, would be to authorize a fraud and deception upon the public by representing goods made by the licensee as emanating from the original adopter of the mark. This rule, however, is not without exceptions. Thus, the manufacturer of a patented article, upon which a trade-mark is employed, in selling the patented article, gives an implied license to all subsequent purchasers to deal in the article itself and to sell it under the same trade-mark.

found, is because the point has never been doubted." And, in the same case, Rooke, J., said: "If the right which the bankrupt had in this paper were assignable by deed, it passed under the assignment of the commissioners."

1. In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "It has also been held, in several cases, that where a trade-mark or a name, or a trade-mark and name united, has been used and recognized, as denoting that the article is made at a particular establishment, the name used being that of the proprietor of the establishment, as 'Stilman's Mill' (*Carmichel v. Latimer*, 11 R. I. 409; 23 Am. Rep. 481), that those who succeed to the establishment, such as his heirs, next of kin, or his successors in interest, may, in carrying on the establishment thereafter, there being no statutory enactment to the contrary, continue to use the same name and trade-mark, without any reference to their derivative title, for nobody is thereby deceived, as they get the same article and from the same place as they got it before. *Witthaus v. Braun*, 44 Md. 303; 22

Am. Rep. 44; *Fulton v. Sellers*, 4 Brew. (Pa.) 22; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 542; *Carmichel v. Latimer*, 11 R. I. 409; 23 Am. Rep. 481; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 444." In *Marshall v. Pinkham*, 52 Wis.

572; 38 Am. Rep. 756, Cassoday, J., said: "It is equally clear that any of the Marshall children, or any other person by the name of Marshall, having acquired a knowledge of the compound, had a perfect right to manufacture and sell it, by himself or others, in his own name, even against the protest of old Samuel Marshall, provided he did not do it in such way as to be likely to mislead ordinary purchasers, proceeding with ordinary caution, into the belief that they were purchasing the liniment manufactured and sold by old Samuel Marshall himself."

The name of a person, in connection with other marks, may form proper subject-matter for trade-mark registration by the business successors of such person. *Ex p. Frieberg*, 87 P. & S., Am. Trade-Mark Cases; 20 Pat. Off. Gaz. 1164.

In all cases where the good-will of a business is purchased, and the trade names or trade-marks are of a nature indicating the personality of the original founder of the business, the use of the marks by the purchaser will always be by the license of the original founder, and unless this is expressly made irrevocable by contract, it may be terminated at the will of the original founder of the business whose name is used in connection with it.¹

VIII. PARTNERSHIPS—1. Trade-Mark of Individual Entering Firm; Rights of Firm Therein.—The rights of a firm in the trade-marks of a member, which were held and employed by him before entering the firm, will, in great measure, be controlled by agreement. In the absence of express agreement, the rights of the firm in

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "A point is made in behalf of the defendant, Annie Oakes, that before the plaintiffs acquired the alleged right to use the name of Oakes in the manufacture of candles, she, by marrying with Oakes, had acquired a right to use his name in the same connection, of which the plaintiffs cannot lawfully deprive her. There is nothing in this point except novelty. Peter Oakes could not confer upon Annie McLaughlin, by marrying her, any higher rights in the use of his own name than he himself had. A son cannot acquire from his father the right to use his father's name as a trade-mark, if the father had parted with the right by contract (*Filkins v. Blackman*, 13 Blatchf. (U. S.) 440), and we do not see how a wife could stand in a better position as to the name of her husband."

In *Huwer v. Dannenhoffer*, 72 P. & S., Am. Trade-Mark Cases; 82 N. Y. 499, Earl, J., said: "A trade-mark is a specie of property which may be sold or transmitted by death with the business in which it has been used. *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; 11 H. L. Cas. 523; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278."

See *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523.

1. Where a distiller sells his business and agrees that his name may be employed in connection therewith for a short period, the purchaser may, during such period, employ the name of the founder, but the license is terminable at the will of the founder. *Mattingly v. Stone* (Ky. 1890), 14 S. W. Rep. 47.

Where a license for the use of patents coupled with a trade-mark, in-

cludes a keeping of accurate accounts and the rendering of statements at specified periods, the fulfillment of these terms becomes a condition precedent to the existence of the license, and on breach the license is terminable. *Martha Washington, etc., Flour Co. v. Martien*, 44 Fed. Rep. 473.

A dealer in sewing machines, who has purchased old machines bearing the trade-mark of the manufacturer, will not be restrained from selling them with said mark. *Singer Mfg. Co. v. Bent*, 41 Fed. Rep. 214. See *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208.

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, Daly, F. J., said: "The defendants were simply the servants of the company during the period covered by the agreement. The transfer of the wood-cuts to the latter was simply to enable them to place the labels upon the pomade manufactured by them under the company's supervision, and was not intended to, and did not, have the effect of transferring to the defendants any property in the trade-mark. In fact, the defendants by their own acts afterward acknowledged the company's continuing ownership and right to use the trade-mark."

So far as the object sought could be attained, it would operate to the plaintiffs' detriment by diminishing the sale of their articles in the market, and they are entitled to be protected by a court of equity from this attempt on the part of rivals to deprive them of the fruits of their industry or enterprise in making their own fabric known and recognizable by its distinctive trade-mark. There is a right of property in a trade-mark which is capable of being transferred to another, and the right and title

such a case will amount to nothing more than a license, revocable by the retirement of the owner of the marks from the firm.¹

2. Rights of Members of a Firm in the Trade-Marks of the Partnership.—The trade-marks adopted by the firm to designate the origin and ownership of its goods are partnership assets, and all the members are entitled to their use, and are interested in their value in proportion to their interest in the firm.²

3. Rights of Retiring Partner.—Where the trade-marks or trade names of a partnership consist of technical trade-marks or trade names other than the name of the retiring partner, and the retiring partner, either by express agreement or acquiescence, permits

which the company had to this trade-mark passed to the plaintiffs by the assignment."

1. In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Shipman, J., said: "When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, 'the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property.' *Bury v. Bedford*, 10 Jur. N. S. 503."

In *Kidd v. Mills*, 5 Pat. Off. Gaz. 337, S. N. & H. Pike, when in partnership in Cincinnati under the firm name of "S. N. & H. Pike," adopted as trade-marks for whisky the words "Magnolia" and "Dave Jones." In 1854 H. Pike retired, and S. N. Pike carried on the business for several years, sometimes alone and sometimes in partnership with others. When in partnership with one Kidd, he sold the premises on which, and the apparatus, etc., with which, the business was carried on at Cincinnati, but which were his private property, to Mills, Johnson & Co., giving them at the same time what purported to be a license to use the brands used in the business. Mills, Johnson & Co. registered these brands as their trade-marks. Kidd & Co., a firm which consisted of Kidd and one other surviving partner of "S. N. Pike & Co.," applied for registration of the same marks. Interference was declared in order to try title. On these facts the commissioner decided that, "When Pike ceased the use of these trade-marks as an individual, and consented to their adoption and use by the firm of which he became a member, the right to the trade-mark passed to the firm." This case was practically reversed on this point by *Kidd v. Johnson*, 100 U. S. 617. The facts were the same as in the above case, but the

court, speaking through Mr. Justice Field, held that Pike "did not place his interest in the trade-mark in the concern as a part of its capital stock. He allowed the use of it on packages containing whisky manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned, and on which their business was conducted. He was engaged in the same business before the partnership as afterwards, and taking his clerks into partnership changed in no respects beyond its terms, their relation to his individual property. Their subsequent conduct, moreover, plainly shows that they claimed no interest in the trade-mark."

In *Bury v. Bedford*, 4 De. G. J. & S. 352, Turner, L. J., said: "This part of the case . . . rests, as it seems to me, upon the simple question whether, upon the formation of a partnership with a person entitled to the benefit of the trade-mark, the trade-mark does not, in the absence of express provisions in relation to it, become an asset of the partnership, and in my opinion it does, for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade." This case is followed on this point in *Sohler v. Johnson*, 111 Mass. 238.

2. Where two persons associated in business for the manufacture and sale of a commodity (one having been the originator or inventor thereof), jointly adopted a trade-mark for it, they are equally entitled to its use after the dissolution of their connection; and this whether the arrangement constituted a partnership, or whether one was to receive a portion of the profits of the business as a salary, provided the trade-mark was adopted in conjunction. *Taylor v. Bottim*, 5 Sawyer (U. S.) 584.

the continued use of the trade-marks by the firm, he will be held to have abandoned all rights in them; but where the trade-mark or name consists of the personal name of the retiring partner, nothing short of an express agreement will deprive him of the right to use his own name in connection with a similar business, and as a general rule he can enjoin his former partners from the further use of his name in any manner which might involve him in liability for the debts or contracts of the firm or deceive the public.¹

1. In *Ward v. Ward* (Supreme Ct.), 15 N. Y. Supp. 913, defendant withdrew from plaintiff corporation and established the firm of Wm. H. Ward & Co., engaged in the same business. An injunction was asked to prevent defendants from stamping the words, "Marcus Ward's Son" on their goods, and the words, "Late of the firm of Marcus Ward & Co." The injunction was refused, the facts being that defendant was a son of Marcus Ward and was lately a member of said firm.

G., S. & B., partners in trade, carried on business under the firm name of "G., S. & B." B. sold his interest to G. The court said that, as there was no express agreement to assign the good-will, G. had no right to continue to use the name of B. by carrying on business under the old name. *Gray v. Smith*, 43 Ch. Div. 208. *Levy v. Walker*, 10 Ch. Div. 436, *distinguished*.

A copartnership, trading under the firm name of C. W. Dorr & Co., made an assignment for the benefit of creditors, and the assignee under order of court, sold the stock (including a number of wrappers, etc., marked with the name of the firm) to plaintiff corporation, which continued the business at the old stand. C. W. Dorr, of the old firm, organized another corporation under the old firm name. An injunction was refused on the ground that C. W. Dorr had a right to go into business in his own name, unless he misled the public or encroached on the rights of plaintiff. *Iowa Seed Co. v. Dorr*, 70 Iowa 481; 59 Am. Rep. 446.

A junior partner retiring from a firm retains no interest in a trade-mark used by the firm and originated by its senior member, particularly when the weight of evidence indicates that he released all rights to the brand. *Holt v. Menendez*, 128 U. S. 514, *affirming* 23 Fed. Rep. 869. Here Fuller, C. J., said: "It may be that where a

firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain 'his share' in the good-will, so far as that might consist in the use of trade-marks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business, and the future conduct of the business by them under the old name, the good-will remains with the latter as of course."

Where one partner retires from a firm, and the other members of the firm, with the consent of the retiring member, continue the business under the old firm name, they will be held to have succeeded to the business of the old firm, and the trade-marks and trade name of the old firm. Where the facts show that the remaining partners took the legal statutory steps to perpetuate the old business as to successors, and the retiring partner permits them to carry it on as such under the old name, for two years, without objection, admitting them in sundry receipts to be "successors to the old firm," he will not be now heard to gainsay it. *Hazard v. Caswell*, 57 How. Pr. (N. Y. Supreme Ct.) 1.

A purchaser of all the partnership property of a firm, on their dissolution, does not thereby acquire the right to use the firm name as a label on his goods, or to advertise himself as the successor of such firm, and will be restrained from so doing. *Reeves v. Denicke*, 12 Abb. Pr. N. S. (N. Y. Super. Ct.) 92. In this case, Monell, J., said: "When, therefore, the name and style of a mercantile firm is that of the principal, and most responsible and influential member of the partnership, the mere transfer of the interests of such member, in the partnership property, will not convey the partnership's

4. Rights of Partners Buying Others Out; Rights of Purchaser in Name of Retiring Partner.—A partner who has sold out his interest in a firm to other partners, will be restrained from carrying on the same business under any name so nearly like that of his former firm as to be likely to deceive purchasers, and interfere with the business of his former partners, unless the name under which the firm did business happened to be the personal name of the retiring partner, in which case he could not, in the absence of an express agreement to the contrary, be restrained from using his own name, and he might even be able to restrain his former partners from using it, if by doing so they would make him responsible for their debts or deceive the public.¹

name to the purchaser, or give to him the right to continue its use against the consent of such person. . . . It is a very common mistake to suppose that a purchaser of the property of a mercantile firm is the 'successor' of the firm. He succeeds to the property, to all that is conveyed to him, but to nothing more; and he has no more right to describe himself as the successor of such firm, because he has purchased such property, than he has to designate himself the successor of a manufacturing company from which he has casually purchased some goods." *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394, *disapproved*, and *Howe v. Searing*, 6 Bosw. (N. Y.) 354, *followed*.

The remaining partner is not entitled, upon dissolution, and under a contract which permits him to take over the shares of the retiring partners at a valuation, to use the names of the retiring partners. *Dickson v. McMasters*, 18 Ir. Jur. 202.

Plaintiffs and defendants having carried on business as partners under the name of "A. J. White & Co.," defendants withdrew and set up the same business on their own account, using the same firm name. An injunction was refused so far as the use, by defendants, of the name of firm, "A. J. White & Co.," was concerned, the name of one of the defendants being A. J. White. *Comstock v. White*, 18 How. Pr. (N. Y. Supreme Ct.) 421.

1. In *Jennings v. Johnson*, 37 Fed. Rep. 364, it was held that the plaintiff, who had been a member of the firm which had prepared the article, and who had purchased the business, had a right to state on his labels that the article was prepared by the old firm.

An injunction lies to restrain part-

ners who have sold out their interest in the good-will of a business, from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business. *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; 52 Am. Rep. 811.

Two women, C. and W., carried on a partnership business under the firm name of "C. & W." C. married L., and afterwards proceedings were had to wind up the partnership, and by decree the partnership business, good-will, etc., was ordered to be sold to plaintiff or defendant, whichever should be the highest bidder. W. was the purchaser, and carried on the business under the old name. On appeal the court said, *reversing* the court below, that the assignment of the good-will and business included the exclusive right to the name of the old firm. *Levy v. Walker*, 10 Ch. Div. 436.

Plaintiff was a partner with defendant and his son, under the firm name of "Bryan Corcoran, Witt & Co." Defendant having purchased the business, good-will, trade names, trade-marks, etc., began business under the name of "Bryan Corcoran & Co.," or "Bryan Corcoran, Son & Co." The defendant was restrained from so doing, or from carrying on the business under any other name calculated to make people believe that he was successor to the old firm. *Witt v. Corcoran*, Seton (4th ed.) 257; 2 Ch. Div. 69; 45 L. J. Ch. 603; 34 L. T. N. S. 550; 24 W. R. 501.

Theodore and John McGowan were manufacturers of pumps, under the name of "McGowan Brothers." John sold out to Theodore his interest in the business, assets, etc., including the old patterns with name of "McGowan Brothers" on them. After contract of sale was executed, there was inserted

5. Rights of Partners on Dissolution Dependent Upon Nature of Trade-Mark; Rule as to Technical Trade-Marks; Rule as to Name of Partner or Partners.—On the dissolution of a partnership, technical trade-marks, being the assets of a firm and also indivisible, must either be sold with the business as entireties, or all partners may use them with equal right, subject to the exception, however, that on dissolution the partners revert to their individual rights and responsibilities, and each partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name, and prevent its use by another, even although during the partnership it may have been the name under which the partnership did business.¹

in the notice of dissolution a privilege to Theodore of using the old firm name. Theodore, with others, incorporated under the name of "The McGowan Brothers Pump and Machine Company," and transferred to said corporation all his right and interest as purchased from John. Injunction was granted at suit of John to restrain the use of the words "McGowan Brothers" in said corporate name, the grant of its use to Theodore being in the nature of a revocable license. *McGowan Bros. Pump, etc., Co. v. McGowan*, 2 Cin. Super. Ct. (Ohio) 313.

Plaintiff and defendant carried on business under the firm name of "James Milbourn & Co." Plaintiff bought out defendant's share of the business and the latter set up the same business next door, and used the former firm name. An injunction was refused, "Milbourn" being the defendant's own name which he had a right to use. *Bond v. Milbourn*, 20 W. R. 197.

In *Churton v. Douglas*, Johns. 174; 28 L. J. Ch. 841; 5 Jur. N. S. 887; 33 L. T. 57; 7 W. R. 365; 22 L. R. 172, J. D. and his partners carried on business under the firm name of "J. D. & Co." J. D. sold out his interest in the copartnership and good-will of the business to his partners, and subsequently set up a similar business next door under the same firm name. An injunction was granted on the ground that, although he could not be prevented from carrying on the same trade, yet he could not adopt the name of the old firm. *Wood, V. C.*, saying: "The name of a firm is a very important part of the good-will of the business carried on by the firm. . . . The question of trade-mark is, in fact, the same question. The firm stamps its name on the articles. It stamps the

name of the firm which is carrying on the business on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put in anything short of that."

1. A partnership to which is given by one of the partners the right to use his name as a part of the firm style or title, cannot, upon its dissolution, transfer that right to its successor. A grant by an individual of the right to the use of his name in that of a partnership of which he is not a member, given without consideration, is probably a mere license, revocable at pleasure. But the case of a trade-mark proper must be distinguished. *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 618. The court saying: "If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred." Acquiescence by any person in the wrongful use of his name will not prevent his asserting his rights in equity, if he has not had notice of such wrongful use during his acquiescence.

This case cites with approval *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278; 9 Am. Rep. 324, where it is said: "At the dissolution of the partnership, the partners revert back to their individual rights and responsibilities, and each

partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name."

After the dissolution of a partnership, either of the partners can use a trade-mark belonging to the partnership, until, in some way, he has divested himself of that right. *Huwer v. Dannenhoffer*, 82 N. Y. 499.

In *Young v. Jones*, 3 Hughes (U. S.) 274, Hughes, J., said: "It is well-settled law that, upon the dissolution of a partnership, each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say 'successor to the late firm,' and any like representations. In the absence of express stipulations, each partner may use the good-will of the former partnership. It is also held that rights in the trade-mark are analogous to rights in the good-will of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trade-mark of the firm. This right does not pass inferentially under a general assignment; but is like a man's skill in any kind of pursuit, it remains with him. See, for this principle, *Banks v. Gibson*, 11 Jur. N. S. 680."

In *Wright v. Simpson*, 15 Pat. Off. Gaz. 968, reversing *Simpson v. Wright*, 15 Pat. Off. Gaz. 248, the commissioner said: "Upon the dissolution of a co-partnership terminable at the pleasure of either partner, neither is entitled to the exclusive use or to the registration of its trade-mark, unless by virtue of special stipulations."

In *Robinson v. Findlay, Ward v. Robinson*, 9 Ch. Div. 487, an agreement was made between W., R. and G. by which W., a manufacturer, undertook to export through R., a commission agent, to G. in Rangoon, certain cotton goods. A trade-mark was arranged by the three parties for these exportations, some portions of which, and the general arrangement were new, while other parts consisted of R.'s coat of arms and name, and a symbol previously used by G. Some years after, W. ceased to send goods through R., but exported them through F. Both R. and W. laid claim to and continued to use the same mark. The court, speaking through James, Bag-gallay, and Bramwell, L. JJ., said the

principles of partnership applied. Bag-gallay, L. J., said: "It being clear upon the evidence that the designs were designs in which three persons were interested, for the purpose of carrying on a business or adventure in which all three were interested, it follows that upon the termination of that adventure, none of the three could claim any title against the other."

In *Condy v. Mitchell*, 37 L. T. N. S. 268, 766; 26 W. R. 269, M. and C., partners, who had sold a patented article, known as "C.'s Fluid," dissolved, and each commenced business for himself, C. in his own name and M. under the name of C.'s Fluid Company. An injunction by C. to restrain M. from using said firm name and mark was refused. Here James, L. J., said: "The partnership having come to an end, each partner having as much right as the other to the use of any name and of every word which had been used while the partnership existed, each of them set up a continuation of the same business; the tree of the partnership divided into two branches, one consisting of Condy and the other consisting of Mitchell. Condy set up his own part of the business, and Mitchell set up his part of the business; each of them had the right to use all the reputation that had been acquired by the manufacture and the sale of the article by the partnership; and each of them had the right to represent himself as the successor to, or the legitimate user of, the name of the article manufactured by the partnership. Each of them had a right at the moment of the dissolution of the partnership to use the word; and no special right could accrue to the plaintiff, unless he could show that, after the partnership had been dissolved, after both of the former partners had set up their several manufactures, the world was deceived into supposing that the one half which was represented by Mitchell was selling things made by the other half."

On the dissolution of a firm, the right to use the trade-marks thereof is an equitable asset of the firm, in which all the partners retain equal rights. *Weston v. Ketcham*, 39 N. Y. Super. Ct. 54.

Upon the dissolution of a partnership, the trade-mark vests in both partners, and a party claiming under a grant from one only has not an exclusive right to such mark, and, therefore, under the statute, cannot register it.

6. Rights of Creditors in Trade-Marks of Firm.—The creditors of a firm, if it be insolvent, may sell the good-will of the business and also the trade-marks, to satisfy their claims; but the interest of an individual member of a solvent firm in its trade-marks cannot be attached in any way, except so far as his interest in the firm is concerned.¹

Armistead v. Blackwell, 1 Pat. Off. Gaz. 603.

In *Scott v. Rowland*, 26 L. T. N. S. 391; 20 W. R. 508, on the dissolution of a partnership, the stock in trade was purchased by a surviving partner, but no assignment was made of the good-will. An injunction was granted on behalf of the outgoing partner to restrain the use of his name in the style of the firm. The vice chancellor said: "Even assuming that the good-will had been effectually assigned to the defendant, it would still be a question whether he would have a right to use the plaintiff's name. The law, as laid down in *Churton v. Douglas*, Johns. 174, makes an outgoing partner, who leaves his name in the style of the firm, liable to some extent for the debts of the firm; for instance, he would be *prima facie* liable on bills of exchange. In *Banks v. Gibson*, 34 Beav. 566, the outgoing partner was dead, and the case only goes to show that, as no liability can attach to an outgoing partner who is dead or bankrupt, there is no reason why his name should not be retained; but it is different where he is living. The injunction must be granted, restraining the defendant from using the plaintiff's name in connection with his business as a glass stainer, so as to represent that the plaintiff is a partner in the business."

In *Banks v. Gibson*, 34 Beav. 566, Romilly, M. R., said: "The state of the case seems to be this: The plaintiff's husband entered into partnership with the defendant for the term of fifteen years, and they carried on business until the death of the plaintiff's husband, in 1860. The articles of partnership contained a proviso, that, in the event of the death of either of the partners, before the expiration of the term of fifteen years, his executors or administrators should have the option, either of retiring from the partnership, or of continuing it with the surviving partner. What took place was this: The plaintiff's husband died in 1860, and the plaintiff, as his administratrix,

continued the partnership with the defendant for four years; they then dissolved the partnership and divided the assets between them as they thought fit. The name or style of the firm of 'Banks & Co.,' in which the defendants had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the good-will of a business had been sold, the name, as a trade-mark, would have been sold with it. If, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divided the other partnership assets, then each is at liberty to use the name, just as they did before. It is the same as if two persons who alone carried on the business of Child & Co., thought fit to separate, each would be entitled to use the name by which they carried on their business."

An injunction will lie at the suit of one against his former copartner, restraining the continuance of the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394.

In *Hoffman v. Duncan*, Seton (4th ed.) 256; Cox's Man. of Trade-Mark Cases 122, an injunction was granted, after dissolution of the firm of "Hoffman & Duncan," to restrain one of the partners from the use of said name.

1. An assignment for the benefit of creditors and a subsequent transfer from the assignee to a purchaser of the trade-mark and good-will, and as connected with it, the business name of a partnership, does not confer upon the purchaser (who subsequently organizes a corporation under the old firm name), the right to represent that the old firm has resumed business, and generally conduct the business as if it were a continuation of the old firm and not a corporation. In view of the statutes of the state against doing business under a fictitious name, a purchaser, as

7. Rights of Surviving Partners in Firm Trade-Marks and Name of Deceased.—Trade-marks, like good-will, are an asset of the firm, and when a firm is dissolved by the death of a member, they do not survive to the survivor, but must be sold and accounted for in the distribution of assets. The name of the deceased, which may be the trade-mark of the firm, may be used by the survivor or successors, if proper consideration has been given therefor in the settlement of the firm's affairs, and a representative of the estate cannot restrain the surviving partners from so doing. This rule is based upon the ground that the former bearer of the name, being dead, can no longer be held responsible for the firm's debts nor injured by the use of his name.¹

above, has not the right to do business under the old firm name, but only as successor of that firm. The surviving partner of the old firm has, after the assignment, no right growing out of his former connection, to the business name, trade-mark, or anything incident to the old firm, except to the use of his own name, and this he must use in a way not calculated to deceive. *Hegeman v. Hegeman*, 8 Daly (N.Y.) 1.

In *Taylor v. Bemis*, 4 Bliss. (U.S.) 406, the sale by execution creditors of a partner's interest in a firm name or trade-mark, was refused, on the ground that such interest was merely a right to a part of it, and that the right was too shadowy and intangible to be of any value apart from the partnership business.

1. In *Young v. Jones*, 3 Hughes (U.S.) 274, Hughes, J., said: "It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner, after the death of the other, succeeds to the good-will of the firm; the better opinion now being that he does not. *Hammond v. Douglas*, 5 Ves. 539. Even where the good-will of a prosperous business of eight years' duration has been sold by its proprietor along with the lease of the premises, and all the stock, wagons, and fixtures used in the business, which consisted of 'Howe's Bakery,' it was held in a leading case that the vendee had not the right to use the name 'Howe' of the vendor, that not having been expressly mentioned in the contract of sale. *Howe v. Searing*, 10 Abb. Pr. (N.Y. Super. Ct.) 264; *Collyer on Partnership* (last ed.) 236; 2 Kent's Com. 372, in notes."

Defendant, a surviving partner of the firm of Phelan & Collender, purchased from the executors of his de-

ceased partner the interests of the latter in the partnership property, patents, trade-marks, etc., and described himself as "Successor to Phelan & Collender," and his tables as "Phelan & Collender's Standard American Tables." Suit was brought by a son of the deceased partner to restrain defendant from so doing. An injunction was refused on the ground that plaintiff had no more right of action than any other person of the same name, and that his bill did not allege that defendant had acted with intent to deceive, etc. *Phelan v. Collender*, 6 Hun (N.Y.) 244.

Partnership stock includes the good-will of the business and the right to use the trade-mark. On the death of one partner and a sale to the other under a prior agreement, these do not survive to the surviving partner, but must be included in the valuation of the partnership stock. *Hall v. Barrows*, 32 L. J. Ch. 548; 9 Jur. N. S. 483; 8 L. T. N. S. 227; 33 L. J. Ch. 204; 10 Jur. N. S. 55; 9 L. T. N. S. 561, *reversing* the court below, Lord Westbury saying: "The case requires only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works; and that, as it might be so sold, it must be included in the valuation to the surviving partner."

Two of the defendants, who had been in business with J. G. Loring before his decease, under the firm name of "J. G. Loring & Co.," after his death took in the remaining two defendants as partners, and continued to use the name of the old firm both as a trade name and trade-mark. Suit was brought by the executors of J. G. Loring for an injunction to restrain defendants from so doing. It was decided

that defendants had acquired by user a right to use the name as a trade-mark; but that the representatives of J. G. Loring, under the *Massachusetts* statute (Gen. Stat., ch. 56), could restrain the use of the name as a trade name. *Bowman v. Floyd*, 3 Allen (Mass.) 76; 80 Am. Dec. 55. See also *Rogers v. Taintor*, 97 Mass. 291.

In *Howe v. Searing*, 6 Bosw. (N. Y.) 354; 10 Abb. Pr. (N. Y.) 264; 19 How. Pr. (N. Y.) 14, Hoffman, J., said: "It is, I apprehend, a well-settled rule, that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm." But the sale of the good-will of the business does not of itself transfer a right to the vendor's trade name.

The good-will of a partnership is a part of the assets of the firm, and does not survive to surviving partner. *Macdonald v. Richardson*, 1 Giff. 81; 5 Jur. N. S. 9; 32 L. T. 237.

Good-will is a part of the partnership assets and does not survive. *Wedderburn v. Wedderburn*, 22 Beav. 84; 25 L. J. Ch. 710; 2 Jur. N. S. 674; 28 L. T. 4. The court said: "The good-will of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity."

Although the personal representatives of a deceased partner may have a right jointly with survivor to the use of a trade-mark of the firm ("a trade-mark being in the nature of a personal chattel"), still the surviving partner alone has sufficient interest to entitle him to file a bill for injunction against an infringer. *Hine v. Lart*, 10 Jur. 106; 7 L. T. 41.

The good-will of a trade does not survive, but is partnership property. *Dougherty v. Van Nostrand*, Hoff. (N. Y.) 68; *disapproving* *Hammond v. Douglas*, 5 Ves. 539.

The good-will of a medical partnership survives to the surviving partner. *Farr v. Peace*, 3 Madd. 74.

In *Robertson v. Quiddington*, 28 Beav. 529, the court said: "The case of *Lewis v. Langdon*, 7 Sim. 421, also appears to me to establish very clearly that the firm's name (whatever its value may be) survives to the surviving partner." And in *Lewis v. Langdon*, 7 Sim. 421, Vice Chancellor Shadwell

said: "I cannot but think, when two partners carry on a business in partnership together, under a given name, that, during the partnership, it is the joint right of them both to carry the business on under that name, and that upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor."

In *Hammond v. Douglas*, 5 Ves. 539, it was held that the good-will of a trade carried on in partnership without articles, survives and is not partnership stock; in *Crayshaw v. Collins*, 15 Ves. 218, Eldon, L. C., expressed doubt of the decision in *Hammond v. Douglas*, 5 Ves. 539, on the point that the good-will of a partnership survived.

But in *Webster v. Webster*, 3 Swanst. 490, an injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, was refused. Thurlow, L. C., said: "It is impossible that using the testator's name in the trade, can subject his name to the trade debts."

As will be seen from the above cases there was some conflict in the early English cases as to whether, on the death of one member of a partnership, the trade-mark or good-will survived to the surviving partner. The rule is now definitely settled that both the trade-mark and the good-will are assets of the firm, and must be so dealt with. It has been, however, held that the tradename of a partnership will survive, but no reason is perceived why this should not be included in the valuation of the assets made to the representatives of the deceased partner.

It has also been well settled that, upon an assignment of the business or good-will, the trade-mark will pass. But a distinction must here be taken between trade-marks and trade names. The cases with regard to the latter are very conflicting, but the following seems deducible from the authorities: Where, by the use of the trade name, a liability may possibly attach to the retiring member of the firm, such use of the trade name will be enjoined; but where the assignee of the good-will, etc., whether continuing partner or third person, may use the firm name without any danger of liability attaching to the outgoing partner or deception of the public, such use will not be restrained. Again, where the trade name of the firm has also become by use its recognized trade-mark, it will pass as such by assignment of the business or good-

IX. LACHES AND ABANDONMENT—1. *Laches*.—In *England*, a trade-mark owner who permits the use of his mark by others while he continues to use it himself may, by gross laches, forfeit the right to enjoin the infringer. But in the *United States* this rule is rarely, if ever, applied,¹ the general rule being that delay in asserting a trade-mark right against an infringer amounts only to a

will, and its use will not be restrained. It may also be stated as a general doctrine, that where the name of the firm is substantially that of the assignor or outgoing partner, he will not be prevented from subsequently setting up business under his own name, in spite of its identity with, or close resemblance to that of the old firm, unless by sale or contract he is estopped to claim the right to use his own name.

1. In *Sanders v. Jacob*, 20 Mo. App. 96, Thompson, J., said: "The question of laches would be a serious one if there were no element of fraud in the case on the part of the defendant. . . . If the defendant had adopted this trade name innocently, and had gone on honestly practicing his trade under that name for four years, without objection on the part of the plaintiff, and had built up an extensive business under that name, we should say that it would be contrary to the maxims of equity to enjoin him from further practising under that name, at the suit of the plaintiff, at this late day. But where the element of fraud supervenes, lapse of time does not purge the defendant's conduct of this taint."

In *Estes v. Worthington*, 22 Fed. Rep. 822, a motion for a preliminary injunction was denied. Wallace, J., said: "Laches in prosecuting infringers has always been recognized as a sufficient reason for denying a preliminary injunction; sometimes, apparently by way of discipline to a complainant who has manifested reluctance to burden himself with the expense and vexation of a lawsuit, and delayed legal proceedings until his patience was exhausted. See *Bovill v. Crate*, L. R., 1 Eq. Cas. 388. When delay of the owner of a patent or trade-mark to prosecute infringers has been of a tendency to mislead the public, or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing. So, also, where, as in this instance, the extensive use of the trade-mark by others

with the implied acquiescence of the owner has contributed to give a reputation and create a demand for the article to which it has been applied, which it would not otherwise have acquired, equity should not by any stringent interlocution assist the owner to secure these fruits."

In *Re Heaton's Trade-Mark*, 27 Ch. Div. 570, Kay, J., said: "Where persons come and object, in whatever form, to the use of a trade-mark which has been used for a great number of years, it does not follow as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but most certainly it throws on those who object to the use the onus of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case."

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601, Nixon, D. J., said: "In *England* the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrongdoer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." See *White v. Schlect*, 14 Phila. (Pa.) 88; 67 P. & S. Am. Trade-Mark Cases; *Fillay v. Child*, 16 Blatchf. (U. S.) 376.

Plaintiffs were manufacturers of "Estcourt's Hop Supplement," and defendants began to sell another article as "Estcourt & Co.'s Hop Essence." An injunction was refused on the ground of delay, plaintiffs having waited seven months after knowledge

license at will which can be terminated at any time by a suit for an injunction.¹ And if the title of the plaintiff and the infringement

of use of word "Estcourt" by defendants, and failing then to produce evidence that a single person had been misled. *Estcourt v. Estcourt Hop Essence Co.*, 31 L. T. N. S. 567; L. R., 10 Ch. 276; 44 L. J. Ch. 223; 32 L. T. N. S. 80; 23 W. R. 313.

In *Rodgers v. Rodgers*, 31 L. T. N. S. 285, the mark in question was the words "Norfolk Works" or "Norfolk," applied to designate the place of business of both parties. Turner, L. J., said: "I do not think that as a matter of law the mere fact that it [the mark] has been used for a great number of years, necessarily affords a defense. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs having a remedy."

Where for twenty-five years complainants have had knowledge that their trade-mark is being infringed by rival manufacturers and have acquiesced in such use, they will be estopped from asserting their rights against innocent purchasers of such goods. But whether long acquiescence might debar complainants from remedy for their injury as against rival manufacturers, *quære*. *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

Isaacson v. Thompson, 41 L. J. Ch. 101; 20 W. R. 196, was a suit to restrain the use of trade-names in a fraudulent manner. The vice chancellor said that a delay of nine or ten months since discovery of the user, in asking for relief, was good ground for refusing an interlocutory injunction; that it is one of the most wholesome rules that a person who comes for the extraordinary relief of an injunction should come speedily.

In *Beard v. Turner*, 13 L. T. N. S. 746, a delay of two years on the part of the plaintiff in asserting his rights was held to disentitle him from asking for an account of profits. The court said: "But suppose you wish to profit by that act of which you say you have a right to complain, and shall at some future period complain of, then I apprehend this court will say, You must come here at once; for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of these goods. . . .

By not complaining at the time when you might complain, you are lying by, the man continuing to use your property, with the hope . . . of obtaining those profits which you stood by allowing him to make under this designation, without apprising him of your intention to make any such use of it."

In *Chappell v. Sheard*, 2 K. & J. 117; 1 Jur. N. S. 996; 3 W. R. 646. Wood, V. C., said: "The only doubt I have felt in this case was as to the laches; I have no doubt as to the infringement. But the principle is this—that if the owner of a copyright suffers one depredation to go unchallenged, the court will not allow him to call another's infringement in question. The plaintiffs have to purge themselves from the imputation of laches; but the onus of proving the laches is on the defendants; they must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches, so as to prevent them from having protection against any other depredations." In this case the delay, since the plaintiffs knew of the infringement, was not more than two months, and an injunction was granted. See also *Farina v. Gebhardt*, *Cox's Man. of Trade-Mark Cases* 118; *Flavel v. Harrison*, 10 Har. 467; 22 L. J. Ch. 866; 17 Jur. 368; 1 W. R. 213; 19 Eng. L. Eq. 15.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. Duer, J., said: "The consent of a manufacturer to the use or imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether express or implied, when purely gratuitous, may certainly be withdrawn, and, when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in making an account of profits, if such an account shall hereafter be decreed; but even the admission of the facts would furnish no reason for refusing an injunction."

1. See also cases cited in the note immediately succeeding. In *Blackwell's Durham Tobacco Co. v. McElwee*, 100

N. Car. 150, Smith, C. J., said: "The delay in vindicating an invaded right, beyond its weight in disproving its existence, cannot have the effect of extinguishing it, or operate beyond barring the action under the Statute of Limitations or a presumption of an abandonment. The indulgence may be deemed such an assent to the use of the device, as would not entitle the owner to demand damages for its intermediate use. . . . As is held in *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, a long delay in prosecuting the claim after knowledge of the wrong, would be competent evidence of acquiescence in it, but could be no bar to recovery, unless extended to the period presented in the Statute of Limitations."

The unauthorized use by other parties of plaintiff's trade-mark, is no justification of defendant's acts of infringement; but, on the contrary, such circumstance is, under the authorities, one of aggravation. *Funke v. Dreyfus*, 34 La. Ann. 80.

In *Consolidated Fruit Jar Co. v. Thomas, Cox's Man. of Trade-Mark Cases* 665, Nixon, J., said: "There has been large discussion of the question how far laches, in stopping the infringement of a trade-mark, will deprive a complainant of the benefits of a preliminary injunction. But that discussion has been put to rest, so far as this court is concerned, by the recent decision of the supreme court, in the case of *McLean v. Fleming*, 96 U. S. 245, where it was held that acquiescence of long standing was no bar to an injunction, although it precluded the party acquiescing from any right to an account for past profits." The court also quotes with approval *Fullwood v. Fullwood*, 9 Ch. Div. 176; 47 L. J. Ch. 459; 38 L. T. N. S. 380; 26 W. R. 435. Here an injunction was asked to restrain defendants from representing the business carried on by them as identical or connected with that of plaintiff. The court said the fact that the plaintiff had delayed for a year and a half to commence action, after having become aware of the conduct of defendant, was no defense, the period fixed by the Statute of Limitations not having elapsed. Fry, J., said: "In my opinion, that delay (and it is simply delay) is not sufficient to deprive the plaintiff of his rights. The right asserted by the plaintiff in this action is a legal right. He is, in effect, assert-

ing that the defendants are liable to an action for deceit. It is clear that such an action is subject to the Statute of Limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course, if the legal right be proved to exist. In saying that, I do not shut my eyes to the possible existence in other cases of a purely equitable defense, such as acquiescence or acknowledgment, and the various other equitable defenses which may be imagined; but mere lapse of time, unaccompanied by anything else (and to that I confine my observations), has, in my judgment, just as much effect and no more, in barring a suit for an injunction as it has in barring an action for deceit."

Where the defendant has been infringing the labels of the plaintiff or his predecessors in business, for more than twenty years, with the knowledge of the former during most of that time, although an injunction will be granted, yet by reason of the long-continued acquiescence of the plaintiff and his unreasonable delay in seeking relief, he will not be entitled to an account nor a decree for the profits. *McLean v. Fleming*, 96 U. S. 245, Clifford, J., saying: "Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complainant for an account of past gains and profits. . . . Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

Plaintiff was the manufacturer and vendor of "Wolfe's Aromatic Schiedam Schnapps," and defendant applied the same name to other spirits. The fact that defendant had used this name for ten years, failed as a defense. *Wolfe v. Barnett*, 24 La. Ann. 97.

The fact that plaintiff has been guilty of laches for several years in not seeking to enjoin defendant from using his trade-mark, will not finally disentitle him, especially where defendant has not been misled by the silence of

by the defendant are clear, the injunction will, as a general rule, be granted, notwithstanding the fact that the infringement may have continued for a long period; but the trade-mark owner will be held to have forfeited his right to damages and profits by the delay.¹

plaintiff into making serious outlays. *Lazenby v. White*, 41 L. J. Ch. 354.

The fact that third parties have at different times also pirated plaintiff's trade-mark, does not aid defendant, "unless it appears that the plaintiff assented to, or acquiesced in, such infringements upon his rights. . . . The depredations of others upon plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him, and courts have not shown any disposition to encourage that line of defense." *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275.

A moderate delay on the part of the plaintiff in prosecuting an infringement of his trade-mark or trade name, or such a delay as will enable him to obtain evidence, is no bar to his success. *Cave v. Myers*, Seton (4th ed.) 238; *Cox's Man. of Trade-Mark Cases* 304.

In *Lee v. Haley*, 21 L. T. N. S. 546; 18 W. R. 181, 242; L. R., 5 Ch. App. 155; 39 L. J. Ch. 284; 22 L. T. N. S. 251, *Giffard, L. J.*, said: "But when you come to look at the question of delay, each case must necessarily depend upon its particular circumstances and its own particular nature. Now, the first thing which is to be observed in cases of this description is this, that it would not be safe for any plaintiff to come into this court until he could establish actual cases of deception, because you would be forever trying hypothetical cases, and you would have a number of people brought forward to say, and probably truly, that the thing done was not calculated to deceive. That being so, I think the plaintiffs were quite justified in waiting until they could collect a sufficient number of cases to prove to the court that there had been a case of deception." Here the delay was only about three months and an injunction was granted.

In *McCardel v. Peck*, 28 How. Pr. (N. Y. Supreme Ct.) 120, *Miller, J.*, said: "It has never been held that a mere consent or acquiescence in the use of a name or trade-mark conferred an absolute and irrevocable right which

could not be annulled. While it may temporarily transfer and impart a right, it by no means follows that such a right is so fixed and determined that the original owner is forever afterwards debarred from revoking a permission previously given. The extent and character of the privilege thus conferred must depend very much upon the agreement and the circumstances of the case."

Acquiescence in the infringement of a trade-mark is not established by proof of the publication of advertisements during a period of ten years, which, although they sometimes infringe, yet they do not do so uniformly or continuously. *Kinahan v. Bolton*, 15 Ir. Ch. N. S. 75.

In *Rogers v. Nowill*, 17 Jur. 109, 171; 1 W. R. 122, 205; 3 De G. M. & G. 614; 22 L. J. Ch. 404; 20 L. T. 319, an injunction having been granted, restraining defendant from the use of a trade-mark containing the words, "*J. Rogers & Sons*," he formed, in 1848, a partnership with his father (who was named *John Rogers*), and brother, and used the same firm name. In 1853, plaintiff moved for committal for breach of injunction. *V. C. Stuart* refused the motion, but without costs, on the ground (among others) of acquiescence by the plaintiffs for five years. This holding was reversed on appeal. *Turner, L. J.*, said: "On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined against as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create a new right in him. See also *Taylor v. Carpenter*, 3 Story (U. S.) 458."

1. See also the cases cited in the note immediately preceding. A delay of two years in bringing suit to pre-

vent infringement is sufficient to preclude plaintiffs from obtaining an account of gains and profits. *Lloyd v. Merrill Chemical Co.*, 25 Ohio L. J. 319.

Where complainants' trade-mark for soap has been in common use among dealers for twenty years, and they have had knowledge of this fact for four years before filing their bill, although an injunction may be granted, they are not entitled to an account of sales or damages. *Low v. Fels*, 35 Fed. Rep. 361.

Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Where consent by the owner, to the use of his trade-mark by another, is to be inferred from his knowledge and silence merely, "It lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license." *Menendez v. Holt*, 128 U. S. 514; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Taylor v. Carpenter*, 3 Story (U. S.) 458.

Where plaintiffs, after the knowledge of an infringement of a trade-mark, delayed for five years bringing suit for injunction and account of profits, although an injunction will be granted, they will not be entitled to an accounting. *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542.

In *Manhattan Medicine Co. v. Wood*, 4 Cliff. (U. S.) 461, Clifford, J., said: "Equity will not decree for an account of past gains and profits where there has been laches in bringing the suit and long acquiescence in the use of the trade-mark by others, and especially not where the acquiescence covers a period of fourteen years."

Where the plaintiff has slept on his rights and has not been very vigilant in ascertaining who was interfering with his trade-mark, an injunction may be granted, but an account will not be allowed earlier than the filing of the bill. *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 219; 20 W. R. 311, 318; 41 L. J. Ch. 682.

Plaintiffs, manufacturers, but not printers, of cotton cloths, stamped on them the word "Amoskeag." Defendants, printers, but not manufacturers, of cloths, used the same word in the same way. A delay of nine years on the part of the plaintiffs in prosecuting

their rights, after they had become aware of the infringement, was held to disentitle them to relief by injunction. *Amoskeag Mfg. Co. v. Garner*, 6 Abb. Pr. N. S. (N. Y. Supreme Ct.) 265. This case was reversed on appeal. *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 297, the court comments upon the vagueness of the evidence by which the period of the plaintiff's laches (nine years), is established, and finds that it has been sufficient to prevent compelling an account for profits, but grants injunction. It criticises *Beard v. Turner*, 13 L. T. N. S. 747, contending for the rule laid down in *Harrison v. Taylor*, 11 Jur. N. S. 408, and *quoting*, with approval, *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. The court also makes a distinction with regard to laches, between a trade-mark and trade name, to the effect that, although a manufacturer and owner of a trade-mark for certain cotton goods may, by extreme laches, indicate that he never intended to apply that mark to a certain other kind of cotton goods, yet "such a process of thought would be inapplicable to an effort like the present, for laches can never have the effect of a concession that a person will not extend the use or the application of his name, nor can it confer upon the wrongdoer the right to build up and establish a business in another name."

Plaintiff, a pen-maker, stamped his pens "Joseph Gillott, Extra Fine," and sold them in boxes particularly labeled, the bottom of the box having a "caution," showing that he knew that others had attempted to pirate his trade-mark. There was also evidence that other manufacturers and stationers had been using the numerals "303" and the words "extra fine" in the same way for some fifteen years. An injunction was granted. *Potter, J.*, at special term, said: "There was, however, no evidence of the plaintiff's actual knowledge of this practice. The legal effect of this evidence is: First, that it is no defense that the fraud has been multiplied. Second, that acquiescence cannot be inferred, and it is revocable if it could be." *Leonard, J.*, at general term, said: "But it does not appear that he [the plaintiff] had discovered any individual whom he could attack as an offender. Nor can I believe that a 'caution' to the public against the fraudulent use of his device can be deemed an acquiescence

2. Abandonment.—The acquisition of title to a trade-mark has been likened in this article to the taking possession of a thing in a state of nature, the adoption and use for the first time for the particular purpose to which the mark is applied, with an intention to adopt it as a trade-mark, and acts indicating this intention, being the only acts necessary to acquire title.¹ This being true, it follows that this title once acquired by adoption and use may be abandoned to its original condition by disuse.² What will amount to an abandonment, is a question which must always be decided by the facts of each particular case; but the

in the use by others of the particular arrangement of numbers upon steel pens and packing boxes, which the plaintiff had first adopted and used, and which had come to be a designation of a particular and popular pen with the public." *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; *affirmed* 48 N. Y. 374; 9 Am. Rep. 553.

A delay of a year, or thereabouts, will not disentitle the plaintiff to an injunction, although he will not be allowed an accounting of profits. *Harrison v. Taylor*, 11 Jur. N. S. 408; 12 L. T. N. S. 339.

In *Cartier v. May*, Cox's Man. of Trade-Mark Cases 200, a motion to commit for breach of injunction was refused on the ground of plaintiff's delay for fifteen months; but injunction was enlarged to cover new fraud, and costs given.

1. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572.

In *Brower v. Boulton*, 53 Fed. Rep. 389, plaintiff's predecessors in business, good-will, and trade-marks, used the words "La Venzolana" on five shipments of flour in 1873, three in 1885, one in 1886, several in 1887, 1888, 1889 and 1890. Plaintiff used the mark thereafter and registered it in 1891. Defendant used the same words much more continuously since 1884. *Wheeler, D. J.*, said: "The use of these words by the plaintiff's predecessor in 1873 does not seem to have been sufficient in extent and time to make them indicate with definiteness that flour on which they might be placed came from him; and whatever rights in that respect had begun to accrue to him by that use were lost by the abandonment of the use long before the defendants began using them in 1884."

2. See *Menendez v. Holt*, 128 U. S. 514; *Symonds v. Greene*, 28 Fed. Rep. 834.

In *O'Rourke v. Central City Soap*

Co., 26 Fed. Rep. 576, the court said: "If the trade-mark be abandoned, or the use of it intentionally discontinued by the original proprietor, it may be readopted and appropriated by another, provided it has not become a mere description of quality or kind of product."

But a person may not appropriate a trade-mark belonging to another, without his consent, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Mouson v. Boehm*, 26 Ch. Div. 398; *Gray v. Taper Sleeve Pulley Works*, 16 Fed. Rep. 436.

The right to use a trade-mark is forfeited by non-user for a period of eight years, and cannot be resumed in prejudice of one who had used it exclusively during the period of abandonment. *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151. Here the court, by *Hughes, J.*, said: "That the right to use a trade-mark may be lost by abandonment or disuse, is too clear to need argument or the support of authority."

In *Lea v. Millar*, Seton (4th ed.) 242; Cox 513, the plaintiffs were manufacturers of "Worcestershire Sauce," and the defendants sold a sauce under the same name and labels. An injunction to restrain defendants from so doing was refused, on the ground of prior use, and also because the plaintiffs had publicly abandoned their old labels by recently adopting a new one, bearing their signature, as a distinctive mark. Cox, in commenting on the case, says: "It is not to be understood that the court decided that by merely adopting a new label plaintiffs abandoned the right to protect the features which were common to both old and new." Cox's Man. of Trade-Mark Cases 513, and foot-note.

Where one, in the employ of another, discovers or invents an article, and

general rule is that the mark will never be held to have been abandoned, unless a clear intention can be gathered from the acts of the former owner to give it up and to abandon his title to it,¹

gives it a distinctive name, and permits the employer with his acquiescence for many years to appropriate it with that name, and put it forth to the public as his own, the inventor will be held to have abandoned all his rights therein to his employer. *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233.

Where the plaintiff has acquiesced for a long number of years in the use by the defendant of plaintiff's alleged trade-mark, "Lackawanna Coal," to designate coal mined by defendants from the Lackawanna Valley, he will be held to have licensed defendant to use the same, and will be estopped from enjoining him from using it for such purpose. *Delaware, etc., Canal Co. v. Clark*, 7 Blatchf. (U. S.) 112.

In *Browne v. Freeman*, 12 W. R. 305; 4 N. R. 476, the plaintiff, who was the inventor of a medicine which he called "Chlorodyne," moved for an injunction to prevent the defendant from using the same word on a preparation of his own make; the plaintiff having previously dismissed a bill with costs which he had filed against defendant for the same purpose. The court said that such dismissal of the previous bill was an abandonment of the exclusive right to the trade-mark.

1. In *Mouson v. Boehm*, 28 Sol. J. 361, Chitty, J., said: "To constitute abandonment, an intention to abandon must be shown. Mere non-user of a trade-mark could no more be said to constitute abandonment than the mere non-user of the right to foul a stream belonging to a mill as an easement, could be said to constitute an abandonment of the easement. . . . Boehm, however, had neither broken up his moulds nor erased this trade-mark from his books and lists. On the contrary, he had continued to issue the mark in the trade-list of his firm."

It is also said that the mere fact of non-registration does not help to show any intention to abandon, as registration is simply a precedent to suing; and knowledge of user must be shown in order to establish acquiescence.

In *Julian v. Hoosier Drill Co.*, 78 Ind. 408, the court, by Morris, C., said: "The question of abandonment is one of intention, and the burden of establishing it lies upon the party who

affirms it. . . . In view of these facts it cannot be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than an intention to abandon valuable rights. Browne says that the question of abandonment is one of intention, and that 'A person may temporarily lay aside his mark, and resume it, without having in the meantime lost his property in the right of user. Abandonment, being in the nature of a forfeiture, must be strictly proven.' It is incumbent upon those alleging the defense of abandonment to show that the right had been relinquished to the public by clear and unmistakable evidence. Browne on the Laws of Trade-Marks, section 681; *Dental Vulcanite Co. v. Wetherbee*, 3 Fish. Pat. Cas. 87.

. . . . We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon and therefore has not abandoned, her right as to the future, to the exclusive use of her property in the trade-mark. Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment." See *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

In *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1, Daly, C. J., said: "A trade-mark, whether it consists of a symbol or a descriptive name, may be abandoned; and, if it is, it may then be appropriated by anyone, who, by doing so, adopts it as his own; or after it is abandoned it may be resumed by the original proprietor and readopted by him, if in the meantime it has not been taken possession of by another, or by the community in general, or become, as a name or device, by general user, a mere designation of the kind of article or product, when its quality as an exclusive trade-mark is gone; the criterion or test being, was there an intention to abandon, which will depend upon the special circumstances of the particular case."

The fact that the owners of a trade-mark ("Excelsior"), at the request of

or unless a common-law right be limited by registration under the statutes.¹

X. INFRINGEMENT—1. In General.—It has long since been established, that in the case of a technical trade-mark, the right of the plaintiff to relief is entirely independent of the intention of defendant, and even of his knowledge of the fact of his infringement. Generally speaking, all that is necessary is, for the plaintiff to show the existence of his trade-mark, his exclusive right therein, and its use by the defendant upon articles of the same class of merchandise, without his license.²

2. Imitation of Name.—The infringement of a trade-mark which consists of a name, generally presents a case easy of determination. Given the fact that the name is a valid trade-mark, anything will

a few purchasers, erased it and placed another name upon the article sold, can in no sense be regarded as a representation to the public of the abandonment of the trade-mark and the adoption of another. Nor is the fact that the owners of a trade-mark, at the request of dealers, placed the dealer's name upon the article near the trade-mark, any indication of abandonment, especially when it is customary in the trade to do so. *Sheppard v. Stuart*, 13 Phila. (Pa.) 117. The court saying: "In considering acts, from which acquiescence or abandonment are or may be inferred, it should not be forgotten that a trade-mark is property. In all cases of litigation it may fairly be said to be valuable property. The man who lends his horse frequently, or permits another to use it, is never said to have abandoned his horse to the public, or to acquiesce in any claim to use the horse at pleasure. Much less can these acts justify the stranger who breaks into the stable and steals the horse.

It needs no citation of authorities to show that a license is not an abandonment—not even evidence of abandonment. It is, perhaps, the highest evidence of the assertion of the right and acquiescence therein.

It has been strongly urged that the plaintiffs have lost their right of action by their delay in bringing suit, or in asserting their claim. It may be that even a wrongdoer may sometimes successfully defend upon this ground. It must, however, be such a delay as would lead a reasonable person to suppose that the owner had abandoned his device, or such as induced the defendants to act, or under such circumstances as required the owner to assert his right. Even in

such cases, the title in the trade-mark is not lost or deemed abandoned, but the owner is estopped from asserting it to prevent another from using the device. It is evident, therefore, that each case must be decided upon its own facts. There can be no fixed rule, and time is only a matter of evidence, to be considered with all others."

The abandonment of a trade-mark is not made out by showing numerous infringements in which the owners of such trade-mark have not acquiesced. *Williams v. Adams*, 8 Biss. (U. S.) 452. *Blodgett, J.*, said: "I do not understand the rule to be, that if a party infringes upon another's trade-mark, there is any fixed time in which he must bring suit in order to save his rights. Certainly there is no such neglect on the part of the complainants proved here, as would show an intention to abandon their trade-mark."

The fact that the plaintiff has discontinued the use of his trade-mark for three years and adopted another, will not deprive him of his right of action against one who uses the original mark on the article in question, thus falsely purporting it to be of the plaintiff's manufacture. *Lemoine v. Ganton*, 2 E. D. Smith (N. Y.) 343.

1. See *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455; *aff'd* on app. 59 Fed. Rep. 560; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572.

2. "The first appropriator of a name, etc. . . . is injured when another adopts the same mark . . . for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former." *Strong, J.*, in *Dela-ware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311. See also *Osgood v. Rock-*

wood, 11 Blatchf. (U. S.) 314; Kinney v. Allen, 1 Hughes (U. S.) 106.

The language of U. S. Statutes at Large, ch. 138, p. 502, is that any person who shall reproduce . . . any trade-mark registered, etc., and affix the same to merchandise of substantially the same descriptive properties, shall be liable to an action.

In *Liggett Tobacco Co. v. Hynes*, 20 Fed. Rep. 883, Parker, J., said: "To constitute an infringement exact similarity is not required; there may be an infringement without it. . . . Nor need the resemblance be such as would deceive persons seeing the two trade-marks placed side by side. . . . But the tradesman brings his privilege of using a particular trade-mark under the protection of equity if he proves, or it is apparent or manifest to the court by inspection, that the representation employed bears such a resemblance to his as to be calculated to mislead the public generally, who are purchasers of the article, to make it pass with them for the one sold by him. If the indicia or signs used tend to that result, the party aggrieved will be entitled to an injunction. . . . The plaintiff is entitled to protection if the trade-mark of defendant would deceive the ordinary purchaser, purchasing as such persons ordinarily do."

The innocent consignee and purchaser of articles intended for his own use, but bearing a spurious trade-mark, is liable to injunction at the suit of the owner of the trade-mark, and even if the former assents to an undertaking comprising all the relief asked for in the bill, yet he is liable for costs, certainly where the consignment is a large one, in this case 5000 cigars for private use. *Upmann v. Forester*, 24 Ch. Div. 231.

In *Low v. Hart*, 90 N. Y. 457, *Rapallo, J.*, said: "Although the proof does not establish an infringement by the defendant to any great extent, yet we think that where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved, that is sufficient to sustain an injunction against a continuance of the wrong, and that an action for such injunction will not be defeated solely on the ground that on the day it is brought, the dealer happens not to have any of the article on hand."

In *Seixo v. Provezende*, L. R., 1 Ch. 192; 12 Jur. N. S. 215; 14 L. T. N. S.

314; 14 W. R. 357, the plaintiff, a Portuguese wine-grower, sold his wine in casks, stamped with the figures of a crown and an eagle, and the letters "B. S." on the head of the cask, and the word "Seixo," and the year of the vintage at the bung-hole. The defendants, London merchants, sold their wine in casks stamped with the figure of a crown, the letters "C. B.," the words "Seixo de Cima," and the date 1861, both on the heads of the casks and at the bung-hole. An injunction was granted to restrain defendants from using the crown and the word "Seixo," or other marks, etc., likely to cause their wine to be mistaken for that of the plaintiff. *Cranworth, L. C.*: "What degree of resemblance is necessary, from the nature of things, is a matter incapable of definition, *à priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would have no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of a rival manufacturer, and would purchase it in that belief, the court considers the use of such mark to be fraudulent. But I go farther. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

In *McAndrew v. Bassett*, 33 L. J. Ch. 561; 10 Jur. N. S. 492; 10 L. T. N. S. 65, 442; 4 De G. J. & S. 380; 12 W. R. 777, *Westbury, L. C.*, said: "An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably

be held to be an infringement of it which has the same sound when used to describe the article, and which has sufficiently the same appearance to cause one name to be mistaken for the other. The trade-mark name of an article is generally the essential feature of the mark by which the goods are known and designated, and an infringement will be held to exist where this name is employed by a defendant, although the other indicia of package and labels may be different. A single sale by an infringer will be sufficient to entitle the trade-mark owner to an injunction.

The imitation of a name by which goods are known is frequently the most dangerous form of imitation, for the reason that purchasers may be misled who are entirely unfamiliar with the genuine goods, but who have only seen the name advertised, or have been told of the goods by their name by others and asked for them by name, without ever having seen them. The purchaser, under these circumstances, is much more liable to be misled and to accept the goods of an imitator for those of the owner of the trade name, than where familiarity with the goods is necessary.¹

would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market, other articles of a similar description."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. Cas. 529, an injunction was asked to restrain the use of a complicated stamp on leather cloth. The vice chancellor granted the injunction, but his decision was reversed by the chancellor. On appeal to the House of Lords the latter's judgment was affirmed. Westbury, L. C., said: "The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and, secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business." In the opinion in this case

Cranworth, L. J., said: "No general rule can be laid down as to what is or is not a mere colorable variation. All which can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, Clifford, J., in a dissenting opinion, said: "Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such purchaser usually gives, and to cause him to purchase the one supposing it to be the other. *Gorham Co. v. White*, 14 Wall. (U. S.) 511; *McLean v. Fleming*, 96 U. S. 256. . . . For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. *Wotherspoon v. Currie*, L. R., 5 App. Cas. 519."

1. The use of the phrase, "Improved Fig Syrup," upon bottles, wrappers, etc., resembling a similar preparation manufactured and sold by the name of

"Syrup of Figs," will be enjoined as an infringement of trade-mark. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 175. In this case the court, by Beatty, J., said: "While there is a difference between the two, there is still such similarity as we think would lead many purchasers—the consumer, though not likely the general trade dealer—to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection."

The name, "P. T. Butler's," before the words, "Trade-mark—Best Soap," is not so similar to the words, "B. T. Babbitt's," before the same words, as to be an infringement of the latter, in the absence of proof that anyone has been deceived. *Babbitt v. Brown*, 68 Hun (N. Y.) 515. *Van Brunt, P. J.*, saying: "When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material; but to sustain an action there must be an imitation of something that can legally be appropriated as a trade-mark."

In *Hutchinson v. Blumberg*, 51 Fed. Rep. 829, complainant used the word "Star" and the symbol of a star on his manufactured underwear, etc., which thereby became known as "Star Goods." Defendant used a star and a crescent in a similar way, the star, although somewhat different from that of complainant in color and otherwise, being so prominent that his goods also became known as "Star Goods." An injunction was granted. See also *Hutchinson v. Covert*, 51 Fed. Rep. 832, where the facts of infringement were the same, save in the use of "Lone Star" for "Star," and an injunction was granted.

Plaintiffs stamped on velvet ribbons as a trade-mark "G. F." Defendants, whose trade-mark was G & F, when they stamped it on velvet ribbons, did so with the ampersand greatly reduced in size as compared with the initials. A preliminary injunction was granted. *Giron v. Gartner*, 47 Fed. Rep. 467.

In *Foster v. Webster Piano Co.* (Supreme Ct.), 13 N. Y. Supp. 338, an action was brought by William Foster, as substituted trustee, etc., of the last will and testament of Albert Weber, deceased, whose trade-mark was "Weber, New York," against the defendants, asking for an injunction re-

straining them from putting on their pianos "Webster, New York." It was held, that the defendant's trade-mark was not likely to deceive, and the injunction was refused.

Plaintiff was the publisher of a newspaper called "The Electrical World." Defendant published a paper called "The Electrical Age," adopting a title-page generally similar to that of plaintiff, but being strikingly different in certain points, and printed in and upon different colors. Daniels, J., in refusing a preliminary injunction, said: "While there are points of general resemblance, there are also features of striking diversity, rendering the inference at least somewhat uncertain whether the defendant is publishing its newspaper under such a form of title-page as is calculated to produce the belief in the minds of subscribers or purchasers that the defendant's is the paper of the plaintiff. If that could, upon the affidavits and exhibits, be concluded to be the fact, then the case would be one for an injunction, for that would be a violation of the plaintiff's rights which no court could permit to be successfully devised and followed." *W. J. Johnson Co. v. Electric Age Pub. Co.* (Supreme Ct.), 14 N. Y. Supp. 803.

In *Stokes v. Allen*, 56 Hun (N. Y.) 526, plaintiffs published an illustrated book called "The Good Things of Life," consisting of pictorial illustrations of a publication known as "Life," etc. Defendant called his book "The Spice of Life," and it was made up of pictorials, etc., taken, not from the serial "Life," but from another paper. On the plaintiff's book the word "life" was in quotation marks, but this was not so on defendant's cover; the similarity of the two books was entirely in their size and color of binding. There was held to be no infringement. In the opinion, Daniels, J., said: "It is not sufficient to maintain the action that purchasers inattentively might accept the defendant's publication in place of the plaintiff's. But it is necessary to maintain their action that the defendants should have employed this word 'life' with the same significance, in whole or in part, as it has been employed by the plaintiffs."

It seems that the trade-mark, "Moxie," in the combination "Moxie Nerve Food," is infringed by a similar use of the word "Noxie." *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248.

Plaintiffs had long been the proprietors of a daily morning newspaper, called the "Morning Post." Defendants commenced the publication of a daily evening newspaper, called the "Evening Post." There was no evidence of actual injury. It was held (*reversing* the decision of Kay, J.), that although the public might be deceived into thinking there was a connection between the two papers, there was no probability that plaintiff would be injured thereby, and an injunction must be refused. Cotton, L. J., said: "There is only a suggestion of possible injury, and I think we ought not to act on that. In order to justify us in granting an injunction, we must have evidence to satisfy us that there is reasonable probability that, in fact, there will be damage to the party complaining." *Borthwick v. Evening Post*, 37 Ch. Div. 449.

Plaintiff was the publisher of a newspaper called "The Grocer and Oil Trade Review." Defendant published another newspaper, calling it "The Grocer and Wine Merchant and Irish Brewer and Distiller." An injunction was granted to restrain the use of the words "The Grocer," as the first or principal words in the title of defendant's publication, and the use of any title similar to or only colorably differing from that of plaintiff. *Reed v. O'Meara*, 21 L. R. Ir. 216.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, Bradley, J., said: "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name 'Cellonite Manufacturing Company' is sufficiently similar to that of 'Celluloid Manufacturing Company' to amount to an infringement of the complainants' trade name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead."

Plaintiff owned a trade-mark in the

word "Sanitas," applied to certain disinfectants, etc. Defendant used similarly the phrase "Condi-Sanitas." An injunction was granted against the use of "Sanitas" alone, or in the above combination, or in any other way, which would infringe plaintiff's mark. *Sanitas Co. v. Condy*, 56 L. T. N. S. 621.

Plaintiff, a dentist, caused the words "New York Dental Rooms" to be registered as a trade name for his business. Defendant displayed signs with the words "Newark Dental Rooms," and used a printed form of contract with his customers very similar to that of plaintiff. It appeared from the evidence that the public confused the two establishments and mistakes occurred, and that defendant intended that they should occur. An injunction was granted. *Sanders v. Jacob*, 20 Mo. App. 96. *Followed in McCartney v. Garnhart*, 45 Mo. 593.

It seems that the word "Maizharina" used as a trade-mark for corn flour or starch, is in itself an infringement of the word "Maizena," similarly used; and this is certainly so when the former word is dressed in such accessories that it may be mistaken for the latter. *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823. Here Wallace, J., said: "The rule is well settled that to enable the proprietor of a trade-mark to relief against an illegal appropriation, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; it is sufficient if there is such a degree of resemblance that ordinary purchasers, using ordinary caution, are likely to be deceived."

Plaintiff manufactured and sold a chocolate which he called "German Sweet Chocolate." Defendant sold a chocolate under the name of "Sweet German Chocolate," put up with wrappers and labels similar to those used by plaintiff. An injunction was granted. *Pierce v. Gintard*, 68 Cal. 68; 58 Am. Rep. 1.

The publication of a daily paper at 3 a. m. called "The Morning Mail," does not infringe upon the rights of the publishers of a tri-weekly paper, issued at 11 a. m. and called "The Mail." *Walter v. Emmott*, 54 L. J. Ch. 1059. Bowen, L. J., said: "The use of a similar name is not, as matter of law, conclusive to show that there is an intention to deceive, or, as matter of law, that there would be such a

deception as would cause an interference with or damage to the business of another, because we can conceive cases where the use of a similar name might be so hedged round by other circumstances as to destroy the natural effect of such an act. . . . Similar type, similar appearance in the papers, every kind of circumstance which tends to confuse, is evidence from which the inference may be drawn that the acts will confuse. But we must take them all into consideration, I agree that proof of actual mistake is not necessary."

In *Accident Ins. Co. v. Accident, Disease & General Ins. Corp.*, 54 L. J. Ch. 104, an injunction was granted to restrain defendants from the use of its trade name as above given, on the ground of likelihood of deception.

"The New Northwest," the title of a newspaper, is not infringed by the use of the words, "The Northwest News," as the name of another paper. Here intentional fraud was not alleged. *Duniway Publishing Co. v. Northwest Printing, etc., Co.*, 11 Oregon 322.

The name, "Sporting Chronicle," applied to a newspaper, does not infringe the name "Newcastle Chronicle," similarly used, the appearance and contents of the two papers being dissimilar, and there being no evidence of deception or intention to deceive. *Cowen v. Hulton*, 46 L. T. 897.

In *Guardian F. & L. Assurance Co. v. Guardian & General Ins. Co.*, 50 L. J. Ch. 253, the master of the rolls thought these names (as above) sufficiently similar to cause confusion, although there was no appearance of actual fraud in the assumption by the defendants of the objectionable name.

The words, "The Grocer," used as the name of a publication, is an infringement of "The American Grocer," similarly used. *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398.

"Thorley's Food for Cattle" was a condiment made (according to a particular recipe not invented by Thorley), first by Thorley, and afterwards by his executors at Thorley's works; but it had not become an article of commerce like "Liebig's Extract of Meat." Subsequently a company was started called "J. W. Thorley's Cattle Food Co.," who made a similar condiment and packed it in a similar way. It was held that, although a second Thorley might make and sell "Thor-

ley's Food," yet he must be careful to do so in a manner not calculated to deceive. An injunction was granted on the ground of intention to deceive. In this case, the descriptions and directions for use on the article were identical and helped to make out the case of deception. *Thorley's Cattle Food Co. v. Massam*, 14 Ch. Div. 748.

The phrase "Great IXL Auction Co.," used as a sign over a store, is not an infringement of the phrase "IXL General Merchandise Auction Store," similarly used. *Lichtenstein v. Mellis*, 8 Oregon 464; 34 Am. Rep. 592.

Plaintiffs used the coined word "Electro-Silicon" as a trade-mark for polishing powder. Defendant applied the term "Electric-Silicon" to a similar preparation and imitated the plaintiff's packages, etc. Van Vorst, J., in granting an injunction, said: "The form of the boxes, the color of the paper, the arrangement of the printed matter, the name 'Electric-Silicon,' are all suggestive of a design to fraudulently imitate the plaintiff's trade and business and to reap gain thereby." *Electro-Silicon Co. v. Trask*, 59 How. Pr. (N. Y. Supreme Ct.) 189.

Plaintiffs published a book entitled "Payson, Duntun and Scribner's National System of Penmanship." Defendants issued one similar in form, binding and color, entitled "Independent National System of Penmanship." An injunction was granted to restrain the use of the words "National System of Penmanship." *Potter v. McPherson*, 21 Hun (N. Y.) 559.

The use on labels, etc., of the word "Apollonis," in connection with the representation of a bow and arrow or anchor, is an infringement of the word "Apollinaris," and the representation of an anchor similarly used. *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. (U. S.) 380.

In *Merchant Banking Co. v. Merchants' Joint Stock Bank*, 47 L. J. Ch. 828, Jessel, M. R., said: "In my opinion there is not sufficient similarity in the two names, as above, necessarily to lead to the inference that there was an intention to deceive." An injunction was refused.

In *Hurricane Patent Lantern Co. v. Miller*, 56 How. Pr. (N. Y. Supreme Ct.) 234, Lawrence, J., said: "I do not regard the words 'tempest' and 'hurricane' as so similar [applied to lanterns] as to warrant the conclusion that the public is liable to be misled into

believing that the lamps are of the same manufacture."

In *Charleson v. Campbell*, Ct. of Sess. 4th Ser. IV., 149; 14 Scot. L. Rep. 104, the plaintiff's hotel bore the name, "The Station Hotel, Forres;" that of defendant, "The Royal Station Hotel, Forres." The word "Royal" was deemed sufficient to distinguish them and prevent infringement.

In *Talcott v. Moore*, 6 Hun (N. Y.) 106; Cox's Man. of Trade-Mark Cases 478, it was held that "The Red and White Book" was too dissimilar from "The Little Red Book, New Series, 1875" to grant an injunction, even when there was an apparent attempt to deceive. Daniels, J., said: "The points of difference are so prominent and striking as at once to produce the impression that both the medicines and the books are different productions. . . . The rule upon this subject is practically the same as that applied for the protection of trade-marks, when, in order to maintain an action for an injunction, it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived."

Plaintiff, the manufacturer and inventor of "Ford's Eureka Shirt," sold shirts marked with the words "R. Ford's Eureka Shirt, London." Defendant sold other shirts, marked with the words "The Eureka Shirt." An injunction was granted to restrain the use of the word "Eureka," but not to extend to advertisements between defendant and the trade. *Ford v. Foster*, L. R., 7 Ch. App. 611; 27 L. T. N. S. 219; 20 W. R. 311.

Plaintiff, who was entitled to the exclusive right to import from the Leopoldshall mines a rock salt, called Kainit, sold it as "The Genuine Leopoldshall Kainit." Defendant sold another salt, not from the same mines, as "Kainit [Leopoldsalt]." An injunction was granted. The court saying: "There is nothing in the evidence that I can see to lead to a serious belief that they have used this name *bona fide*. . . . The misspelling of the word is, to say the least, as suspicious a circumstance as can be conceived." *Radde v. Norman*, L. R., 14 Eq. 348; 41 L. J. Ch. 525.

Plaintiffs sold cutlery, marked "Rodgers," "Rodgers & Sons," etc., together with a maltese cross and a star. Defendants used the same symbols in the

same way, together with the words "Rogers & Sons." The court deemed this a fraudulent imitation, but the injunction was refused on other grounds. The court said: "To constitute infringement in trade-marks, it is by no means essential that the imitation should be exact or perfect. . . . If there be a resemblance designed and calculated to mislead the purchaser, it is sufficient." *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

It seems that the words "The Hero," used as a stamp on glass jars, is infringed by the use of the words "The Heroine," similarly used. *Ludlow, J.*, said: "The court will not interfere when ordinary attention will enable the purchaser to discriminate. . . . It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, in buying the article in question, would probably be deceived." *Rowley v. Houghton*, 2 Brew. (Pa.) 303; 7 Phila. (Pa.) 39.

Semble, that there is no such similarity between the names "La Cronica" and "El Cronista," applied to newspapers, as to mislead the public and justify an injunction. *Stephens v. DeConta*, 7 Robt. (N. Y.) 343.

Plaintiff sold a preparation of cocoa called "Schweitzer's Cocolate." Defendant, Atkins, who had been in his employ, set up in business with a man, also named Schweitzer, and sold a similar preparation, labeled "Schweitzer, Atkins & Co.'s Cocolate." There was some similarity between the packets and labels used. It was held to be a colorable imitation and an injunction was granted. *Schweitzer v. Atkins*, 37 L. J. Ch. 847; 19 L. T. N. S. 6; 16 W. R. 108.

Plaintiff applied the term "Cocaine" to a hair oil of his own manufacture. Defendant used the word "Cocaine" on an article which he sold. An injunction was granted, "Cocaine" being a valid trade-mark, and the imitation of it deceptive. *Robertson, J., dissenting. Burnett v. Phalon*, 9 Bosw. (N. Y.) 193; 3 Keyes (N. Y.) 594; 3 Trans. App. 167; 5 Abb. Pr. N. S. (N. Y. Ct. of App.) 212.

In *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 459, a preliminary injunction was granted at the instance of the publishers of "The National Police Gazette," to restrain defendants from continuing the publication of the "United States Police

Gazette," printed so as to deceive the public.

The title of a newspaper, "Bell's Life in London," is infringed by the publication of another paper, entitled "The Penny Bell's Life and Sporting News." An injunction was granted to restrain the use of the words "Bell's Life," in the title of a newspaper, in any way. The court said: "This is an application in support of the right of property. . . . The absence of a fraudulent intention is no defense against an application to the court for an injunction by the person whose property has been injured." *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117.

In *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416, plaintiffs had long manufactured white lead, marking it with their name, and other words. Defendant also carried on the same business, marking his lead, "Brooklyn White Lead, pure, 100 lbs.," but subsequently changed his mark to "Brooklyn White Lead and Zinc Company." Mitchell, P. J., said: "He has no such company, and that part of his new title seems to have been adopted to imitate the plaintiffs, and to make his paint pass as theirs. Such would be its effect with any but the most cautious. . . . Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." Defendant was enjoined from the use of the word "Company," or "Co."

The name "Irving House," or "Irving Hotel," applied to a hotel, is infringed by the use of the name "Irving Hotel" in the same way. An injunction was accordingly granted. *Howard v. Henriques*, 3 Sandf. (N. Y.) 725. See also *Stone v. Carlan*, 3 Month. L. Rep. 360.

Plaintiff invented and sold a certain medicine under his own name. Defendant made and sold a similar medicine, and on his labels used plaintiff's name, testimonials of plaintiff's medicine, similar directions for use, etc., in such an ingenious way as to make it appear at first as if they were applicable to defendant's preparation. It was held that the proceeding was wrongful and calculated to deceive, and an injunction was granted. *Franks v. Weaver*, 10 Beav. 297.

In *London, etc., Assur. Soc. v. London, etc., Joint-Stock L. Ins. Co.*, 17 L.

J. Ch. 37; 11 Jur. 938; 10 L. T. 127, an injunction to restrain defendants from using the first three words in the title of their company, "London and Provincial," was refused, on the ground that no deception or damage was likely to accrue to the plaintiffs.

In *Rogers v. Nowill*, 6 Hare 325; 5 C. B. 109; 17 L. J. C. P. 52; 11 Jur. 1039; 10 L. T. 88, an action was directed to be brought, the court saying: "The court will consider, whether, taking all the names together, it is or not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

The names "The Democratic Republican New Era" and "The New Era," applied respectively as the names of different newspapers, do not conflict, there being no real probability of deception. *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371.

In *Knott v. Morgan*, 2 Keen 213, the London Conveyance Company ran omnibuses on which its name and other devices were painted in a particular way, and clothed its servants in a distinctive manner; the defendant began to run omnibuses painted similarly with the names "London Conveyance," "Original Conveyance for company," etc., and having servants similarly clothed. Langdale, M. R., said: "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company' or 'London Conveyance Company,' or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages, really the defendant's, belong to and are under the management of the plaintiffs."

In *Snowden v. Noah, Hopk. Ch.* (N. Y.) 347; 14 Am. Dec. 547, "The National Advocate" and "The New York National Advocate," the names respectively of two newspapers, were held to be sufficiently distinct to prevent deception. An injunction was accordingly refused.

In *Hogg v. Kirby*, 8 Ves. 215, plaintiff was proprietor of "The Wonderful Magazine." Defendant brought out a publication, very similar in appearance, under the same name, with

3. Imitation of Label.—The general rule applicable to the imitation of labels is, that any such imitation as may or can produce upon the mind of an incautious purchaser the impression and belief that the imitating label is that of a trade-mark owner with whose goods he is more or less familiar, will constitute an infringement. This is what is known as a colorable imitation. It will be noticed that this test involves a certain amount of knowledge on the part of the incautious purchaser of the label of the person whose goods he is seeking, and the imitation need only be such as would produce such an impression on the mind of an ordinary purchaser as would cause him to believe that the label of the infringer was the label of the trade-mark owner. This question is one which must depend upon the circumstances of each particular case, and no fixed rule can be laid down for its determination. Proof of actual deception of a purchaser should always be supplied, if possible, although it is not necessary to control the decision of the court.¹

the addition of the words "New Series, Improved." The Lord Chancellor, in granting an injunction, said: "I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great, and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was, in fact, the same book."

1. Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, was a case of infringement of labels for liquors. Van Fleet, V. C., said: "They are of exactly the same size, their colors throughout are the same, the words descriptive of the goods are the same, and they are arranged in precisely the same manner, printed with letters of the same form and size, and in ink of the same colors." An injunction was granted.

Plaintiff's labels on packages of tobacco consisted of a representation of a shield or banner, an ellipse with a circle, and the words "Smoke and Chew," in red and yellow colors. Defendant used on his labels the same figures, colors, and words, but called his tobacco "Peach Blossom," while that of plaintiffs was named "Sweet Loftus." An injunction was granted. *Wellman, etc., Tobacco Co. v. Ware Tobacco Works*, 46 Fed. Rep. 289.

In *Myers v. Theller*, 38 Fed. Rep. 607, Shipman, J. said: "The shape and color of the bottle, the shield and the general appearance of the label,

are well and designedly adapted to deceive the ordinary purchaser, in the ordinary course of purchasing the article in a small quantity for immediate use."

In *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360, Brown, J., said: "A court of equity will enjoin unlawful competition in trade by means of labels of peculiar design or colors, or packages of distinctive shapes, intended to enable the defendant to pass his goods off as those of the plaintiff." *Citing* *Burton v. Stratton*, 12 Fed. Rep. 696.

Lever v. Goodwin, 36 Ch. Div. 1, was a case of infringement of labels and packets, used in the sale of soap. Cotton, L. J., said: "Looking at the two tablets, one cannot but see that there is a strong general resemblance between them, and especially to the eyes of people who cannot read. . . . There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common-law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendants from passing off their goods as those of the plaintiffs." *Lindley, L. J.* said: "What is called the general 'get-up,' which is an expression used by some of the witnesses, is so similar that obviously the one might easily be mistaken for the other. Of course in all these cases there are differences as well as resemblances, and the question, so far as the packages are

concerned, must always be decided by contrasting the striking resemblances with the striking differences. Now, the only difference which strikes me at all is this: that Goodwin has substituted the word 'Goodwin' in large letters for 'Sunlight.' That is the whole difference which catches the eye. Then look at the resemblances; look at the paper; look at the printing; look at the blank space and the catch words; look at the whole thing, and it is impossible not to arrive at the conclusion, not only that one was intended to pass for the other, but that that intention has been realized."

In *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450, the court, by Moran, J., said: "To infringe a trade-mark, it is not necessary that it should be counterfeited or exactly simulated. It is enough that such a resemblance is produced as is calculated to mislead purchasers who use such ordinary care and observation as are commonly used by the public. *McLean v. Fleming*, 96 U. S. 245. . . . When the labels are examined together there are many differences, but the general appearance of the label, the color of the paper, the resemblance of the prominent features which go to make up the whole, taken in connection with the fact that the label is placed on packages in size, shape and appearance like those of appellee, are well suited to divert the attention of the purchaser from a critical examination that might correct the impression gained by casual inspection. The fact that careful buyers who scrutinize closely are not deceived, only shows that the injury is less in degree, not that there is no injury."

In *Hostetter v. Adams*, 10 Fed. Rep. 838, an injunction was granted to restrain an infringement of plaintiff's label and method of preparation for the market of "Hostetter's Celebrated Stomach Bitters." Blatchford, J., said: "It is plain that it is a copy from the plaintiffs' by design. Variations are made of such a character as to be capable of discernment and description. But the general effect to the eye of an ordinary person, acquainted with the plaintiffs' bottle and label, and never having seen the defendant's label and not expecting to see it, must be, on seeing the defendants,' to be misled into thinking it what he has known as the plaintiffs. The size, color, and shape of the bottle . . . the general effect of the horse and his rider . . . gives

an affirmative resemblance calculated to deceive an ordinary observer and purchaser, having no cause to use more than ordinary caution, and make him believe he has before him the same thing which he has before seen on the plaintiffs' bottle, and expects to find on the bottle he is looking at. The differences which he would see, on having his attention called to them, are not of such a character as to overcome the resemblances to the eye of a person expecting to see only the plaintiffs' bottle and label, and having no knowledge of another."

In *Fleischman v. Schuckmann*, 62 How. Pr. (N. Y. Supreme Ct.) 92, an injunction was granted to restrain the use by defendant of labels on loaves of bread, similar to those of plaintiff, etc. Van Vorst, J., said: "The intention of the defendant to imitate the plaintiff's label and the success of his effort is apparent. . . . In purchasing articles of so common use as bread, labels are not expected to be critically examined, and persons who cannot read, as well as those who do, are obliged to buy."

Plaintiff sold a certain article, put up for him in Paris, under a label containing the words "Conserves Alimentaires," the arms of the city of Paris, with a monogram "A. C.," the words "Paris" and "Julienne," and directions for use, etc. Defendant sold a similar article, with devices alike in size, type, color and appearance, except that the monogram was changed to "F. G." The court found that "customers and patrons were liable to be deceived," and granted an injunction. *Godillot v. Hazard*, 49 How. Pr. (N. Y. Super. Ct.) 5; 81 N. Y. 263.

Although a label bears a name which cannot in equity be protected as a trade-mark, this will not prevent a recovery, where the label is imitated in size, shape, color, device and general appearance. *Conrad v. Uhrig Brewing Co.*, 8 Mo. App. 277.

Dixon Crucible Co. v. Benham, 4 Fed. Rep. 527, was a case of infringement of wrappers and labels for stove polish, those of complainants and defendants being "substantially identical." An injunction was granted, the court observing: "The wrappers and label, and the arrangement of the printed characters, and the language of the wrappers and labels, have become a well-known trade-mark."

Plaintiff sold gin under the name of

"Udolpho Wolfe's Aromatic Schiedam Schnapps" in peculiarly shaped bottles, inclosed in peculiar wrappers. Defendant sold gin, called "Hart's Imperial Schiedam Schnapps," in somewhat similar bottles, inclosed in somewhat similar wrappers. An injunction was granted as regards the bottles and wrappers, but not as to the words "Aromatic Schiedam Schnapps," they being merely descriptive. Stawell, C. J., said: "Nor do I concur in the argument that we are to consider the intelligence or want of intelligence of the purchaser. We ought not to pronounce a decision which would be applicable to the one and inapplicable to the other, or ignore an uneducated and illiterate person who may desire to ascertain whether the article he is about to purchase is the same he has had before. We are to consider whether the infringement of the plaintiff's rights has been proved, not by taking particular isolated points, but by looking at the general resemblance of the packages, labels, bottles and other points." *Wolfe v. Hart*, 4 Vich. L. R. Eq. 125, 134.

In *Brown v. Mercer*, 37 N. Y. Super. Ct. 265, the court, by Van Vorst, J., said: "The defendant, by the adoption of a label similar in color, size, border, ornamentation, circular symbol, and red-colored ink, has so closely imitated the plaintiff's wrapper, that the careless or unobservant purchaser may be readily misled. A crafty vendor might readily palm off on an inattentive buyer the defendant's for the plaintiff's article. . . . It is no answer, that in certain particulars, defendant's label differs from the plaintiff's, as long as the imitation in other respects is so apparent, that purchasers have been and are likely to be deceived."

In *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204, plaintiff was the executor of Udolpho Wolfe, who manufactured "Wolfe's Aromatic Schiedam Schnapps." Defendants sold other spirits under the name of "Von Wolf's" or "Von Wolf's Aromatic Schiedam Schnapps." The labels used were also similar. An injunction was granted to restrain an infringement of the label and also any variation or imitation of the name "Wolfe." Rhodes, J., said: "A label is not a trade-mark, as recognized at common law, though it may, in fact, contain no words, figures, etc., except those which constitute the trade-mark. . . . But labels, like trade-marks,

may be adopted and used by a manufacturer or seller of goods, to distinguish his goods from those of others; and when another person uses the same label, or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trade-mark—that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded. On principle, a person is as fully entitled to be protected in the use of his label as his trade-mark, and the authorities fully sustain this position."

The case of *Lea v. Wolf*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 389; 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 1; 46 How. Pr. (N. Y. Supreme Ct.) 157, was a question of similarity of labels placed on bottles of sauce. Ingraham, P. J., said: "The color of the paper, the words used, and the general appearance of the labels when used, show an evident design to give a representation of those used by the plaintiff, and the directions for using are an exact copy of those used by the plaintiff. . . . It is true that the defendants have substituted their name as the manufacturers, but that alone will not relieve the defendants from the charge of an attempted imitation of the labels and wrappers of the plaintiff for the purpose of misleading purchasers."

Plaintiff, a manufacturer of woolen cloths, invented certain new patterns, calling them, "Turin," "Sefton," etc. Defendants used the same names on tickets resembling the tickets of the plaintiffs. An injunction was granted to restrain defendants from using the above names as aforesaid, and any ticket being an imitation of, or similar to, or only colorably differing from, the ticket of plaintiff. *Hirst v. Denham*, L. R., 14 Eq. Cas. 542; 41 L. J. Ch. 752; 27 L. T. N. S. 56.

In *Bass v. Dawber*, 19 L. T. N. S. 626, plaintiff's trade-mark for ale consisted in the main of a red pyramid, the words "Bass & Co.'s Pale Ale" and a fac-simile of the signature, "Bass & Co." Defendants used labels generally resembling those of the plaintiff in some degree, but having the words "East India Pale Ale," a fac-simile of the signature "Dawber & Co.," and a red Spanish shield reversed. An injunction was refused. Lord Romilly said: "If a man should imitate an-

other person's label or trade-mark, and sail so near the wind as just to avoid an injunction, and do so intentionally, though the court does not grant the injunction, it would not willingly give him any costs of the proceedings. At the same time it must be borne in mind that if a person has *bona fide* taken a label or trade-mark which does resemble the label of another person, and this is not done with the intention to deceive, the court will not require him to change it completely, because a change in a trade-mark is a serious thing. . . . No tradesman likes to alter his trade-mark completely; it is like beginning a new firm; and therefore in dealing with cases of this description, if the defendant has acted *bona fide*, the court will not compel him by injunction to make a totally different thing."

In *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521, the labels used by contestants respectively were alike in size, form and color, the one bearing the name "Bovaline," and the other "Bovina." In the opinion of the court "the design evidently was to depart from the other sufficiently to constitute a difference when the two were compared, and yet to do it so skillfully that the difference would not be detected by an ordinary purchaser, unless his attention were particularly called to it and he had a very perfect recollection of the other label." An injunction was accordingly granted.

Where the plaintiff's trade-mark for washing powder consisted of an elaborate picture of a washroom, with tubs, baskets, etc., the words "Standard Soap Company, Erasive Washing Powder," with directions for use; and the trade-mark of the defendants consisted of a picture and label, the same as the plaintiff's, only in the use of the words "Washing Powder," the directions for use, and in the use of paper of the same color, the court thought this did not constitute an infringement. Two justices dissenting. *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76.

The labels on bottles of cologne manufactured respectively by plaintiff and defendant were similar in every respect, except that one contained the word "Josephs" and the other the word "Julichs." An injunction was granted. *Farina v. Cathery*, L. J. N. Cas. 134.

Plaintiffs sold ink in bottles on which were placed a peculiar style of label,

containing, among other things, the words "Stephens Blue Black," in white capital letters of a large type. Defendant sold ink in similar bottles with similar labels, only substituting the word "Steelpens" for "Stephens." The vice chancellor thought this a fraudulent and colorable imitation and granted an injunction. *Stephens v. Peel*, 16 L. T. N. S. 145.

Where there is no technical trade-mark, and the names of the claimants are the same, "the point of departure from strict legal right commences when the defendants employ a label bearing a general resemblance of form, color, words, and symbols, calculated to create the impression that their gin was that sold by the plaintiff, and in that way to deceive the public." *Binger v. Wattles*, 28 How. Pr. (N. Y. C. Pl.) 206.

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144, Duer, J., said: "Without rejecting the evidence of my senses, I cannot doubt that the label or trade-mark which the defendants admit that they propose to use, from its general resemblance to that of the plaintiff and his firm, is well calculated to mislead the public, by inducing the belief that the articles to which it is affixed are in reality prepared or manufactured by the plaintiff's firm. Nor can I doubt that the label was framed with this design, since the imitation is so close, minute, and exact, as in my opinion to exclude the supposition of any other motive. It is true that the name of R. H. Rice, as proprietor, is printed on the label, but it is so printed as not to attract, but almost certainly to elude observation. A variation must be regarded as immaterial which it requires a close inspection to detect, and which can scarcely be said to diminish the effect of the fac-simile which the simulated label in all other respects is found to exhibit. Hence, were this the only question in the case, I should have no difficulty in holding that the injunction, which is sought to be dissolved, must to some extent, be retained and enforced." See also *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156.

Walton v. Crowley, 3 Blatchf. (U. S.) 440, was a case of infringement of labels, devices and trade marks, for needles, the size, shape, vignette, coloring and marking being so near identical as to make them pass easily for the same. *Betts, J.*, said: "A tradesman, to bring his privilege of using a

4. **Imitation of Package.**—Irrespective of a technical trade-mark, a manufacturer or trader has a right in the manner, style, and form in which he dresses his goods, to an extent sufficient to enable him to prevent other manufacturers of the same class of goods from adopting this same style of dress, package, and manner of preparing the goods for the market, which will be likely to deceive an intending purchaser, and induce him to believe that he is buying the goods of the first manufacturer when receiving those of the infringer. A rival trader has no right to beguile the public into buying his wares under the impression that they are buying those of a rival of established reputation, and this doctrine is extended to the protection of the form, shape, color, names, directions for use, location of labels, arrangement of wrappers, and all

particular mark under the protection of equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him. If the indicia or signs used tend to that result, the party aggrieved will be allowed an injunction staying the aggression until the merits of the case can be ascertained and determined."

Although two labels or wrappers, when compared, may disclose palpable differences, yet if a person, seeing one in the absence of the other, would be likely to mistake it for the other, and purchase it under the supposition that it was the other, an injunction will be granted. *Whitney v. Hickling*, 5 Grant's Ch. (Up. Can.) 605.

Plaintiffs sold their cotton prints, labeled with the words, "Merrimack Prints, Fast Colors, Lowell, Mass." Defendants used in the same way on their own goods the words "English Free Trade, Merrimack Style, Warranted Fast Colors." The labels were of about the same size and color. An injunction, which had been granted, was dissolved on the ground that the infringement was not sufficiently clear without a trial at law. *Daly, J.*, said: "The court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufactures imitated. It is certainly not bound to interfere where ordinary attention will enable a purchaser to discriminate." *Merrimack Mfg. Co. v. Garner*, 2 Abb. Pr. (N. Y. C. Pl.) 318;

4 E. D. Smith (N. Y.) 387, *quoting* *Partridge v. Menck*, 2 Sandf. (N. Y.) 622.

Shrimpton v. Laight, 18 Beav. 164, was a case of colorable imitation of labels for needles. The court said: "The way in which the court deals with these cases is not to see whether manufacturers themselves would distinguish them, but whether the public, who may be more easily misled, would probably be deceived. I have no doubt that if an ordinary person intended to buy the plaintiff's needles and the defendant's needles were handed to him over the counter, he would not know the difference." An injunction was granted.

Edelsten v. Vick, 11 Hare 78; 1 Eq. Rep. 413; 18 Jur. 7, was a case of similarity of labels used on packages of pins. The court said: "The embellishments of the label are of the same character, and they are arranged in the same form and printed in the same gothic type as the labels of the plaintiffs. The same colors are moreover used and there is a similar scroll or border. To the general eye, therefore, they resemble the plaintiffs' labels, although upon a minute examination differences may be detected." An injunction was granted.

In *Davis v. Kendall*, 2 R. I. 566, *Greene, C. J.*, said: "The adoption of the same label as the plaintiff's will, of course, be actionable; and so the adoption of a label so like the plaintiff's as to mislead the public, would be actionable. If the difference be merely colorable, it will not avail the defendant. But if the defendant state in his label that the article which he sells was made by himself, although he calls it by the same name as the plaintiff, he will not be liable."

other indicia which have the capacity of serving to identify the goods of a manufacturer as his own, and which can impress the mind of a would-be purchaser, who is to some extent familiar with the goods of the first adopter of these signs, into believing that in buying the goods of the second party he is receiving those of the first adopter.¹

1. In *Dreydoppel v. Young*, 14 Phila. (Pa.) 226, Thayer, P. J., said: "There is such a general resemblance of forms, words, arrangements, symbols and accompaniments, that the one wrapper might easily be mistaken for the other. In its general appearance the one is a servile imitation of the other, the differences being merely colorable, and evidently designed to evade the consequences of the unlawful infringement of the plaintiff's rights, and to preserve a sufficient individuality to enable the defendants to reap the benefit of their fraud. . . . Even if the resemblance between the plaintiff's wrappers and those used by the defendants was accidental, the plaintiff, according to all the decisions, would be entitled to protection against its injurious results to his trade."

Plaintiffs, manufacturers of soap, sold it, under the name of "Genuine Yankee Soap," using a peculiar wrapper, form of cake, hand-bill, etc. Defendant put up his soap similarly, using similar words of caution, notice, etc. An injunction was granted to prevent simulation, without deciding whether the words "Genuine Yankee" constituted a trade-mark. Woodruff, J., said: "They [the plaintiffs] have adopted in reference to their manufacture (of an article which any and every one may manufacture and sell if he please), a form and size of cake, a particular mode of covering and packing, a combination of three labels on each cake, an exterior hand-bill upon the box, and have so arranged the whole as to suggest to any one desiring to purchase their soap, upon an inspection, that the article is theirs and made by them. . . . All this the defendant has copied, with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny. . . . We have no hesitation in saying that his acts are a clear infringement of the plaintiff's right. He has copied the form, appearance, color, style, and substantial characteristics in all respects, which distinguish the plaintiff's goods."

Williams v. Johnson, 2 Bosw. (N. Y.) 1.

Defendant pirated the name of the medicine ("Miller's Universal Magnetic Balm"), the language in which it was described, the directions for use, and the engraved design of the wrappers. An injunction was granted. *Ransom v. Ball* (Supreme Ct.), 7 N. Y. Supp. 238.

In *Jennings v. Johnson*, 37 Fed. Rep. 364, the medicine sold by plaintiff and defendant was "Dr. Johnson's Anodyne Liniment." Defendant in the sale of his preparation imitated the bottles, wrappers, and labels of plaintiff containing directions for use, etc. It was held that the public would be likely to be deceived, and an injunction was granted.

In *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625, Pardee, J., said: "Complainants ought in equity and good conscience to be protected from the imitation of their packages, so far as they are peculiarly designed and shaped for the purpose of distinguishing complainants' goods, and from the imitation in color, design, style, and lettering combined of the labels used to make said packages, when put on the market." See also *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Von Mumm v. Frash*, 56 Fed. Rep. 830.

In *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293, Brown, J., said: "I do not think the use of the words 'Coral Baking Powder' is in itself an infringement of plaintiff's trade-mark, 'The Royal Baking Powder.' The difficulty is with the similarity of the labels upon which the words are used. The general arrangement of the words being the same, the devices upon the cans being very much alike, and the labels of the same color and general appearance, I think purchasers might be very easily deceived into buying the one for the other." An injunction was granted to extend, not to the use of the words, but to their use in connection with cans and labels of the same general appearance as those of complainants.

A. made and sold "Morse's Syrup of Yellow Dock Root." B. sold a medicinal preparation in bottles perfectly similar to A.'s, and having the words "Dr. Morse's Celebrated Syrup" blown in the glass. The labels used were different, and A.'s bottles were wrapped in a paper cover, while B.'s were not. An injunction was granted and an account of profits derived from the use of bottles similar to those used by A. *Alexander v. Morse*, 14 R. I. 153; See also *Avery v. Meikle*, 81 Ky. 73; 117 P. & S., Am. Trade-Mark Cases.

Complainant's label consisted of a blue wrapper, pasted around a bottle holding bluing, and containing various inscriptions in gold and silver letters, and the general designation, "Sawyer's Crystal Blue and Safety Box." Defendant's label was of same size, color, and type, the inscriptions, although not identical, being very similar, and the general designation being "Sawin's Soluble Blue and Pepper Box." An injunction was granted. *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

In *Sawyer v. Horn*, 1 Fed. Rep. 24, Morris, J. said: "We find that the respondent has been guilty of improper and inequitable conduct, to the injury of the complainant, in having designedly so put up, labeled, and packed his goods that purchasers, for whose use they are intended, are misled and deceived, and do get Horn's blue, when they desire and suppose they are getting Sawyer's." This was a case of fraudulent imitation of package and label. The general designation, encomium and directions were exceedingly similar in wording and general appearance.

Plaintiffs and defendants both sold bitters in similar peculiarly shaped bottles, the sealing-wax used was alike in color, and the wrappers, in appearance and printing, were very similar. The court thought there was great similarity in the "get-up" of the two articles, and granted an injunction. *Siebert v. Findlater*, 7 Ch. Div. 801.

Plaintiffs packed a compound, called "Hamburg Tea," in long packages with pink wrappers, with crimson papers of directions, yellow ones of warning, etc. Defendant used the same style and form of package, substituting his own name. Wheeler, J., said: "Probably no mere form of package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any par-

ticular make. But when the form of these packages, the color of the wrappers, and papers done up with them, and the form and color of the labels are considered all together, it is quite apparent that when they had been so long used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation that they contained that article, of that manufacture." *Frese v. Bachof*, 14 Blatchf. (U. S.) 432. See also *Frese v. Bachof*, 12 Blatchf. (U. S.) 234.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required, to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights, and to prevent their continued invasion."

Hostetter v. Vowinkle, 1 Dill. (U. S.) 329, was a question of infringement of labels and packages. Dillon, C. J., said: "But the size of the labels and the devices, the appearance, the directions for the use, the size and shape of the bottles, mode of packing, etc., were in exact imitation of the plaintiff's, and the boxes or cases intended for sale were marked 'Dr. Hostetter's Bitters,' the same name as the genuine." An injunction was granted.

In *Moorman v. Hoge*, 2 Sawy. (U. S.) 78, Sawyer, C. J., said: "Doubtless a bottle, vessel or package of a peculiar form may be used as auxiliary to the trade-mark proper, and may be of use in solving a question of intent of a party, in imitating, or using, an evasive simulation of another's trade-mark. As, for instance, a party may adopt a trade-mark, and imprint it upon or connect it with, the package of peculiar shape containing the article of his manufacture. Another party might make a colorable simulation of the trade-mark so used, but so different as to render it doubtful, upon a mere in-

5. Imitation of Essential Feature.—The purpose of an imitator of a trade-mark, as a general rule, is to sell his goods as and for those of the owner of the mark whose reputation is established, and for whose goods there is an existing demand, while at the same time dressing his goods and employing the trade-mark of his rival in such a manner as to avoid the charge of infringement and escape the punishment which his imitation deserves. In doing this he generally avoids the imitation of all the features of the package and goods of his rival, except the particular one by which the public took hold of the goods, such as a particular symbol by which the goods are known, or from which the name of the goods is derived, or some combination of words or letters which are considered by the public as the established guaranty of the owner's reputation and the identity of the goods. This essential feature of the mark or the method of putting the goods before the public is the thing upon which the infringer seizes, and by using it alone, hopes to escape the charge of infringement; but this essential feature is always the most important element of a trade-mark, and when proof is secured, or it is apparent from examination of the label or the goods that the essential feature has been taken, the defendant will be enjoined.¹

spection of the simulation of such mark alone, whether it was intended to be an imitation or not, or whether it would be likely to mislead the public. But, if the imitator should, in addition to this, use the peculiar shaped package adopted by the party entitled to the trade-mark, and impress upon, or connect with it, the simulation of the trade-mark, all doubt as to the intention and the effect would at once vanish. In this view, a peculiar package might be a valuable auxiliary to the trade-mark, although it could not, of itself alone, constitute a lawful trade-mark, or a substantive part of a lawful trade-mark."

In *Williams v. Spence*, 25 How. Pr. (N. Y. Supreme Ct.) 366, the term "Yankee," applied to soap, was not considered a valid trade-mark (*following Williams v. Johnson*, 2 Bosw. (N. Y.) 1); but the similarity between the labels, devices, and hand-bills of respective parties was sufficient to grant an injunction. Among other things, "the size and shape of the boxes, the almost literal adoption of the language used in the plaintiff's labels and hand-bills, overwhelms the small marks of difference which the defendants hoped would relieve them from the consequences of using the plaintiff's trade-mark."

Plaintiff, a manufacturer of metallic hones, sold them wrapped in envelopes, containing directions for use, etc. De-

fendant sold the same articles in similar envelopes with the same words. It was held that this was a fraud against the plaintiff and he was entitled to damages, although no special damage was proved. *Blofeld v. Payne*, 4 B. & Ad. 410.

1. A trade-mark on whisky barrels, consisting of the figure of a chicken cock within a circle surrounded by the words "Old Bourbon Whisky, Bourbon Co., Ky.," and the words "From J. A. Miller, Paris" (the whisky becoming known as "Miller's Chicken Cock Whisky," or "Chicken Cock Whisky"), is infringed by a trade-mark consisting of a similar picture and circle, the latter brand being called "Miller's Game Cock Rye," and the label bearing the words, "The King of all Whiskies. John Miller & Co., Sole Proprietors, Boston, Mass." *White v. Miller*, 50 Fed. Rep. 277.

Even where there is no technical trade-mark, as in the case of the word "American," used in connection with beer, yet protection will be granted against one who fraudulently uses the same word so as to palm off his goods as those of another. *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14. In this case, defendant closely imitated large muslin signs which plaintiff had hung at the various places where its beer was being

retailed, the most prominent feature of which was the word "American."

Pratt's Appeal, 117 Pa. St. 401, was a case of infringement of a peculiar stamp or print used on butter, and claimed as a trade-mark, the distinguishing feature of which was the representation of a cornucopia. The court, by Paxson, J., said: "If the defendant's print is an imitation of that of the plaintiffs . . . the motive of the defendant in adopting it is not material, so far as the law of the case is concerned." And it was further said that though the two devices, when placed side by side, present points of dissimilarity, and the distinctive name of each party appear upon the one he uses, yet if the distinguishing features of the two be the same, an injunction will be granted.

Plaintiff used on his bottles of bluing a bright metallic cap of tin, having six perforations. An injunction was granted to restrain defendants from using a similar cap in the same way on bottles of the same shape and appearance as those of plaintiff, although the labels used were entirely dissimilar. *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 389.

Plaintiffs and defendants bottled beer for export. Plaintiffs' label consisted of a bull-dog's head on a black ground, surrounded by a circular band in blue, on which were the words "Read Brothers, London, The Bull-Dog Bottling," in white letters. Defendants' label consisted of the head of a terrier on a black ground, surrounded by a red band on which were similarly printed the words, "Celebrated Terrier Bottling, E. Richardson." There was evidence that the beer of plaintiffs was known in the colonies as "Dog's-Head Beer," and it was alleged that the use of defendants' label enabled his beer to be also sold in the colonies as "Dog's-Head Beer." Jessel, M. R., refused a preliminary injunction, which was granted on appeal. He said: "But I must be convinced of a great deal more than a want of anxiety on the part of the defendants to distinguish their beer from anybody else's beer (it being the mere label that is complained of); I must be satisfied that it is calculated to deceive, as it is said, or, in other words, that the use of it represents the goods of the defendants as the goods of the plaintiffs." Brett, L. J., said: "But the plaintiffs' case is not founded merely upon the

alleged similarity of the labels. The plaintiffs found themselves upon the doctrine which has been laid down by Lord Cranworth and Lord Westbury, and especially upon the statement of Lord Cranworth, that if the goods of a manufacturer have, from the mark or device used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market is a violation of the rights of his rival." Read v. Richardson, 45 L. T. N. S. 54.

Plaintiffs, manufacturers and exporters to the markets in India of Turkey-red yarn, placed thereon a triangular-shaped ticket in green and gold, prominent among the devices of which were two elephants, supporting a banner with an inscription, and a crown between the elephants. Defendants began to export Turkey-red yarn and placed thereon a ticket, similar to that of plaintiffs, which had also two elephants supporting a banner, with an inscription, and the figure of the Hindoo goddess, Gunputty, between the elephants in the place of the crown. Plaintiff's ticket was proved to have been known in India by the name, among several others, of the "Bhe Hattie" or "Two Elephant" ticket. There was some evidence that defendant's goods were known as "Gunputty" or "Gunputty Hattie" yarn. There was no evidence of deception, but there was evidence that, although the merchants in Bombay might not be deceived, the ultimate purchasers would probably be. An injunction was granted to restrain defendants from the use of their ticket, or from using two elephants on any tickets on Turkey-red yarn not dyed by plaintiffs, without clearly distinguishing them from those of plaintiffs, or so as to represent that any of such yarn was dyed by the plaintiffs. *Orr v. Johnston*, 13 Ch. Div. 434; L. R., 7 App. Cas. 219. Fry, J., said: "It appears to me, therefore, that I ought to hold that if one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions, as that the reasonable probability of error should be avoided." *Baggallay, L. J.*, said: "But it does not appear to me to be necessary for the plaintiffs to establish that such an intention [to imitate and copy plain-

tiff's trade-mark] existed. . . . Even if they acted through ignorance or inadvertence, they could not be allowed to continue to use a trade-mark of a character which would be calculated to lead to the deceit which I have already suggested." Lord Watson, in the House of Lords, said: "Apart from all questions as to *bona fides* or *mala fides* of the appellants, I am disposed to hold that the circumstances to which I have already adverted afford sufficient grounds for an injunction against the appellants. When a prominent and substantial part of a long and well-known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs. The probability of that result is in this case enhanced by the circumstance that all Turkey-red yarns exported from this country are sold in packages which in size, shape, and color have the closest resemblance to each other. The reproduction of a prominent part of another merchant's trade-mark upon a new ticket does not *per se* establish that the latter was prepared by its owner with a view to deceive, by himself selling, or by enabling others to sell his goods as the manufacture of that other merchant. But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader into whose hands his own goods may come, to sell them as the goods of his rival."

In *Hegeman v. O'Byrne*, 9 Daly (N. Y.) 264, Van Brunt, J., said: "As the labels are there shown, the most prominent feature upon both is the eagle with outstretched wings, perched upon a mortar, in which rests a pestle, and it is this device which would be the first to attract the attention of any purchaser." Judgment, which had dismissed the complaint in the court below, was reversed and a new trial awarded.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, Clifford, J., *dissenting*, said: "When the entire trade-mark is copied, the case is free of difficulty, as the rule is universal that the infringer is liable; but the question is, when may it be said that a trade-mark has been taken by another? Answers to that question are found in several cases, of

which no one is more satisfactory than that given by the Master of the Rolls in a recent case. He says that a trade-mark to be taken need not be exactly copied, nor need it be copied with slight variations, but it must be a substantial portion of the trade-mark; to which he adds that it has sometimes been called the material portion, but that, as he states, means the same thing, and he then remarks that it means the essential portion of the trade-mark, and finally concludes the subject by saying that 'what the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description.' *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 443. . . . Complete imitation is not required by any of the well-considered cases. Instead of that, it is well settled that the proof of infringement is sufficient if it shows even a limited or partial imitation, provided the part taken is an essential portion of the symbol."

Plaintiff placed upon his cigarettes the symbol " $\frac{1}{2}$ " in peculiar form, color, size, and style. Defendant used a similar symbol on other cigarettes, though the labels were entirely dissimilar. The court held that, although plaintiff was not entitled to the exclusive use of the symbol, since it indicated the presence in the cigarettes of two different kinds of tobacco and was not therefore sufficiently arbitrary, yet that he was entitled to the exclusive use of the symbol in the peculiar form in which he had used it, and granted an injunction accordingly. *Kinney v. Allen*, 1 Hughes (U. S.) 106.

Plaintiffs being, by agreement with the owners of the Apollinaris Spring in Germany, the sole importers into England of "Apollinaris Water," defendants sold a manufactured water as "London Apollinaris Water, possessing all the qualities of the natural water," but put up in a different way. An injunction was granted. *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

Plaintiffs were manufacturers for many years of "Glenfield Starch," doing business, first at Glenfield, afterwards at another place. Defendants began to manufacture starch at Glenfield, and sold it in packets on which the word "Glenfield" was prominent. It appears that Glenfield was neither a town, hamlet, nor village, nor had it a post office, but was a mere field in

which there were two or three manufactories. It also appeared that several persons, asking at the shops for "Glenfield Starch," had been given that of the defendants. An injunction was granted by Vice Chancellor Malins, order discharged by Lord Justice James, and reversed on appeal to the House of Lords. *Wotherspoon v. Currie*, 22 L. T. N. S. 260; 18 W. R. 562, 942; 42 L. J. Ch. 130; 23 L. T. N. S. 443; L. R., 5 H. L. 508; 27 L. T. N. S. 393. Malins, V. C., said: "Now, one man may adopt or imitate the label or trade-mark of another with the most innocent intention possible, but the law is settled that if his imitation is such as is calculated to mislead purchasers into the belief that he is selling an article manufactured by that other, this court will interfere."

... Whatever words or descriptions he used on his labels, he should not have used the one word which would prove injurious to the plaintiffs." *Hatherley, L. C.*, said that where, according to the custom of the trade, as in the case of needles and starch, they were always put up in packages more or less similar, "it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations so that persons do not look at the shape of the packet, or at any other indicia of the packet than the particular distinguishing mark (in this case the name of the man or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct." *Chelmsford, L. J.*, said: "Where the trade-mark is not actually copied, fraud is a necessary element in the consideration of every question of this description—that is, the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark. For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs."

Westbury, L. J., said: "I have no doubt, therefore, that this case comes within the principle on which the jurisdiction is founded—the principle being to prevent a party from fraudulently availing himself of the trade-mark of another, which has already attained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the word, and provided it be shown from the manner in which he has employed those means that his object was, from the beginning, to invade the property of the appellants."

In *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275, the plaintiff owned a trade-mark for stoves, consisting of the words "Charter Oak," surrounded by a sprig of oak leaves. Defendant sold other stoves, using the same words as a mark, but without the sprig of leaves. *Currier, J.*, said: "The only question raised on this branch of the case is whether the use of the name 'Charter Oak,' separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark, in combination with the device of oak leaves. On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself. That was the conspicuous element of the mark. By that name the stove was bought and sold, and known in the western and southern markets. It was the prominent, essential, and vital feature of the plaintiff's trade-mark. . . . The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated; nor is it necessary to show that anyone has in fact been deceived, or that the party complained of made the goods; nor is it necessary to prove intentional fraud. If the court see that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction."

Boardman v. Meriden Britannia Co., 35 Conn. 402; 95 Am. Dec. 270, was a case to restrain the fraudulent imitation of certain labels, etc., used by complainant in putting his spoons on the market. An injunction was granted.

6. Unlawful Competition—Deception of Public by Retailer.—Dress of Goods.—Where a technical trade-mark, trade name, or proper name of an individual, firm, or company is involved, the question of infringement requires only that the title of the plaintiff, and the unlawful use of his property, should be proven to entitle him to relief; where, however, no property of the plaintiff has been unlawfully appropriated, but devices have been resorted to, by which the defendant is enabled to sell his goods on the reputation

Carpenter, J., said: "The presumption of a designed imitation, arising from the similarity of the spoons, the resemblance of the labels, and the identity of the numbers, would be very strong if all these circumstances were found to exist in reference to only one kind; but when the case finds, as it does, that they do exist in respect to several different kinds, the presumption is vastly strengthened. . . . It is true that the respondents put their own name on the labels used by them, in place of that of the petitioners; but that is not sufficient to destroy the effect of the imitation in other respects; especially in respect to the numbers. . . . The most prominent feature of the label and the one most likely to attract attention would be the number."

In *Blackwell v. Crabb*, 36 L. J. Ch. 504, it was said that where a case of infringement is to be decided merely by an inspection of the two labels, and it is difficult to say where the imitation begins, the "important question is, what is the customer likely to look at?" In this case the "name is the thing which a customer would look at and that is conspicuously different. The capsule is also different, and the labels are not of the same color." An injunction was refused.

In *Glenny v. Smith*, 2 Dr. & Sm. 476; 11 Jur. N. S. 964; 13 L. T. N. S. 11; 13 W. R. 1032; 6 N. R. 363, the court said: "And it is not the question whether the public generally, or even a majority of the public, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled; and I think it may safely be said that is not a very inconsiderable portion of the public."

In *Lee v. Haley*, L. R., 5 Ch. App. 161, Giffard, L. J., said: "I quite agree that they have no property in the name ('Guinea Coal Company') but the principle upon which the cases upon this subject proceed is, not that there

is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In *Edelston v. Edelston*, 9 Jur. N. S. 479; 7 L. T. N. S. 768, the plaintiff was a manufacturer of metal wire which he sold with metal labels, or tallies, attached to it, bearing his trade-mark, an anchor, from which his wire had acquired the name of "Anchor Brand Wire." The defendant sold wire with tallies bearing an anchor and crown, and called the wire "Crown & Anchor Wire." It was held to be a colorable imitation. Lord Westbury, C., said: "The plaintiff has all the essentials of a right of property claimed by him, and this right extends to two things, first, the device or emblem of an anchor attached to this wire; and secondly, the name 'anchor brand wire' or anchor wire which has resulted from the use of the device and has become the distinctive appellation in the market of the wire manufactured by the plaintiff."

Plaintiff exported cloths to a foreign market stamped with the figure of a lion or elephant, from which the cloths had become known as "Lion Chop" or "Elephant Chop." Defendant exported other cloths similarly stamped. An injunction was granted. The court thought the fact that the respective names of the parties appeared round the figures, did not sufficiently prevent deception or operate as a defense. *Henderson v. Jorss*, Seton (4th ed.) 236; *Cox's Man. of Trade-Mark Cases* 198.

Plaintiffs were manufacturers of blacking, which they sold in bottles labeled with words "Manufactured by Day & Martin." Defendant sold black-

of, and as and for the goods of, the plaintiff, a different case is presented. The trade-mark case proper rests upon an invasion of property; the latter case is one of unfair competition, and rests upon fraud—fraud upon the plaintiff, and also upon the public.¹

It has been said in the leading case in the Supreme Court of the *United States* that: "Irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such a manner as to deceive an intending purchaser and induce him to believe he is buying those of the plaintiff."² This doctrine is extended to cases where, although the immediate purchaser from

ing in similar bottles with similar labels, except that for the words "Manufactured by Day & Martin" were substituted the words "Equal to Day & Martin's," the words "equal to" being in very small type. An injunction was granted. *Day v. Binning*, C. P. Coop. 489; 1 Leg. Obs. 205.

1. In *Simmons Medicine Co. v. Mansfield Drug Co.* (Tenn. 1893), 23 S. W. Rep. 165, Neil, S. J., said: "Unfair competition" may be defined, in general terms, as consisting of any device or trick whereby one manufacturer's or dealer's goods are palmed off in the market as and for the goods of another, in fraud of the public and of the persons whose goods are so displaced; the most usual of such devices being the simulation of labels, the imitation of another's style of putting up goods, and the reproduction of the form, color and general appearance of the packages. . . . As in cases of trade-marks, so in cases of unfair competition in business, imposition upon the public is a necessary constituent of the plaintiff's title to sue, but only in the fact that it is the test of the invasion of the plaintiff's rights by the defendant. . . . There is this difference, however: The law of trade-marks is designed to protect primarily a property right, and, as incidental thereto, gives redress for the injuries resulting from invasions of the right, a distinct technical trade-mark being in itself evidence, when wrongfully used, of an illegal act; while the jurisdiction exercised over cases of unfair competition in business is grounded in the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark rights may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element in trade-mark

cases in awarding damages and costs, while, in the case of unfair competition in business, fraud is of its essence."

2. *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324; 149 U. S. 562. Here plaintiffs sold thread with black and gold labels, on which was stamped the phrase "Best Six Cord," and embossed the numbers of the thread on the spool. The use of the words "Best Six Cord" on defendant's spools was relied on, among other things, to establish unfair competition, but the general appearance of the labels was sufficiently dissimilar, and the injunction was refused. Wheeler, J., said: "Irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such a manner as to deceive an intending purchaser and induce him to believe he is buying those of the plaintiff. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of a rival." *Citing Perry v. Truefitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84; *Lee v. Haley*, L. R., 5 Ch. App. 155; *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508; *Johnston v. Orr-Ewing*, L. R., 7 App. Cas. 219; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Taylor v. Carpenter*, 2 Sandf. (N. Y.) 603; 42 Am. Dec. 114; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *McLean v. Fleming*, 96 U. S. 245; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Gilman v. Hunnewell*, 122 Mass. 139.

In *Brown v. Seidel*, 153 Pa. St. 60, Mitchell, J., said, *dissenting*: "The true rule I take to be that in cases of trade-mark proper, anything so sim-

ilar as to be likely to deceive intending purchasers, will be treated as an infringement, without reference to the purpose to deceive, or to whether the resemblance is intentional or accidental; but that where the imitation is with intent to acquire wrongfully and in an underhand manner, a portion of another's good-will or business, equity will enjoin the attempt as a fraud, though the imitation be not of a legal trade-mark, and such intent may be gathered from imitation of name, descriptive words used, size or style of package, color or shape, or mode of application of label, general appearance, or any circumstances which afford basis for the inference of an intent to copy, and where such intent is thus indicated, the actual resemblance need not be so close as to deceive any but the most careless buyers. It is enjoined not as a deception of the public likely to be successful, but as an attempt to defraud the plaintiff. Any rule short of this is a premium on dishonesty, and an invitation to a commercial policy which measures its actions, not by conscience or right, but by ingenuity in dodging the law."

In *Goodman v. Bohls*, 3 Tex. Civ. App. 183, it was said: "There can be no doubt about the power of a court of equity, in a proper case, to interfere to prevent the piracy of a device used to distinguish the articles manufactured and sold, although the device itself will not constitute a technical trade-mark."

In *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier* (Super. Ct.), 24 N. Y. Supp. 890, Gildersleeve, J., said: "A dealer has no right to simulate tokens which tend to confuse the identity of his business with that of another, and by false representations of facts, attempt to mislead the public, and divert custom from the latter."

Fischer v. Blank (Supreme Ct.), 19 N. Y. Supp. 65; 138 N. Y. 245, was a case of infringement of wrappers, labels, packages, etc. Andrews, J., said: "It must be admitted that there is no single point of resemblance or imitation, which would of itself be regarded as adequate grounds for the grant of equitable relief. Form alone would not be sufficient; nor size; nor color; nor the general decoration of the panels; nor disks of the same size and color arranged in the same way; nor a label of the same shape and color attached to the same part; nor the use of the

same name to designate the kind or quality of tea. Each of these distinguishing features might be separately used and no harm result. But when all, or a number of them, are combined in a single package, and so arranged and exhibited, that when they strike the eye of the intending purchaser, possessed of ordinary intelligence and judgment, the false impression is likely to be produced that the goods of the plaintiff are offered, it is the province of equity to interfere for the protection of the purchasing public as well as of the plaintiffs, and for the suppression of unfair and dishonest competition. The true test, we think, is whether the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates. No inflexible rule can be laid down. Each case must in a measure be a law unto itself."

Solis Cigar Co. v. Pozo, 16 Colo. 388, was a case of infringement of trade-mark or brand for cigars. Bissell, C., said: "The first difficulty which arises here is to determine the question of infringement. Exact similarity is not necessary. To insist on that would be to permit most wrongdoers to evade responsibility. Colorable imitations are as much the subject of legal redress as the more exact and perfect similitudes. What is necessary in all cases is a similarity which will operate to convey a false impression to the ordinary purchaser, and serve to deceive and mislead him. The rule is grounded as much on the notion that the public is to be protected as on the theory that the inventor may have the exclusive benefit of the reputation acquired by the thing which he has produced. For this reason it is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected."

Plaintiff made tobacco, to each plug of which it attached six five-pointed tin stars with a hole in the center. After its tobacco became known as the "Star" brand, defendant put on the market a "Buzz-saw" tobacco, to which it attached a tin symbol with eight points, a hole in the center, and the word "Buzz" dimly impressed on the surface. An injunction was granted. Black, J., said: "To entitle the plaintiff to a per-

petual injunction, the imitation need not be exact or perfect. To constitute an infringement, it will be sufficient to show that the imitation is such as would be likely to mislead one in the ordinary course of purchasing the goods, and lead him to suppose or believe that he was purchasing the genuine article. It is not necessary to show that any one has in point of fact been deceived, nor is it, at this day, necessary to show intentional fraud." *Liggett Tobacco Co. v. Reid Tobacco Co.*, 104 Mo. 53.

In *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340, plaintiff manufactured and sold cigarettes, each of which was inclosed in a rice-paper wrapper, and upon the middle of the cigarette, outside of this wrapper, were the words, in circular form, "Sweet Caporal." Below these words was the word "Rice," the words "Kinney Bros." and the word "Paper." The cigarettes manufactured by defendant bore the words "Sweet Coronal," "Rice," "Oscar Maller" and "Paper," arranged in a perfectly similar way. An injunction was granted. *Daniels, J.*, said: "A casual or inattentive observer, as most purchasers are, would be very likely to accept one [label] in place of the other. . . . It is by this peculiar form, combination and location of the words, rendering one label a close resemblance of the other, that deception and injury would be caused. And when that is the nature of the device resorted to, although the defendant may employ the words he has a legal right to select and use, yet he violates the right of the plaintiff by so printing, placing and arranging them as to produce the conclusion that the manufacture is that of the other party."

A manufacturer of a certain article of dentistry printed on the boxes containing it the words, "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber," the words "Akron Dental Rubber," which were the trade-mark of a rival manufacturer, being in red ink and very prominent type. An injunction was granted on the ground that the label was likely to mislead. *Elliott, J.*, said: "Where the similitude is in the substantial parts of a trade-mark, there is an infringement, and that an evasive attempt to hide the similarity, or a colorable explanation which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-

mark, will not defeat the owner's right to an injunction." *Keller v. Goodrich Co.*, 117 Ind. 556.

A real-estate auctioneer used in his business in newspaper advertisements, etc., the representation of a flag with stars on the upper and lower borders. Defendant adopted and used in a similar way a like design. An injunction was granted, not on the "theory of trade-mark proprietorship," but on the ground of "illegitimate competition in trade." *Patterson, J.*, saying: "The defendant has just as much right to use in his advertisements the picture of a flag as the plaintiff has, but he has not the right to imitate those peculiar and fanciful arrangements of details which indicate to the public the plaintiff's special business sign." *Johnson v. Hitchcock* (Supreme Ct.), 3 N. Y. Supp. 680.

In *Goodyear India Rubber Co. v. Goodyear Rubber Co.*, 128 U. S. 598, *Field, J.*, said: "Relief in such cases [unfair trade] is granted only where the defendant by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff." *McLean v. Fleming*, 96 U. S. 245; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *Perry v. Truefitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84." See also *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 536; *Putnam Nail Co. v. Bennett*, 43 Fed. Rep. 800.

In *Trask Fish Co. v. Wooster*, 28 Mo. App. 408, *Lewis, P. J.*, said: "It is not essential to the protection of a trader against a rival's fraudulent interference with his business, that he shall have a trade-mark to be pirated. 'The right to a technical trade-mark, in the strict sense of the word, is not necessary to entitle the complainant to relief.' *McLean v. Fleming*, 96 U. S. 245. It is enough if the wrongdoing rival uses any letters, marks, shapes, devices, or symbols, so nearly like those previously employed by the complainant to distinguish his wares, that purchasers from him may be likely to believe they are getting the goods of the complainant."

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, where complainant put up and labeled his chewing gum in a particular way, he was held not entitled to an injunction to restrain defendant from doing likewise, in the absence of clear proof that he had first established a

reputation for his goods by this means, and that the defendants had attempted to supplant him in the market by the unlawful use of such device.

In *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205, complainant owned and used a trade-mark consisting of the word "Moxie," prefixed to the words "Nerve Food," with a label containing a picture and descriptive words. It also used a champagne bottle wrapped in peculiar paper, etc., in which to put up this preparation. Defendant used words "Standard Nerve Food," with reference to a similar article, and put it up similarly. A motion to dissolve the injunction was refused, Sabin, J., saying: "While it is clear that words or articles in common use could not be enjoined if used upon other preparations, yet if used upon like or simulated preparations of same flavor, taste, and appearance, it seems to me that they can; and particularly when the first party using the same, in connection with his trade-mark and style of package, has established such a use of the same, and an intimacy between himself, it, and the public, as to become a matter of value by way of preventing deceit. . . . There is room enough in the world for all, and so there are bottles and styles of packages enough for all; and if a man has an article which, either by accident or design, happens to have the same quality, and be entitled to the same descriptive class of goods, and of the same taste, flavor, and color, as another's and, when used, is used in the same way, or is in imitation of another's article, and he finds that his neighbor is making money by vending such article of his own, why then, and in such case, let him use a different kind of bottle or package in placing his own preparation before the public, to the end that he may neither derive advantage over his neighbor, nor induce the public to buy one thing when they think they are buying another." See also *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *McCartney v. Garnhart*, 45 Mo. 593; *Parlett v. Guggenheimer*, 67 Md. 542.

In *Foster v. Blood Balm Co.*, 77 Ga. 216, Bleckley, C. J., said: "But whether the design would suffice or not for a technical trade-mark, there can be no reasonable doubt that it is sufficient for a label, . . . and if others, for goods of the same class, have imitated

the main features of it so closely as that the imitation is likely to mislead the average public and betray purchasers into ordering goods covered by the simulated label, thinking them to be those put on the market by the complainants, this would amount to unfair competition in trade, and, upon being ascertained with due certainty, the use of the imitation ought to be enjoined."

In *McCann v. Anthony*, 21 Mo. App. 83, Thompson, J., said: "The governing principle is that one manufacturer shall not be allowed to impose his goods upon the public as the goods of another manufacturer, and so derive a profit from the reputation of that other. It is not necessary that the trade-mark, trade name, sign, label, or other device which is employed by one merchant for that purpose shall be an exact imitation or counterfeit of the trade-mark, trade name, sign, label, or other device employed by the other manufacturer. Nor is it required that the imitation be so close as to deceive cautious and prudent persons; it is sufficient that it be so close as to deceive the incautious and unwary, and thereby work substantial injury to the other manufacturer. Nor is it necessary to prove that actual fraud was intended by the manufacturer employing the simulated trade-mark, trade name, sign, label, or other device, in order to entitle the other manufacturer to relief in equity, or to an action for damages at law."

In *Landreth v. Landreth*, 22 Fed. Rep. 41, Dyer, J., said: "Even admitting that the defendant has the right to use the same words as those which constitute the complainant's label, he has no right to use them in such form or such style of arrangement as to lead the public to suppose that the [goods] . . . contained in his bags are . . . grown and sold by the complainants." See also *New York Cab Co. v. Moon-ey*, 15 Abb. N. Cas. (N. Y.) 152.

In *Avery v. Meikle*, 81 Ky. 73, Hargis, C. J., in speaking for the court, said: "A trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for in all cases the trade-mark, in indicating the origin by necessary implication, represents the quality of the article, which is the true source of its reputation in the market. . . . And its real value consists in the confidence and patronage of the

public, secured through its instrumentality in acquainting them with the origin and ownership of an article which thus gains reputation for its superior qualities. . . . When a workman or manufacturer has, by skill, care, and fidelity, manufactured a good article, it becomes of the utmost importance to him that its origin and ownership should be known, and the law points out to him what means, and how he may appropriate them to indicate this important fact, and when he adopts and uses them and his reputation is thereby built up, it is to him the most valuable of property rights. Sound policy, which dictates the protection of the public from imposition, the security of the fruits of labor to the laborer, the encouragement of skillful industry, and above everything, the inculcation of truth and honor in the conduct of trade and commerce and the requirement that all the contractual relations of life, natural, abstract and relative, shall be honestly observed, demands that such a reputation, so gained, shall be free from the grasp of piracy, and its infringement accorded the safest and best remedy for redress known to the courts of equity. . . . The law says you may use anything which is the common property of all, or that cannot be exclusively appropriated, but you must use it to convey the ideas which it commonly expresses and of which it is the accepted sign. You must use it to tell the truth, the whole truth, and nothing but the truth. You cannot, under pretense of exercising a common right of use, and by reason of the fact that the means used represent the quality and size of your goods, so use them that while they perform this simple and innocent purpose apparently of representing quality and size, caution and description, you cause them to do more, to represent your goods as those of another, and by the seeming fairness which follows the selection of a legal or innocent instrument or means, escape the consequences of an illegal use thereof. This would be stealing the livery of heaven to serve the devil in. . . . The trade-mark and trade reputation pirate always undertakes the difficult task of sailing between the Charybdis and Scylla of the law, but he should never be allowed a successful voyage. If, on the one hand he escapes the rocks by not infringing through instrumentality of the trade-mark itself,

he will not, on the other, if the courts of equity are true to the principles of their own existence, be allowed a safe passage by the use of any means of deceit or false representation known to the inventive brain of man. Courts of law and equity have finally become possessed of jurisdiction, through the unfolding process of adjudication, ample to protect a trade-mark, which may be used by all to distinguish their goods from others; to prevent the sales of the goods of one as being those of another by means of fraud and misrepresentation of the use of marks, signs, words, numerals, or symbols, to afford redress for such sales of goods which are a misleading imitation of those of another, for whose manufacture they may be sold, where the sales are made by the use of the trade-mark of another, or direct or indirect, intentional false representations or fraud, from which damage is presumed and its extent may be proven."

In *Humphrey's Specific Homoeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, Nixon, D. J., said: "It is now well settled that to entitle the proprietor of a trade-mark to relief, or to establish a case of infringement, it is not necessary to show that the imitation is exact in all particulars. If the resemblance is such as not only to plainly suggest an intention to deceive, but is calculated to mislead the public, who are purchasers of the article, and thus to injure the sale of the goods of the proprietor of the original device, the injured party is entitled to redress."

Where plaintiff had for some years painted upon wagons made by him the words "Shaver Wagon, Eldorado," it was held that the painting of the same words in the same style on wagons made by defendants was an infringement. *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194. Beck, J., said: "In order to authorize the interference of chancery, it is not necessary that the trade-mark should be copied with the fullest accuracy. An imitation which varies from the original, in some particulars, will be restrained. The rule is that if the imitation is calculated to deceive and may be taken for the original, its use will be restrained."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55, Clifford, J., said: "Judicial protection is granted in such a case, upon the ground that the honest, skillful, industrious manufacturer or enterprising merchant, who has produced or

brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it as his and from that of all others, shall receive the first reward of his honesty, skill or enterprise, and shall in no manner, and to no extent, be deprived of the same by another, who to that end appropriates the same or a colorable imitation of the same to his production, so that the public are, or may be deceived or misled." See also *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258; *Mitchell v. Henry*, 15 Ch. Div. 181.

In *Civil Service Supply Assoc. v. Dean*, 13 Ch. Div. 512, *Malins, V. C.*, said: "In the conduct of trade one man must not make such representations as to lead the public to believe that he is selling another man's goods, or that they are buying another man's goods while they are, in point of fact, buying his. . . . These rules of trade are made for the general public and for rational persons, and not for those who are willing to be misled, and to believe that when they go into one street they are going into another."

In *Levy v. Walker*, 39 L. T. N. S. 654, 656; 10 Ch. Div. 436; 48 L. J. Ch. 273, *James, L. J.*, said: "It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes, in the course of any business he chooses to carry on, is a right in the nature of a trade-mark; that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' That is the principle and the sole principle on which this court interferes."

"They (the orators) have the exclusive right to sell their wares as their own, and no other person has any right, by any means, to palm off any other wares than theirs as theirs; and if a person does utter any other wares than theirs as theirs, an action at law will lie and a court of equity will grant an injunction." *Per Wheeler, J.*, in *Frese v. Bachof*, 13 Pat. Off. Gaz. 635. See also similar observations by the courts in *Skinner v. Oakes*, 10 Mo.

App. 45; *Williams v. Brooks*, 50 Com. 278; 47 Am. Rep. 642; *Electro-Silicon v. Levy*, 59 How. Pr. (N. Y. Supreme Ct.) 469; *Enoch Morgan v. Schwachofer*, 5 Abb. N. Cas. (N. Y.) 265.

Plaintiffs were proprietors of "Henry's Royal Modern Tutor for the Pianoforte." Defendant employed Henry to bring out a new edition of an obsolete work, entitled "Jousse's Royal Standard Pianoforte Tutor," and published it as "Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Henry's" being in large and conspicuous letters. An injunction was granted on the ground that "no man has a right to sell his goods as the goods of another." *Metzler v. Wood*, 8 Ch. Div. 606; 47 L. J. Ch. 625; 33 L. T. N. S. 541; 26 W. R. 577.

A complainant is entitled to an injunction for violation of his trade-mark if the defendant should endeavor to convey a false impression that his goods are the complainant's goods, or that the complainant is responsible for them, by any means that are calculated to deceive. *Day v. Walls*, 12 Phila. (Pa.) 274.

Plaintiffs' trade-mark for stove polish was "The Rising Sun," with the device of an orb rising over a body of water. Defendant adopted the words "The Rising Moon," with a similar device. An injunction was granted against the use of the words "Rising Moon," as well as against the device used. *Paxson, J.*, said: "In determining a question of this kind, some regard must be had to the character of the article, its price, and the average intelligence of the persons who are likely to be its chief purchasers and consumers. When an article is costly, is used principally by persons above the ordinary standard of intelligence, and is likely to be inspected closely, the danger of deception would necessarily be less than in the case of an article of stove polish, sold at retail for ten cents, and used chiefly by the humbler and more ignorant classes." *Morse v. Worrell*, 10 Phila. (Pa.) 168; *Codd. Dig.* 242; 2 W. N. C. 12; *Cox's Man. of Trade-Mark Cases* 445.

Plaintiffs, carriage dealers, had for many years called their place "Carriage Bazaar." Defendant, engaged in the same business, first styled his place "Carriage Repository," afterwards changing it to "Carriage Bazaar." There was evidence of mistakes made

by patrons, etc. An injunction was granted on the ground of unfair competition. *Boulnois v. Peake*, 13 Ch. Div. 513, note. See also *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 401.

Plaintiffs, thread manufacturers, placed on one end of their reels, labels with the words "Taylor's Persian Thread," and on the other end, the armorial bearings of the city of Leicester, the words "J. & W. Taylor, Six Cord" etc. Defendant used similar reels, placing on the labels on one end, "Taylor's Persian Thread," on the other, "Sam Taylor," and his own armorial bearings. The court, in granting an injunction, said: "In every case the court must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblance and differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the court to consider, because, if the court finds, as it almost invariably does find in such a case as this, that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading." *Taylor v. Taylor*, 2 Eq. Rep. 290; 23 L. J. Ch. 255; 22 L. T. 271.

In *Marsh v. Billings*, 7 Cush. (Mass.) 322; 54 Am. Dec. 723, Fletcher, J., said: "The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words 'Revere House,' on the coaches and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessée of the Revere House, in violation of the rights of the plaintiffs."

In *Coats v. Holbrook*, 2 Sandf. Ch. (N.Y.) 586; 3 N.Y. Leg. Obs. 404, plaintiffs, manufacturers of thread in Scotland, sold it on spools labeled, among other things, with the words, "J. & P. Coats Best Six Cord." Defendants, American commission merchants, sold other thread similarly gotten up and

labeled. An injunction was granted. The court said: "A is not to sell the goods or manufactures of B, under the show or pretense that they are the goods or manufactures of A, who by superior skill or industry has established the reputation of his articles in the market. The law will permit no person to practise a deception of that kind, or to use the means which contribute to effect it. He has no right, and he will not be allowed, to use the names, letters, marks, or other symbols by which he may palm off upon buyers as the manufactures of another, the article he is selling; and thereby attract to himself the patronage that, without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up, or was alone accustomed to use, such names, marks, letters, or symbols."

Plaintiffs in *England* were manufacturers of "Taylor's Persian Thread." Defendants in *America* sold other thread, imitating exactly the names, trade-marks, envelopes, and labels of plaintiffs. It was held to be a fraudulent infringement and an injunction was granted. Story, J., said: "The case presented is one of unmitigated and designed infringement of the rights of the plaintiffs, for the purpose of defrauding the public and taking from the plaintiffs the fair earnings of their skill, labor and enterprise." *Taylor v. Carpenter*, 3 Story (U. S.) 458. See also *Taylor v. Carpenter*, 4 Wood & M. (U. S.) 1; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603; *affirmed* 11 Paige (N. Y.) 292; 42 Am. Rep. 114.

No man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufactures of such other person, while he is really selling his own. To do these things is manifestly a very gross fraud. The right which any person may have to the protection of the court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and that may be practised against him by

the defendant is not deceived, nor intended to be, nor likely to be, deceived, yet where the ultimate purchaser may be and is likely to be deceived. Proof of actual deception is unnecessary; the probability of deception, if shown, will entitle the plaintiff to relief.¹

means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. Two things are required for the accomplishment of a fraud: First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; second, sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. *Croft v. Day*, 7 Beav. 88.

In *Perry v. Truefitt*, 6 Beav. 66; 1 L. T. 384, the court said: "I think that the principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under pretense that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own that it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or has not a property in the name or mark, I have no doubt that another person has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark."

1. In *Von Mumm v. Frash*, 56 Fed. Rep. 830, plaintiffs originated a champagne, having a "dry" flavor, which they called "G. H. Mumm & Co.'s Extra Dry," selling it in bottles having peculiar rose-colored capsules and other indicia of ownership. The words "Extra Dry," though used at times by others, were generally under-

stood by dealers to represent this particular wine of plaintiff. Defendant put a wine on the market which had no "dry" flavor, calling it "Extra Dry," and using colorable imitations of plaintiffs' capsules and labels. An injunction was granted. The court laid down the general doctrine that one who puts into the hands of retail dealers an article so dressed up as to enable such retail dealers to deceive the ultimate purchaser, will be enjoined. And that a court may determine whether a trade-mark has been infringed by comparison, without the testimony of witnesses as to the likeness. Where the proofs warrant the conclusion that the dress of defendant's article is adopted so that it can be successfully used to defraud the ultimate consumer, no proof of actual deception is necessary.

In *Lever v. Goodwin*, 36 Ch. Div. 1, Chitty, J., said: "Now, it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shop-keeper or the shop-keeper's assistant. But that is not the true view of the case. The question which I have to try is, whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser."

In *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125, Gresham, J., said: "The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of the complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud or is likely to be injured by it."

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, Clifford, J., in a dissenting opinion said: "But the practice in equity has long been settled otherwise, the rule now being that the injury the owner of the trade-mark suffers by the offering for sale in the market of other

7. Sale of Goods Under Another Person's Wrappers and Labels, or in Stamped Bottles.—The refilling of labeled or stamped bottles with spurious goods of the same class, and selling them as and for genuine goods, is a common method of infringement, and when proven will always be promptly enjoined, for the reason that such an act cannot be committed without an appreciation of the danger of deceiving the public, which it involves. The evil has become so great that most of the states have adopted statutes providing for the registration of stamped bottles and the criminal punishment of all persons unlawfully using them.¹

goods, side by side with his, bearing the same trade-mark, entitles the real owner of the trade-mark to protection in equity, irrespective of the intent of the wrongdoer, it being held that the injury done to the complainant in his trade by loss of custom is sufficient to support his title to relief. Neither will the complainant be deprived of remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trade-mark of the real owner were well aware that they were not of the complainant's manufacture. If the goods were so supplied by the wrongdoer for the purpose of being resold in the market, the injury to the complainant is sufficient to entitle him to relief in equity. Nor is it necessary, in order to entitle the party to relief, that proof should be given of persons having been actually deceived, or that they bought goods in the belief that they were of the manufacture of the complainant, provided that the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other."

In *Clark v. Clark*, 25 Barb. (N. Y.) 76, the plaintiffs were manufacturers of thread, which they sold, labeled with their name and other particulars. The defendant sold other thread labeled in a very similar manner. An injunction was granted to restrain defendant from imitating plaintiffs' trade-marks on spool cotton. Mitchell, J., said: "An imitation of his mark, with partial differences such as the public would not observe, does him the same harm as an entire counterfeit. If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer or consumer is, the injury is the same in law, and differs only in degree. The right of action must exist for the last, as well as the first."

The continued manufacture of goods

under a patent, and the continued marking thereof as "Sykes Patent," had been held invalid. Defendant likewise marked his goods "Sykes Patent," in order to denote that they were of the genuine manufacture of the plaintiff. It was held that, though they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers, for the express purpose of being resold, as goods of the plaintiff's manufacture, which is substantially the same thing. A motion for a new trial was overruled. *Sykes v. Sykes*, 3 B. & C. 541; 10 E. C. L. 176.

1. See the statutes of the various states under the section of this article, *supra*, *State Statutes*. In *Allen v. Richards*, 26 Sol. J. 658, an injunction was granted to restrain defendant from selling ginger-beer not manufactured by the plaintiff, in bottles stamped or marked with plaintiff's name, or registered trade-mark.

Plaintiff, a manufacturer of lime-juice, sold it in bottles molded especially for him with a spray of lime-tree leaf, and blossom, and his name, "Rose & Co.," and placed the same combination on his labels. Defendant systematically collected the empty bottles of the plaintiff, refilled and sold them with lime-juice not prepared by plaintiff. An injunction was granted. *Rose v. Henley*, Cox's Man. of Trade-Mark Cases 551. See also *Rose v. Loftus*, 47 L. J. Ch. 576; 38 L. T. N. S. 409, where the vice chancellor said: "I lay it down as a general rule, that it is not justifiable for a trader to fill bottles, or casks, or anything else bearing a known name, so as to induce the public to believe that the thing contained in those vessels is the production of the man whose name they bear; because by doing that he puts it in the power of the person selling these goods to impose on the public."

Plaintiff was a gun-maker, who

8. Sale of Inferior for Superior Goods of the Same Manufacturer.—It is a palpable fraud for a dealer to so bottle or prepare for sale the inferior goods of a manufacturer as to be able to pass them to the public as goods of a superior quality. Both the manufacturer and the public are injured by such action. The manufacturer's reputation for his best goods is seriously injured, and the public are induced to buy an inferior article, believing it to be a superior one.¹

stamped upon the lock-plates and levers of his rifles the words "Westley Richards," or "Westley Richards & Co." Defendants purchased some of such lock-plates and levers of worn-out guns, and, with other parts of guns not made by plaintiff, made them up into new rifles. It was established in evidence that the name appearing on the lock-plate was an indication recognized by the trade, that such manufacturer was responsible for the gun as a whole. An injunction was granted. *Richards v. Williamson*, 30 L. T. N. S. 746; 22 W. R. 765.

In *Hostetter v. Anderson*, 1 V. R. Eq. 7; 1 A. J. 4; *Cox's Man. of Trade-Mark Cases* 652, an injunction was granted to restrain defendants from selling bitters other than plaintiffs' in bottles of the plaintiffs, molded with the words, "Dr. J. Hostetter's Stomach Bitters," although the labels used by the parties on the bottles were different.

Plaintiffs were manufacturers of toy fire-works called "Pharaoh's Serpents," and defendant sold similar fire-works, placing them in old boxes bearing the plaintiff's labels, but without making any false representations. An injunction was granted. *Barnett v. Lenchars*, 13 L. T. N. S. 495; 14 W. R. 166.

Plaintiffs, manufacturers of soda-water, sold it in bottles in which were molded the words, "J. Schweppe & Co., 51 Berners Street, Oxford Street, Genuine Superior Aërated Waters," and which had a label over the cork with the words, "J. Schweppe & Co." Defendant sold soda-water in old bottles of the plaintiff, with a similar label over the cork, except that it bore the words "Soda-Water" instead of the plaintiff's name. An injunction which had been granted, was dissolved on the ground that no intention to deceive was shown, and no probability of deception; but if a probability of deception of the public had been caused, although unintentionally, the injunc-

tion would have been continued. *Welch v. Knott*, 4 K. & J. 747; 4 Jur. N. S. 330.

1. *Hennessy v. White*, 6 W. W. & A. B. Eq. 216, 221; *Cox's Man. of Trade-Mark Cases* 650. Here the plaintiffs sold their brandy both in casks and bottles, the latter being the better quality, placing on their bottles distinctive labels, corks and capsules. Defendants purchased plaintiffs' inferior or cask brandy, and sold the same in bottles bearing similar labels, corks, etc., only changing "Jas. Hennessy & Co., Cognac," into "Jas. Hennessy & Co.'s Cognac," the figure of an arm with a battle ax into a spread eagle, and having in addition the words, "Bottled by T. & W. White, Melbourne," etc. An injunction was granted. *Molesworth, J.*, said: "The makers of articles of different qualities are entitled to brand their best article in a particular way, to show the superior value they put upon it. . . . I put this case upon the particular ground, that an article of Hennessy & Co.'s manufacture of a higher quality has had a particular mark used for it, and that defendants' brand is an attempt to deceive, probably not the direct purchaser of the article, but the ultimate consumer." *Stowell, C. J.*, said: "If a brandy different from that which the manufacturer bottled is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy does not make the sale less an imposition."

Plaintiff, a manufacturer of pens, put them up for sale in boxes. The boxes containing the first quality were labeled No. 303, and those containing pens of an inferior quality were labeled No. 759. Defendant removed labels from boxes containing inferior pens, replacing them with labels bearing the number 303, and closely imitated from the plaintiff's labels. An injunction was granted. *Gillott v. Kettle*, 3 Duer (N. Y.) 624.

9. **Intention to Defraud.**—Wherever a technical trade-mark, trade name, proper name, firm name, or corporate name is involved, to which a plaintiff can assert a property right, the essence of the offense of infringement lies in the injury to property right, and will be restrained, irrespective of the question of intention on the part of the defendant.¹ When, however, the defendant

1. *De Youngs v. Jung* (C. Pl.), 25 N. Y. Supp. 479; 27 N. Y. Supp. 370.

Intention to Defraud not Necessary.—*Singer Mfg. Co. v. Loog*, 18 Ch. Div. 395; *Liggett, etc., Tobacco Co. v. Sam Ried Tobacco Co.*, 104 Mo. 53; *McCann v. Anthony*, 21 Mo. App. 83; *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886; *McLean v. Fleming*, 96 U. S. 253; *Wotherspoon v. Currie*, L. R., 5 App. Cas. 512; *Woollam v. Ratcliff*, 1 H. & M. 259; *Colman v. Crump*, 70 N. Y. 573; *Stonebraker v. Stonebraker*, 33 Md. 268; *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117; *Dixon v. Fawcus*, 3 El. & El. 537; 107 E. C. L. 535; 30 L. J. Q. B. 137; 7 Jur. N. S. 895; *Welch v. Knott*, 4 K. & J. 747; 4 Jur. N. S. 330; *Davis v. Kendall*, 2 R. I. 566.

In *Liggett Tobacco Co. v. Hynes*, 20 Fed. Rep. 883, *Parker, J.*, said: "If the effect of the simulated trade-mark is to deceive the public into the belief that the article upon which it is placed is the article of some other manufacturer, then it is deception, whether it was the actual intention of the person using the simulated trade-mark to deceive or not, as the principle of law applies that persons are held to have intended the necessary, natural and probable consequences of their acts."

Relief will be granted even against a person who merely has in his possession a quantity of goods bearing a spurious trade-mark, and intends not to part with them, but use them for his own consumption. *Upmann v. Forester*, 24 Ch. Div. 231.

In *Orr-Ewing v. Johnston*, 7 App. Cas. 219, it was said that plaintiffs need not wait for a case of actual deceit; they have only to satisfy the court that the similarity between the two tickets was such as to be calculated to mislead purchasers; and the conduct of the defendants themselves, in adopting such a ticket, is evidence to prove this.

In *American Grocer Pub. Co. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398, *Brady, J.*, said: "It is not necessary, under the rules of law, as they now prevail in this state, in regard to trade-

marks, to determine whether there was an intent to wrong or not."

Fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. *Singer Mfg. Co. v. Wilson*, 3 App. Cas. 376. Here *Cairns, L. C.*, said: "I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. . . . A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade-mark of his neighbor, and intending and desiring to injure his neighbor by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the court must depend upon the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them." And *O'Hagan, L. J.*, said: "If a man has acquired legitimately a right to the property in an exclusive use of a name, it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties, and the law ought not to permit and will not permit, the continuance of the invasion, whatever may have been its origin. If the ruling in *Millington v. Fox*, 3 My. & Cr. 338, be law, as it is clearly in consonance with policy, justice and common sense, the fact of misleading or the tendency to mislead, and not the intention of the proceeding which has such a result or such a tendency,

dresses his goods up or designates them by signs, symbols, wrappers, colors, packages, labels, or any other means or device so as to cause them so nearly to resemble the goods of the plaintiff as to deceive the public, and cause them to purchase the goods of the defendant, believing them to be the goods of the plaintiff, and the latter has no property in the means employed by the defendant to accomplish this deception, then fraud is of the essence of the cause of action, and must be shown, or else actual deception or probability of deception must be so strongly shown, as to enable the court to presume a fraudulent intent on the part of the defendant.¹

entitles the person who is injured to the protection of a court of equity, although the matter might be dealt with on different principles in a court of common law."

In *Blackwell v. Wright*, 73 N. Car. 313, Bynum, J., said: "It would seem to be immaterial whether an infringing trade-mark is adopted by fraud or mistake, for the injury is the same."

A person innocently selling goods bearing the spurious trade-mark of another is not, in equity, liable to account for the profits made thereby, but the owner of the trade-mark is entitled to an injunction. *Moet v. Couston*, 33 Beav. 578; 10 L. T. N. S. 395; 4 N. R. 86.

In *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. N. S. 479. Westbury, C., said: "At law the proper remedy is by an action on the case for deceit, and proof of fraud on the part of the defendant is of the essence of the action, but the court [equity] will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom, is sufficient to support his title to relief."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "Even where no fraud can be justly imputed, where the use of the name or style originated in mistake, and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a violation of the right of property, that if persisted in with a knowledge of the fact would be fraudulent. . . . An injunction must be granted whenever the public is

in fact misled, whether intentionally or otherwise, by the imitations of marks, forms or symbols which the party who first employed them had a right to appropriate, and this for the plain reason that when a right of property has been thus acquired, it must be protected."

In *Coffeen v. Brunton*, 4 McLean (U. S.) 516, McLean, J., said: "It would seem that intentional fraud is not necessary to entitle the plaintiff to protection, but that where the same mark or label is used which recommends the article to the public by the established reputation of another who sells a similar article, and the spurious article cannot be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to think that this is the correct view of the principle, for the injury will be neither greater nor less by the knowledge of the party."

In *Millington v. Fox*, 3 My. & C. 338, the court said: "In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names."

1. In *C. F. Simmons Medicine Co. v. Mansfield Drug Co.* (Tenn. 1893), 23 S. W. Rep. 175, the difference between technical trade-mark cases and cases involving unfair competition was stated as follows: "The law of trade-marks is designed to protect primarily a property right, and as incidental thereto gives redress for the injuries resulting from invasions of the right, a distinct technical trade-mark being in itself evidence, when wrongfully used, of an illegal act; while the jurisdiction exercised over cases of unfair competition in business, is grounded in

10. Marks Used on Other Kinds of Goods than Those of Complainant.—A trade-mark owner who has by adoption and sufficient use acquired title to a trade-mark as applied to a particular article, is entitled to claim the exclusive use of that mark upon all goods legitimately belonging to the same class of merchandise, for two reasons: First, because the public, knowing his trade-mark as applied to one article of a class, may not distinguish between his ownership of that particular article and other articles of the same class, and hence, seeing his mark upon another article of the same class, may conclude that it is of his manufacture, and if it be of inferior quality he will suffer injury to his reputation; and secondly, a manufacturer of a single article belonging to a general class, in the natural course of events, is likely to want to extend his manufacture to other articles of the same class, for the reason that, having acquired a good reputation for one article of a class, that reputation would extend to the whole class when additional articles of the same class are made by him. If another is allowed to acquire trade-mark rights in a manufacturer's trade-mark, as applied to any article of his class of merchandise which the manufacturer does not make, those rights would necessarily be exclu-

the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark rights may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element in trade-mark cases in awarding damages and costs, while in cases of unfair competition in business, fraud is of its essence." See also *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

In *Ex p. Farnum*, 18 Pat. Off. Gaz. 412, there is the following *dictum* as to geographical names used as trade-marks: "Undoubtedly courts of equity have granted injunctions to restrain the fraudulent use of words of this character; but the grounds of such decisions have been invariably, I think, the fraud of the defendants, and not any exclusive right of the plaintiffs."

In *Cheavin v. Walker*, 5 Ch. Div. 850; 46 L. J. Ch. 686; 36 L. T. 938, *Jessel, M. R.*, could see no fraudulent imitation in defendant's label, and remarked: "Fraud is the foundation of all this branch of jurisdiction, and unless fraud is proved, this court ought not to interfere."

In *Wotherspoon v. Currie*, 22 L. T. N. S. 260; 18 W. R. 562; L. R., 5 H. L. 508; 42 L. J. Ch. 130, *Malins, J.*, said: "Now, one man may adopt or imitate the label or trade-mark of another

with the most innocent intention possible, but the law has settled that if his imitation is such as is calculated to mislead purchasers into the belief that he is selling an article manufactured by that other, this court will interfere." *Chelmsford, L. J.*, said: "Where a trade-mark is not actually copied, fraud is a necessary element, and the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark. For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs." See also *Corwin v. Daly*, 7 Bosw. (N. Y.) 222.

In an action at law, fraud is of the essence of the injury, and must be proved. *Cramshay v. Thompson*, 4 Man. & G. 357; 43 E. C. L. 189; 5 Scott N. R. 562; 11 L. J. C. P. 301.

In *Blanchard v. Hill*, 2 Atk. 484, *Hardwicke, L.*, said: "It was not the single act of making use of the mark

sive against him, as well as the rest of the world, and when he desired to manufacture the particular article made by his rival, he would not be able to apply his own trade-mark to, and get the benefit of his own reputation for, his own goods.¹

11. Similitude; Duty of Competitor.—What similitude will be sufficient to constitute infringement, is a nice and delicate question in most cases. It is established that exact similitude is not necessary, nor evidence of actual deception of the public. The general rule is that any simulation which, in the opinion of the court would be likely to deceive and mislead an ignorant and incautious purchaser, will be sufficient. Some judges have said that the public must be given credit for some powers of observation, and that only such similitude will be enjoined which in a majority of cases would be likely to deceive. In determining this question, however, a different standard has been applied in different cases, dependent to some extent upon the character of the goods involved in the controversy, and the average intelligence of the class of the community who constitute the consumers of the particular article in question. Another rule and one which might be applied to all cases is this: one who begins to sell an article in competition with a similar article of established reputation, is held to a high standard of responsibility, to avoid danger of confusing his article with that of his successful rival, and particularly is this the case where, from the nature of the article and the custom of trade, all articles of that class are put up in very similar shape. If the dealer coming into a field already occupied, desires to deal honestly, and avoid danger of confusion, he can with comparative ease devise a means of doing so.²

that was sufficient to maintain the action [at law], but doing it with a fraudulent design."

1. See cases collected, *supra*, this title, *Class of Merchandise*.

2. *Schmidt v. Brieg* (Cal. 1893), 35 Pac. Rep. 623. The words "Sarsaparilla and Iron," in this case, were deemed to be not a valid trade-mark, but an injunction was granted on the ground of fraudulent imitation of label, etc., the court saying: "A competing business firm is bound to deal fairly in placing its rival article upon the market, and if it clearly appears that the defendants have closely imitated the plaintiff's labels and style, and have done obvious damage to the latter's business through the unlawful business methods employed, the plaintiffs are entitled to relief upon the ground of fraud. . . . The only material difference between the two labels in design and appearance exists in the colors, and this is no defense." See

also *Coats v. Merrick Thread Co.*, 149 U. S. 562.

No evidence of actual deception is necessary. It is the liability to deception which the remedy may be invoked to prevent. *Taendsticksfabricks Aktiebolaget Vulcan v. Myers* (Black Package or Caravan Tea), 139 N. Y. 364.

In *Hoyt v. Hoyt*, 143 Pa. St. 623, *Williams, J.*, said: "As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products."

In *Vulcan v. Myers*, 58 Hun (N. Y.) 161, *Daniels, J.*, said: "To maintain this or any other action, for the use of the trade-mark of another, the law does not exact a perfect or complete simulation or resemblance. But what has

been made necessary is, that there shall be such an imitation of the plaintiff's trade-mark by the defendants, as is calculated to, and probably will, deceive purchasers into the belief that, in buying the defendant's articles, they are really obtaining those manufactured or dealt in by the plaintiff, and in that manner induce them to purchase the defendant's productions for those of the plaintiff."

In *Sperry v. Percival Milling Co.*, 81 Cal. 252, McFarland, J., said: "The rule governing such cases is, that if the imitation of a trade-mark is intentionally so close as to deceive an ordinary purchaser, the defendant is liable, and the fact that an attentive inspection will disclose differences in even many respects between the two articles, will not shield him."

In *Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co.*, 40 Fed. Rep. 588, Shipman, J., said: "The complainant's label, with its words, symbols, and distinctive appearance, not having been simulated, and the defendant's box with its label, not being adapted to deceive or mislead the purchaser, is the use of the same or similar colors of wrappers and of boxes to be enjoined as infringing the rights of the complainant? The answer must be in the negative, unless the complainant's trade-mark proper has been imitated to some extent, or unless there is a colorable resemblance between the two marks."

In *Mumm v. Kirk*, 40 Fed. Rep. 589, the use of a capsule of the same color as that used by complainants on bottles of champagne was held to be not an infringement, where there is no attempt at deception, and where the labels used by the parties are so unlike that no mistake could arise. Coxe, J., said: "A man of average intelligence, exercising ordinary care, could readily ascertain the difference. . . . If the vendor happened to be a knave and the purchaser an imbecile, all manner of imposition might be practised, especially if previous potations had combined with nature to make the latter oblivious to surrounding occurrences. For such conditions, however, the defendant is not responsible. In short, infringement in this case is reached through such a succession of improbable 'ifs' that the doctrine, if pushed a few steps further, would drive all competitors from the field. The law cannot be so refined; it cannot deal with hypothesis and conjecture."

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, 448; 45 L. J. Ch. 491; 34 L. T. N. S. 858; 24 W. R. 1023; 3 App. Cas. 376; 47 L. J. Ch. 481; 38 L. T. N. S. 303; 26 W. R. 664, Jessel, M. R., said: "A manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer—that is the principle. . . . A trade-mark, to be taken, need not be exactly copied; it need not be copied, even with slight variations, but it must be a substantial portion of the trade-mark that is copied. It has sometimes been called the material portion; but that means the same thing—it means the essential portion of the trade-mark. . . . The second class of cases are cases of a totally different character—they are always cases of fraud. They are cases where the defendant, without putting any trade-mark at all on his goods, or putting a trade-mark which is admittedly different in substance from the trade-mark, if any, of the plaintiff, on the goods, has represented the goods as being goods manufactured by the plaintiff." O'Hagan, L. J., said: "I think we should be cautious in holding that, although a person of intelligent and observant habits might, in a case like this, by exercising reasonable vigilance, escape misleading, there should be no restrictive interference to prevent others from being misled. It is a question of degree—of more or less; there can be no rigid rule, and the special facts must be considered in every instance. There are multitudes who are ignorant and unwary, and they should be regarded as considering the interest of traders who may be injured by their mistakes. If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs." And there is [Blackburn, L. J.] "no difference between the wrong done by passing off goods as and for the plaintiff's which are not so, by means of a trade-mark, or by means of an advertisement."

In *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508; 42 L. J. Ch. 130, Hatherly, L. C., said: "In every respect the packets sent out by all starch

12. *Damnum Absque Injuria.*—It is not every case of interference by one trader with the business of another by the use of the same or of similar marks, names, or indicia, that will give a right of action. Cases may exist in which one trader may be seriously injured by having his trade diverted from him, and even the public deceived, without giving rise to a right of action. Such a case will exist whenever the marks, names, or indicia used by the plaintiff are things in which he has no exclusive property right, and which the defendant may use with equal right, and where he exercises this right with no illegal motive or design. Again, where a dealer had employed his own name as a trade-mark for his goods, any other person of the same name would have an equal right to employ his name upon the same class of goods, no matter what injury might result to the first dealer.

manufacturers would be like those sent out by the appellants and the respondents, with one or two exceptions. . . . You may see packets of needles done up in much the same way as those packets of needles were, that is to say, in dark-blue paper with a green label, as for that particular article of trade. I took occasion to remark in that case, and that is the only remark to be made upon what the respondent has done in this case, that when there is so much general similarity, it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations, so that persons do not look at the shape of the packet, or at any other indicia of the packet than the particular distinguishing mark (in this case the name of the man, or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct."

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392, Monell, J., said: "The rule is that the imitation of a trade-mark need not be exact and perfect. It may be limited and partial. It may embrace variations that a comparison would instantly disclose. Yet, if a resemblance exists which was designed to mislead the public, its use may be restrained."

Sohl v. Geisendorf, 1 Wilson (Ind.) 60, was a case of infringement of trade-marks for flour. An injunction was granted. The court said: "If the two marks were seen at different times or places, a majority of purchasers would not distinguish the one

from the other, unless their attention were specially called to the difference. If such be the case, the law is well settled, that the defendants' trade-mark is an infringement of the plaintiffs,' even if the marks, side by side, would not mislead."

In *Anglo Swiss Condensed Milk Co. v. Swiss Condensed Milk Co.*, W. N. 1871, p. 163; L. J. N. C. 154, the court said: "It is not necessary, in order to enable the court to interfere, that there shall be absolute identity; but there certainly is so close a resemblance between the two as to deceive an ordinary purchaser."

In *Davis v. Reid*, 17 Grant Ch. U. C. 69, the court said: "If even ordinary purchasers may be deceived, or 'incautious purchasers,' as Lord Kinsdowne mentioned in a case in the House of Lords (*Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 539), an injunction will be granted."

Plaintiff practised his profession under the name of "The Colton Dental Association." Defendant, formerly in plaintiff's employ, began to style himself, in the sign over his door and in his cards, as "Dr. R. F. Thomas, late operator at the Colton Dental Rooms," the words "late operator at the" being in very small letters. The signs were otherwise very similar. An injunction was granted. Allison, P. J., said: "An imitation with partial difference, such as the public would not observe, does as much harm as an entire counterpart. If such variations impose on a portion or class of customers only, it is evident that the damage is of the same character, though varied in the amount

The same would be true of a manufacturer who employed the name of the town where his factory is situated, as a trade-mark—any other manufacturer in *America*, residing at the same place—or, in fact, elsewhere—might employ the same name upon similar goods without becoming responsible to the first dealer for any damage which might result.¹

or degree. . . . Wherever, upon the face of the label, or symbol, or sign, or name, there is a plain and manifest design to make the counterfeit appear in the eye of the public to be that which it is not, the probable and natural result of which must be to appropriate by this means to the maker of the counterfeit the benefit or profit which belongs to the true owner of a trade-mark, in such case preventive justice will not be invoked in vain." *Colton v. Thomas*, 7 Phila. (Pa.) 257; 2 Brew. (Pa.) 308. *Criticising Partridge v. Menck*, 2 Sandf. (N. Y.) 622, where it is held that equity will not interfere by injunction, where ordinary attention will enable a purchaser to discriminate between the marks or symbols employed.

In *Bradley v. Norton*, 33 Conn. 157; 87 Am. Dec. 200, *McCurdy, J.*, said: "It is well settled that the imitation of a trade-mark to render a party liable need not be a precise copy. If there is a substantial similarity, so that the community would be likely to be deceived, it is a sufficient infringement of the right." See also *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *Coffeen v. Brunton*, 5 McLean (U. S.) 256.

1. See *supra*, this title, *What May not Be a Valid Trade-Mark*. New York, etc., *Cement Co. v. Coplay Cement Co.*, 44 Fed. Rep. 277; 45 Fed. Rep. 212. Here complainants manufactured cement in Rosendale, N. Y., and called it "Rosendale Cement," the name by which all cement made in Rosendale was generally known. Defendants sold cement made in *Pennsylvania* as "Anchor Rosendale Cement." An injunction was refused unless it could be shown that complainants had an exclusive property in the name. *Bradley, J.*, said: "No doubt the sale of spurious goods, or holding them out to be different from what they are, is a great evil, and an immoral, if not an illegal act; but unless there is an invasion of some trade-mark, or trade name, or peculiarity of style, in which some person has a right of property, the only persons legally entitled to judicial redress would seem

to be those who are imposed upon by such pretenses."

Where the names of two medicines are respectively "Brown's Iron Bitters" and "Brown's Iron Tonic" (the name "Brown" in each case being justifiably used), and the bottles, wrappers and labels employed by each party are different, there is no case of infringement, and the similarity in the sound of the two names is no ground for injunction. *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453; 139 U. S. 540. In this case *Thayer, J.*, said: "So long as the representation is true, so long as it appears that the mixture is Brown's Tonic, and no artifice is shown, as by simulated bottles and labels, or other means to deceive the public, equity will not enjoin. Whatever mistakes may arise because the names of the compounders of the two medicines are the same, cannot be remedied by injunction." And *Brown, J.*, said: "A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria*."

In *Avery v. Meikle*, 81 Ky. 73; 117 P. & S., Am. Trade-Mark Cases, *Hargis, C. J.*, said: "This limitation must be observed, that if the means used are such as are common to all, or not exclusively appropriated by another, and injury follows which is not the result of design and improper use of those means, no remedy exists. There may be a design in adopting lawful means to absorb another's trade reputation, yet if those means are the common property of all, and are used in a lawful manner, and damages ensue, it would be *damnum absque injuria*."

In *Enoch Morgan v. Troxell*, 89 N.

13. Deception Impossible.—In considering the cases on the question, of what will not constitute an infringement, we meet the oft-repeated statement that: "In trade-marks, in order to entitle the plaintiff to relief by injunction, the resemblance must be such

Y. 292; 42 Am. Rep. 294, *reversing* 23 Hun (N. Y.) 632, Rapallo, J., said: "When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material, but to sustain an action, there must be an imitation of something that can legally be appropriated as a trade-mark. . . . If, as we think, there was no imitation of any trade-mark of the plaintiff, the judgment cannot be sustained on the ground of fraudulent representations or devices on the part of the defendants to palm off their goods upon individuals as the goods of the plaintiff. What remedy there is for such a wrong, if proved, it is not necessary now to inquire, but the remedy clearly is not to restrain the defendants from selling their own goods in packages and with labels which they have a legal right to use, and which do not infringe upon any trade-mark of the plaintiff."

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, Strong, J., said: "It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or accidental, that there is any title to relief against it. True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, Duer, J., said: "It is evident, however, that in order to convey a false impression to the mind of the public as to the true origin or manufacture of goods, it is not necessary that the imitation of an original trade-mark shall be exact or perfect. It may be limited and partial. It may

embrace variations that a comparison with the original would instantly disclose, yet a resemblance may still exist that was designed to mislead the public, and the effect intended may have been produced; nor can it be doubted that, whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued and ought to be issued. . . . My conclusions on this branch of the subject are, that an injunction ought to be granted whenever the design of a person who imitates a trade-mark, his design apparent or proved, is to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence; and that an injunction must be granted whenever the public is in fact misled, whether intentionally or otherwise, by the imitation or adoption of marks, forms, or symbols which the party who first employed them had a right to appropriate, and this for the plain reason that when a right of property has been thus acquired, it must be protected. It must not, however, be inferred from these remarks that an injunction ought to be granted whenever there exists such a resemblance between trade-marks as may induce a belief in the minds of the public that they belong to and designate the goods of the same trader or manufacturer. It is not enough that the public may be misled or has been misled. As already intimated, the resemblance must arise from the imitation or adoption of those words, marks, or signs which the person who first employed them had a right to appropriate as indicating the true origin or ownership of the article or fabric to which they are attached; and the resemblance, where it induces error, and gives a title to relief, must amount to a false representation, express or implied, designed or accidental, of the same fact. . . . Purchasers may be deceived; they may buy the goods of one person as those of another, but they are not deceived by a false representation; they are deceived because certain words or signs suggest a meaning to their minds, which they do not in reality bear and were not designed to convey."

that ordinary purchasers, exercising ordinary prudence and caution, are likely to be misled." The court is not bound to interfere where ordinary attention will enable the purchaser to discriminate.¹

1. *Heinz v. Lutz*, 146 Pa. St. 592, was a case of infringement of labels. Paxson, C. J., said: "It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. . . . In trade-marks, in order to entitle the plaintiffs to relief by injunction, the resemblance must be such that ordinary purchasers dealing with ordinary caution are likely to be misled. *McLean v. Fleming*, 96 U. S. 245. The court is not bound to interfere where ordinary attention will enable the purchaser to discriminate. . . . In that part of plaintiff's trade-mark, which he is entitled to claim as such, there is no resemblance whatever. They differ in style, color and device."

Munro v. Smith (Supreme Ct.), 13 N. Y. Supp. 708; 59 Hun (N. Y.) 624, was a case of infringement of title-pages of two publications. Barrett, J., said: "But in the absence of proof of the intention to deceive, or that purchasers have actually been misled by a resemblance, if the two trade-marks are not to the eye of the court either altogether identical, or so similar that the court considers the difference unsubstantial, an injunction will be refused. . . . The rule has regard to the ordinary purchaser. I agree with Sir George Jessel in *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 447, when he says: 'I am not, as I consider, to decide cases in favor of fools and idiots, but in favor of ordinary English people, who understand English when they see it, and are not deceived by any difference in type, but who have before them a very plain statement. There are undoubtedly cases where the law will consider the probable ignorance of the purchaser, such as where domestics are in the habit of buying kitchen soaps, and the like, and also cases where even the careless and unwary will be looked after (*Colman v. Crump*, 70 N. Y. 573); but novel readers, even of the 'Old Sleuth kind,' ought to be able to read plain English, to know what the cover of a book represents, and to get what they want."

A white label with a red border, containing the words, "Microbe Killer" and the picture of a man striking a human skeleton with a bludgeon, used

with reference to a medical compound, is not infringed by a yellow label with a black border, containing only the words "Microbe Destroyer," the words themselves being held words in common use and not a valid trade-mark. *Alff v. Radam*, 77 Tex. 530. Here the court said: "Notwithstanding plaintiff has no real or legal trade-mark, if the defendants had intentionally simulated the particular device or symbol employed by plaintiff on his labels, and such simulation was calculated to deceive ordinarily prudent persons, and did deceive such persons, the plaintiff would be entitled to protection against the consequences of such deception, not because of his device or symbol being a trade-mark, in the legal sense of that term, but because of the fraud and deception practised by the defendants upon the plaintiff and the public. In this case, however, the labels used by the plaintiff and defendants respectively are so entirely dissimilar that we do not think it possible for any person of ordinary prudence and caution to have been deceived by defendants' label, and thereby induced to buy their remedy, when the purchaser desired and intended to buy the plaintiff's remedy."

Where the plaintiff used as a trade-mark for tobacco a five-pointed star, made of tin with a hole in the center, and attached to the plug by prongs in the back, his tobacco thereby acquiring the name of "Star Plug Tobacco;" and the defendant used in a similar way a round piece of gilded paper with a red star on it, and the word "Light" printed beneath, etc., thus giving it the name of "Starlight" tobacco, the court thought there was "no possibility of any person, not afflicted with color blindness, to mistake the one for the other," and affirmed a decree refusing an injunction. *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182.

The only resemblance between the packages of complainants and defendants was in the color of the labels, the use of the words "Montserrat Lime Juice" (Montserrat being a geographical name and therefore held not capable of exclusive appropriation), and the form of the bottles, which, how-

This rule is an excellent one in cases to which it is applicable; but it by no means covers the whole subject nor states the law for all cases. The courts, both in *England* and the *United States*, have been slow to admit the full force and logical effect of the proposition that a trade-mark is property, and as such, capable of exclusive appropriation by an individual, and entitled to the same measure of protection as any other form of property. Logically, if a trade-mark is property, the offense of infringement consists of injury to that property and the rights and privileges which

ever, were similar to all those used in the trade. The court thought there was no deception. *Evans v. Von Laer*, 32 Fed. Rep. 153.

In *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767, Scholfeld, J., said: "It is true that, . . . as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection. . . . But the court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties."

In *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589, Rapallo, J., said: "Where the trade-mark consists of a picture or symbol, or in any peculiarity in the appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not interfere." Citing with approval *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22. See also *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527.

In *Robinson v. Berry*, 50 Md. 595, Miller, J., said: "Upon the question of resemblance, the authorities all agree that it is impossible to lay down any general rule as to what degree of resemblance is necessary to constitute the fraudulent or colorable imitation. All that can be done is to ascertain in every case as it occurs, whether there is such a resemblance as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. *Kerr on Injunctions* 483; *McLean v. Fleming*, 96 U. S. 245; *Siexo v. Provezendo*, 1 Ch. App. 192."

In *Gilman v. Hunnewell*, 122 Mass.

148, Gray, C. J., said: "All the authorities agree that the court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines, and devices are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other."

Plaintiff's trade-mark consisted of the figure of a bull, and the words "Genuine Durham Smoking Tobacco. Manufactured only by W. T. Blackwell (Successor to J. R. Green & Co.), Durham, N. C." Defendant used the figure of a bull's head in a circular design, and the words "The Original Durham Smoking Tobacco. Manufactured by W. A. Wright." The court, by Bynum, J., in refusing an injunction, said: "But before the owner of a trade-mark can thus call upon the courts, he must show, not only that he has a clear legal right to the trade-mark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendants is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public, or whether the symbol adopted was calculated to deceive. But if it appear that the trade-mark alleged to be imitated, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated." *Blackwell v. Wright*, 73 N. Car. 310.

In *Talcott v. Moore*, 6 Hun (N. Y.)

it represents, and any act by a defendant which can be shown to work an injury to this property should be restrained. It is true that in most cases the deception of the public is the best test of injury, and therefore it is that this criterion has been so universally adopted, and the courts have been led to say that, unless the probability of the deception of the public can be shown, the plaintiff will not be entitled to relief. There are cases, however, to which this test does not apply; for instance, cases in which the defendant has applied the plaintiff's trade-mark to an article which the latter does not make, but which belongs to the

106; *Cox's Man. of Trade-Mark Cases* 478, it was held that the name "The Red and White Book," was too dissimilar from "The Little Red Book, New Series, 1875" to grant an injunction, even when there was an apparent attempt to deceive. *Daniels, J.*, said: "The points of difference are so prominent and striking as at once to produce the impression that both the medicines and the books are different productions. . . . The rule upon this subject is practically the same as that applied for the protection of trade-marks, where, in order to maintain an action for an injunction, it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived."

Plaintiff sold lard in vessels on which were stamped his name, the figure of a fat hog, and the words "Prime Leaf Lard." Defendants similarly used the devices of a globe and a small wild boar, with their name and the words "Prime Leaf Lard." An injunction which had been granted was dissolved on appeal. *Allen, J.*, said: "The question in this, as in every other case, is, whether there is such a resemblance between the two as to deceive a purchaser using ordinary caution. The difference is so palpable here that no one can be deceived. . . . The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties." *Popham v. Wilcox* (afterwards *Popham v. Cole*), 66 N. Y. 69; 14 Abb. Pr. N. S. (N. Y.) 206; 38 N. Y. Super. Ct. 274; 23 Am. Rep. 22.

In *Cope v. Evans*, L. R., 18 Eq. 138; 30 L. T. N. S. 292; 22 W. R. 453, plaintiffs sold their cigars in boxes branded with the words "Flor Fina Prairie Superior Tabac," and the figure of a hunter. Defendant sold cigars of his manufacture in boxes branded with the

words "Flor de la Prairie," and the half figure of a girl. An injunction to restrain defendants from using the word "Prairie" was refused. The court, by *Hall, V. C.*, said: "I take it that the law of this court is, that it will not grant the injunction unless it is satisfied that there will be deception, or that there is a probability or likelihood of deception, or, in *Lord Kingsdown's* words, that what the defendant does is calculated to deceive." In *Swift v. Dey*, 4 Robt. (N. Y.) 611, which was a case of infringement of label, the court, by *Robertson, C. J.*, said: "The proper question should be, not differences, but points of resemblance; not the utmost vigilance of purchasers, but ordinary observation. The value of the goods to be sold, and the intelligence of the persons dealing in and consuming them, besides other circumstances, are also to be taken into account in determining the adaptability of a simulated trade-mark to deceive purchasers. . . . The great principle laid down and applied in all the cases of trade-marks is, that if persons of ordinary understanding purchasing the article would be placed on their guard, and would be led to inquire whether they were being deceived by the article they were purchasing, that fact is sufficient for the court to refuse its interference."

Plaintiff, a silk throwster, made up his bundles in a peculiar manner, affixing a label or mark thereto. Defendant, in obedience to an order, made up silk in the same way, omitting the mark. An injunction was refused, no case of deception having been proved. *Woollam v. Ratcliff*, 1 H. & M. 259.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 607, *Duer, J.*, said: "In all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of goods of one manufacturer or vendor, as those of another, and it

same class of merchandise.¹ In these cases it is held that the property right of a trade-mark owner extends to the whole class of merchandise, and he has a right to reserve the whole class to himself for the application of his mark; that the public are likely to be misled into the belief that the trade-mark, upon which they are accustomed to rely as a guaranty of origin and quality on one article of a class, will mean the same thing and indicate the same origin and quality when applied to all other goods of the same class. This is true, but inasmuch as the plaintiff does not make the same goods as the defendant, he is losing no sales by the acts of the defendant. The only injury to the plaintiff consists in a possible injury to his reputation by the sale of inferior goods by the defendant bearing his trade-mark, and a confusion of the public mind with reference to the identity and meaning of the plaintiff's mark. The cases are very few in which the courts have gone so far as to say the offense of infringement consists of injury to the plaintiff's property right, and to hold that a plaintiff is entitled to an injunction when it can be shown that this property right has been injured, independent of the question of deception of the public. Logically, any injury of the property right should give rise to a cause of action, and we have no doubt that in time this conclusion will be recognized. Such a case would arise where a defendant uses the technical trade-mark of the plaintiff upon goods of the same class of merchandise, but so surrounded and associated with other things, as to make deception of the public practically impossible, and yet where the use of the plaintiff's property is not only unauthorized, but injurious to him, by undermining the integrity of his trade-mark rights, confusing the mind of the public with reference to the identity and meaning of the trade-mark, and exposing him to the danger of having his reputation injured by inferior goods being sold under his trade-mark. The trade-mark is a dealer's commercial signature, and ought to be given the same protection which would be given to his signature; for, while the signature may be said to carry with it greater power of identification than the trade-mark, still this is only a matter of degree, and who is to determine this question of degree? Is a court to say in any particular case that the use of a man's name will be enjoined, and the use of his trade-

is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief. . . . And the imitation is such that the success of the design (to impose goods of defendant upon the public for those of plaintiff), is a probable or even possible consequence."

In *Partridge v. Menck*, 2 Sandf. Ch. (N. Y.) 622; 2 Barb. Ch. (N. Y.) 101;

47 Am. Dec. 281; 1 How. App. Cas. (N. Y.) 558, the vice-chancellor said: "It does not suffice to show that persons incapable of reading the labels might be deceived by the resemblance. It must appear that the ordinary mass of purchasers, paying that attention which such persons generally do in buying the article in question, would probably be deceived."

1. See *supra*, this title, *Class of Merchandise*.

mark, under exactly similar circumstances and surroundings, will not be enjoined? The two ought to be interchangeable, and we submit that, in the case of a technical trade-mark, if the plaintiff's title is perfect, it should then only be necessary to show that his trade-mark has been taken without his consent and used by the defendant, to entitle him to an injunction, no matter how or in what association it may have been used by the defendant.¹

XI. EFFECT OF PLAINTIFF'S MISREPRESENTATIONS TO THE PUBLIC—

1. *In General.*—It is a general rule of equity jurisprudence that he who seeks equity must do equity; he must come into equity with clean hands. This maxim has been applied in trade-mark cases with great vigor, and there are many cases, where although the imitation of the plaintiff's labels and trade-marks has been of a most flagrant nature, yet the protection of equity has been denied him, in consequence of some false statement contained upon his label or on some publication issued in connection with the sale of his goods. False statements as to ingredients, maker, cures, harmlessness, purity, place of manufacture, and even words not intended to mislead, but which were capable of being misunderstood, have been held to be sufficient to disentitle a plaintiff to relief.² Unlawful acts on the part of the plaintiff, such as the

1. "Any person who shall . . . imitate any trade-mark registered under this act, shall be liable to an action for damages for the wrongful use of said trade-mark." U. S. Rev. Stat. 21; Stat. at Large, ch. 138, p. 502; Act March 3d, 1881.

In *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, the court said: "The first appropriator of a name or device pointing to its ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the article, is injured when another adopts the same mark or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former."

In *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 314, Blatchford, J., said: "It is apparent that the protection given by the statute is the exclusive use of the trade-mark only so far as regards that particular description of goods set forth in the filed statement as the particular description of goods to or by which the trade-mark has been or is intended to be appropriated; that the inhibition of the statute is only against the use of substantially the same trade-mark or substantially the same particular description of goods, and that the wrong-

ful use which may be enjoined is only the affixing by another, of substantially the same trade-mark to goods of substantially the same descriptive properties as those set forth in the filed statement as the particular description of the goods for which the trade-mark has been or is intended to be appropriated." See also *Kinney v. Allen*, 1 Hughes (U. S.) 106.

In *Singer Mfg. Co. v. Wilson*, 2 Ch. Div. 434, Mellish, J., said: "Consequently when you get to a case of the first class (technical trade-mark), you have nothing more to do than to show that the trade-mark has been taken."

2. In *Koehler v. Sanders*, 48 Hun (N. Y.) 48, Van Brunt, P. J., said: "Although we might well base our decision in this case upon the evident fact that the plaintiffs have adopted the name of the 'International Banking Company' for the purpose of deceiving the public into the belief that such 'International Banking Company' is a corporation, organized under the laws of this state for banking purposes, and that persons dealing with it have that security which the law exacts from such corporations, and that, therefore, the plaintiffs do not come into court with clean hands, and the court ought not to lend its aid to a perpetration of such imposition, it may be proper to consider the question

imitation by him of the trade-mark of another will, as a rule, disentitle him to relief and protection as against a rival.¹

involved upon its merits." This case was affirmed in 122 N. Y. 65. See also *Buckland v. Rice*, 49 Ohio St. 526; 131 P. & S., Am. Trade-Mark Cases.

In *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, Field, J., said: "A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were original circumstances to guide the purchaser of the medicine." See also *Robertson v. Berry*, 50 Md. 591.

In *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151, Rives, J., said: "This is upon the ancient and familiar principles that those who do iniquity must not ask nor expect equity. It is worthy of all acceptance; it is a hoary maxim, hallowed by its age, and unlike some other sacred antiquities, as yet unsaluted by the spirit of change or reckless progress; I adhere to it."

In *McNair v. Cleave*, 10 Phila. (Pa.) 155, there was a suit by plaintiffs, co-partners, trading as the "Galaxy Publishing Co.," to restrain defendants from the use of the trade name "The Galaxy Publishing Co. Limited." An injunction was refused. Paxson, J., said: "The plaintiffs are not in a position to invoke the aid of a court of equity. The name which they have adopted, with their manner of using it, is a fraud upon the public. The words 'Galaxy Publishing Company' imply that they are incorporated. As if purposely to strengthen this impression, the plaintiffs add to the name just cited the words 'William McNair, president, and Charles Robson, secretary and treasurer.' . . . It may be that no actual fraud was intended, and that the adoption of the name and designation of officers was regarded by the plaintiffs as a mere device which would harm no one and might benefit them. I give them the benefit of this doubt. It does not, however, help their case. A court of equity will assist no one in carrying on such a scheme as this. The familiar rule that he who seeks equity must do so with clean hands, is decisive of this motion."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523,

Lord Kingsdown said; "Nobody doubts that a trader may be guilty of such misrepresentations with respect to his goods, as to amount to a fraud upon the public, and to disentitle him on that ground, as against a rival trader, to the relief in a court of equity which he might otherwise claim. What would constitute a misrepresentation of this description, may in particular cases be a reasonable subject of doubt, and it was in the present case the ground of the difference between the two judgments under consideration. The general rule seems to be that the misstatement of any material fact calculated to deceive the public, will be sufficient for the purpose."

In *Dale v. Smithson*, 12 Abb. Pr. (N. Y. C. Pl.) 237, Hilton, J., said: "It is undoubtedly true that a court of equity will not interfere preliminarily by injunction, and protect a person in an exclusive right to a trade-mark or label manifestly devised and intended to cheat the public in the purchase of the article to which it may be attached, by representing the thing to be a different substance or compound from that of which it really consists, or by stating untruthfully its origin, properties, or qualities."

In *Fetridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385, Duer, J., said: "Those who come into a court of equity seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

1. In *Parlett v. Guggenheimer*, 67 Ind. 542, Stone, J., said: "One defense set up by the defendants is, in fact, a quasi admission that they were simulating the trade-mark of the plaintiffs, but that the plaintiffs were simulating the trade-mark of Palmer, and therefore could not complain of them."

2. Misrepresentation as to Ingredients.—Any misrepresentation as to the ingredients of an article, such as a statement that it is pure and free from adulteration when this is not strictly true, has been held sufficient to debar a plaintiff from relief. So the use of a name which would suggest that the compound to which it is applied is composed of, or contains, a particular thing or ingredient, which it does not contain, is held sufficient to disentitle a plaintiff to relief. Thus, the use of the word "Habana" on cigar labels, when the cigars on which the labels appeared were only Havana filler, has been held to be such a deceit on the public as to disentitle a plaintiff to relief against infringement.¹

It is a plea of confession and avoidance, but it still would be a good plea if sustained by the proof; for if the evidence does show that the plaintiffs were committing, by the use of their trade-mark, a fraud on Palmer, they are in no condition to complain of the defendants' fraud on them."

In *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457; 176 P. & S., Bookstaver, J., said: "When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. The rule is well settled that the party claiming protection against the fraudulent conduct of another, must himself be free from the imputation of fraud. There is a third reason why this motion should not be granted. A comparison of plaintiff's label with that used on the brand of cigars known as the 'Henry Clay' cigar, will make it plain that the plaintiffs' label is as close an imitation of the 'Henry Clay' label as the defendants' is of the plaintiffs'."

In *Smith, etc., v. Woodruff*, 48 Barb. (N. Y.) 438, Leonard, P. J., said: "The only plausible defense arises from the allegation of the defendant, that the plaintiffs are as wicked as he is, in that they attempt to impose upon and defraud the public, while he attempts only to defraud the plaintiffs. The justice and morality of this defense is not very high, in the present instance; but this rule of law or equity has been recognized in several cases, and must

be followed if the case is brought within its application. It is a defense that ought to be suggested by the court in some cases, and probably would be in all cases where the imposition is flagrant. For instance, where a quack compounds various and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happens to be."

1. *Clotworthy v. Schepp*, 42 Fed. Rep. 62. In *Kruass v. Jas. R. Peebles' Sons Co.*, 58 Fed. Rep. 585, complainant distilled whisky and bottled it under a label which bore the statement "Old Pepper Whisky, the oldest and best brand of whisky made in Kentucky. Pepper Distillery hand-made sour mash. Established 1780. Jas. E. Pepper & Co., Distillers, Lexington, Kentucky. Every genuine barrel has our trade-mark and fac-simile signature burned on the head. Consumers should satisfy themselves that the whisky is distilled by Jas. E. Pepper & Co., Lexington, Kentucky. Bottled at the distillery warehouse and warranted perfectly pure and non-adulterated." The court said: "It is proven and admitted that James E. Pepper & Co., for the eighteen months preceding July, 1893, instead of bottling pure, unadulterated Old Pepper Whisky, has bottled a mixture of Pepper whisky and other

whiskys, of which mixture thirty-five per cent. was not Pepper whisky. To bottle such a mixture and sell it under the trade label and caution notices above referred to, is a false representation and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used. It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainant and Pepper are not to be protected in the deception of the public even if it works to the advantage of the public."

In *Solis Cigar Co. v. Pozo*, 16 Colo. 388, the words "El Cabio Habana," were used by the defendants to designate a brand of cigars. Suit was brought by plaintiff to restrain this as an infringement of his trade-mark. The defense was made that the use of the words was a misrepresentation on the part of plaintiff as to quality. Bissell, C., said: "With regard to the word 'Habana,' the case is not so easy of settlement. This was expressive of a quality, and an absolute representation of the material of which the cigars were made. Some sorts of deception may be practised without loss of right to the legal protection usually given this species of property. It is possible for the proof to show that the public received an erroneous impression, which would not, of itself, be sufficient to destroy the validity of the trade-mark. Neither need the deception be of such a character as to work a positive injury to the purchasers to deprive the user of his exclusive privilege. In the first case it must not concern any of the essential particulars which the trade-mark protects, and in the latter it must not be absolutely false as to any of its leading elements. . . . The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and preferred by the smoking public, yet it was not wholly true. The plaintiff admitted that the cigars sold under that brand were made of Havana filler, seed binder, and Sumatra wrapper. Nothing but the filler came legitimately within the definition of Havana tobacco. . . . Such a course is in contravention of the princi-

ples observed by courts of equity in the administration of this branch of the law. . . . Judged by these rules, as they have been communicated and applied, this case had no standing in court, and the bill was properly dismissed."

In *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782; 105 P. & S., Wallace, C. J., said: "No principles are better settled in the law of trade-marks than that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied, will not be tolerated." See also *In re Dole Bros' Trade-Mark*, 12 Pat. Off. Gaz. 939; *Estcourt v. Estcourt Hop Essence Co.*, L. R., 10 Ch. App. 276; *Wolfe v. Burke*, 56 N. Y. 115; *In re American Sardine Co.*, 3 Pat. Off. Gaz. 495.

In *Laird v. Wilder*, 9 Bush (Ky.) 131; 15 Am. Rep. 707, "Laird's Bloom of Youth or Liquid Pearl," was the label placed on the bottles of a cosmetic preparation for the complexion. Hardin, C. J., said: "But the most important and essential inquiry presented, and the only one which we need to determine, is, did the preparation compounded and sold by the appellant as a harmless cosmetic contain properties which rendered its use injurious or dangerous? We are constrained to conclude that the appellant, in putting his compound on the market as he did, with his express as well as implied assurance to the public that it was 'free from all mineral and poisonous substances,' deliberately engaged in the perpetration of a fraud, which in a court of equity should be rebuked rather than upheld or protected. To a party thus presenting himself, a court of equity, adhering to the maxim, 'He who asks equity must come with pure hands,' will not lend its aid when the object to be effected is to secure him the exclusive privilege of deceiving the public in a particular way, although in doing so it might prevent another equally guilty from committing the same wrong." See also *Phalon v. Wright*, 5 Phila. (Pa.) 464; *Cox's Man. of Trade-Mark Cases* 232; *Bloss v. Bloomer*, 23 Barb. (N. Y.) 604.

In *Perry v. Truefitt*, 6 Beav. 66, the master of the rolls said: "I do not think it is a favorable case for the interposition of this court, to say the least of it, when a party having bought a secret invented by a Mr. Leathart,

3. **As to Cures.**—The cases are very diverse upon this branch of the subject. If a remedy is advertised and sold as a cure for a disease, and it can be shown that it could by no possibility produce any beneficial result in the treatment of the particular disease, the trade-marks for such an article would probably be refused protection. But many excellent proprietary remedies are advertised and sold as useful in the treatment of a large number of ailments to which the remedy is in fact more or less applicable, and often more is claimed for the preparation than it will actually accomplish. In such cases, some judges have taken the high ground that it is beneath the dignity of a court of equity to occupy itself in the consideration of cases of this character.¹ Some judges, on the other hand, recognizing the fact that the proprietary medicine business is a large and reputable business, conducted to a great extent by reputable men, who sell articles which, while they have not the power to do all that may be claimed for them, are still good and useful remedies, and will in many cases render valuable assistance to those who are too poor or too careless to employ a physician, have not hesitated to protect the trade-marks for these remedies. And this seems to be the better view.

represents to his customers and the world that his 'admirable composition is made from an original recipe of the learned Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist.' The plaintiff states also a circumstance, not in the least degree supported by evidence, that the composition is formed of a vegetable balsamic production from *Mexico*. There are other things, which I do not think it necessary to observe upon, which make me think this is not a favorable case for a person to come in the first instance and claim the assistance of a court of equity, in aid of a legal right, which, however, I do not deny he may have." See also *Pidding v. How*, 8 Sim. 477.

1. In *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, Shiras, C. J., said: "It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret, and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle v. Spear*, 7 Pa. L. J. 176; *Cox's Man. of Trade-Mark Cases* 90; *Heath v. Bright*, 3 Wall. Jr. (U. S.) 141. A similar view has prevailed in several state courts.

Wolfe v. Burke, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438. . . . It does not appear that the Supreme Court of the *United States* has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases, in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity. Thus, the case of *McLean v. Fleming*, 96 U. S. 245, is a leading case, often referred to, and related to a trade-mark of a patent medicine. So, too, in the Southern District of *New York*, in the case of *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, Judge Shipman protected the trade-mark 'Dr. J. Blackman's Healing Balsam.'

Plaintiff, proprietor of "Balm of Thousand Flowers," made the most extravagant claims regarding its curative powers. It was claimed that "it effectually cures pimples, blotches, chilblains, all kinds of eruptions, ulcers, wounds, cuts, burns, ring-worms, erysipelas, and St. Anthony's fire, and is a sovereign remedy for canker in the mouth, or elsewhere;" "a luxury, an antidote, and a cure of diseases; they [the young] will increase in

Unless some direct false statement can be proven to have been made, such as a claim of an ingredient which is not contained in the article, or that it is harmless when in fact it is harmful, or that it will cure a disorder to which it is not at all applicable, the trademarks of a proprietary medicine will be sustained, and such statements as are merely exaggerations, or that the remedy will cure a number of diseases without stating the stage at which the cure may be effected, or the length of time the treatment should be continued, or any of the essential facts which would be necessary to enable a physician to say that the claims for the compound are false, will be disregarded.¹

energy, be full of elasticity, health and beauty, and be mirrors of admiration." The court, in refusing protection, said, by Duer, J., "We cease to smile when we remember that the plaintiff, who boldly claims the aid of a court of equity, is filling his pockets by abusing the credulity of the young, the inexperienced, the weak and the ignorant, and that he resorts to misrepresentation and falsehood to induce those to purchase who would not otherwise buy, and those who buy to give a higher price than they would otherwise pay. If this is not deceiving and defrauding the public, what is?" *Petridge v. Wells*, 13 How. Pr. (N. Y. Super. Ct.) 385; *Cox's Man.* 144.

In *Heath v. Wright*, 3 Wall. Jr. (U. S.) 141; *Cox's Man.* 133, plaintiff made the following claims for his patent medicine, "Kathairon," composed of castor oil and brandy—that it would infallibly cure "scald head, tetter, ringworm, erysipelas, itch, barber's itch, shaving pimples, salt rheum, chapped hands, stings, cuts, chilblains, swellings, inflammations, rheumatism," etc., and "almost instantly relieve sympathetic attacks of nervous headache," besides "restoring the hair and preventing it from turning gray." Defendant imitated it, with less exaggeration possibly, and plaintiff sought protection. Kane, J., said: "It is impossible for me to distinguish this case in principle from that of *Fowle v. Spear*, 7 Pa. L. J. 176; *Cox's Man. of Trade-Mark Cases* 90, which was before me on a similar motion some years ago. I then refused an injunction against the vendor of a patent medicine at the suit of his brother quack, who complained that his label and envelope of certificates had been imitated, on the ground that the special action of chancery could not be involved in a contro-

versy that had so little merit to commend it on either side."

In *Fowle v. Spear*, 7 Pa. L. J. 176, Kane, J., said: "The bill sets forth in substance that the complainant is the manufacturer of a secret medicine, which he calls, 'Dr. Wistar's Balsam of Wild Cherry,' and that he sells it in bottles of a peculiar form, inclosed in wrappers, which bear certain devices and directions. On one of these wrappers, which is made part of the bill, the Balsam is described as 'a valuable family medicine for consumption of the lungs, coughs, colds, asthmas, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaints, etc.,' to which another paper, also among the exhibits, adds 'influenza, hoarseness, pains or soreness of the chest, etc.' . . . For aught that appears, it may be innocent enough; but though valuable as it is sworn to be, to the party who compounds and sells it, it is readily conceivable, that to him who buys and takes it, it may be far otherwise. It is not the office of chancery to intervene by its summary process in controversies like this; '*non prostrum tantus companionere*,' looking at the incongruous group of diseases, for which the Balsam prescribes itself to public credulity, I must apply the principle of the vice chancellor's decision in *Pidding v. How*, 8 Sim. 477, that a complainant whose business is imposition, cannot invoke the aid of equity against a piracy of his trade-mark. The only remedy in such a case is at law."

1. *Comstock v. White*, 18 How. Pr. (N. Y. Supreme Ct.) 421; *Cox's Man. of Trade-Mark Cases* 180, was a suit by complainants, proprietors of "Dr. Morse's Indian Root Pills," to restrain defendants, formerly in partnership with them, from the use of the above

4. **As to Origin or Place of Manufacture.**—It has been decided in a number of cases that a false statement with reference to the origin of an article—such as Mexican Balm, East India Remedy, etc., when they had no connection with, nor were derived from, *Mexico* or *East India* respectively—is such deceit as will disentitle the plaintiff to relief against infringement. So, also, with reference to the place of manufacture; if an article is made in one place, but claimed to be derived from another, such a statement will deprive the plaintiff of relief. Thus, where the plaintiff had resided at one place, but subsequently moved his factory to another near by, but failed to state upon his label that he had made the change, or that he was manufacturing at the new place, relief was refused him. So, also, where a trader used words suggestive of the fact that the article was known and used in a foreign country, which was not true, relief was denied him.¹

trade-mark. Sutherland, J., said: "It does not appear that the pills are positively injurious; it is not to be believed that they have a tittle of the wonderful and benign curative or preventive capacity claimed for them in the eloquent pictorial advertisements of the parties; but it is not for the defendants to say that the plaintiffs are humbugging the public, and are, therefore, not entitled to any relief against them, when the defendants have been and still are engaged in the same work. As to the public, if these pills are an innocent humbug, by which both parties are trying to make money, I doubt whether it is my duty, on those questions of property, of right and wrong between the parties, to step outside of the case, and abridge the innocent individual liberty which all persons must be presumed to have in common, of suffering themselves to be humbugged."

In *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y. Super. Ct.) 156, Hoffman, J., said: "It is constantly insisted, and the position is sanctioned by some judges, that when the article in question is innocuous, or in some degree useful, no absurd panegyric or extravagant price is a reason for denying the interference. In short, as counsel once said before me, if a man should compound tallow with some high scent and beautiful coloring matter, and term it 'The Ointment of Immortality,' he has a right to appropriate so much of the public credulity as he can, to this designation."

Plaintiff, manufacturer of "Holloway's pills and ointment," sued to

restrain defendant from gross simulation. Plaintiff, in his circulars and wrappers, had made extravagant claims as to the curative properties of his medicine. The master of the rolls said: "I think this as clear and as plainly avowed a fraud as I ever knew. I do not mean to say that I have any respect for this sort of medicines. I have none; but the law protects persons from fraudulent misrepresentations, and this is a species of property which the law does allow, and so long as the law recognizes it, it must be protected." *Holloway v. Holloway*, 13 Beav. 209.

1. Plaintiff stamped his razors "Queen's Own Co., Sheffield." Suit was brought to restrain defendant from imitation. Patterson, J., said: "The plaintiff is seeking to enjoin the defendant from using a trade-mark which he himself is not, in equity or good conscience, entitled to use, because it is a fraud upon the public. The evident purpose of the defendant's (plaintiff's, probably) stamp upon the razor and his advertisement and label, as the court below said, were 'to cause the purchasing public to believe that these razors are manufactured by a firm known as the "Queen's Own Co.," and in Sheffield, England,' when in point of fact he did not know where they were manufactured, nor by whom. The positive assertion of a thing not known to be true is as reprehensible as the assertion of a thing which is known to be untrue. . . . A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a

trade-mark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured." *Joseph v. Macowsky*, 96 Cal. 518.

Plaintiff's trade-mark for tea contained the following: "Standard He-No Tea, Kind the Chinese Drink," etc. Irving, J., said: "From these statements the casual reader of them would certainly understand that there was a kind of tea in *China* called 'He-No Tea,' and that this tea was the kind the Chinese drank, and that this very tea the appellees imported direct from *China*, and was by them guaranteed to be the pure and genuine article. We were so impressed and believed, until we knew the contrary; and we do not think the most scrutinizing reader would ever imagine it to be a tea compounded of several varieties in the city of Baltimore, as the evidence clearly and undeniably shows it to be prepared in the house of the appellees, and that it was not imported, as sold, from *China*. . . . It is not necessary that the appellees should have deliberately designed to deceive (and in this case they may not have so intended); if what they have said in their label is naturally calculated to deceive, and must and does inevitably deceive, then the falsehood which their label conveys must bring to them the same consequences as if willfully uttered." The bill was dismissed. *Kenny v. Gillet*, 70 Md. 574.

In *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, Field, J., said: "A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were original circumstances to guide the purchaser of the medicine."

The trade-mark of complainants, whose bitters were first made in Angostura, but at the time of the suit in Port-of-Spain, represented that the article was still made by Dr. Siegert at Angostura, now Port-of-Spain. The court, by Irving, J., said they failed to distinguish the case from *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, and observed that, "it is a general rule of law that courts of equity, in cases of this kind, will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there

is any misrepresentation in his trade-mark or labels." *Siegert v. Abbott*, 61 Md. 276; 48 Am. Rep. 101.

In *Ex p. Farnum & Co.*, 18 Pat. Off. Gaz. 412, Marble, Commissioner, said: "Were I to admit the word 'Lancaster' to be an essential feature of the mark, the case would then seem to be open to the further objection that the use of such word would convey a false impression to the public—viz.: that the goods were manufactured in Lancaster when, in fact, they were made in Philadelphia, and that anyone making like goods in Lancaster might obtain an injunction against the use of such word by parties manufacturing elsewhere. . . . Words calculated to deceive the public as to the place of manufacture should not be allowed registration."

In *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397, Gray, C. J., said: "This is a bill in equity to restrain the defendant from infringing upon an exclusive right claimed by the plaintiffs in the words 'East Indian,' used, together with the word 'remedy' or 'remedies,' as a trade-mark upon bottles of medicine. . . . But the conclusive answer to this suit is, that the Master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote and to indicate to the public that the medicines were used in the *East Indies*, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

In *Palmer v. Harris*, 60 Pa. St. 156; 100 Am. Dec. 557, plaintiff's trade-mark for cigars, made in *New York*, represented that they were manufactured in Havana. The court, by Sharswood, J., in refusing to restrain by injunction a counterfeit of the mark, said: "The maxim which is generally expressed, 'He who comes into equity must come with clean hands,' but sometimes, in stronger language, 'He that hath committed iniquity shall not have equity,' has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another. . . . It is plain that there

5. As to the **Maker (Assignee)**.—The name of the maker of an article has always been considered as the best guaranty of genuineness, hence it is that the use of a name of high reputation upon goods not made by the person whose name they bear, is an injury to the person whose name is used, and also a deception of the public, who buy the goods under the belief that they are getting the goods of the man whose name is used.¹ This case most often happens where a business formerly carried on by one man is purchased and continued by others under the name of the former proprietor, without making any change in the name or style of the concern. In some cases this has been held sufficient to forfeit a right of action,² to which the plaintiff would otherwise have been

is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trademark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act."

In *Hobbs v. Francois*, 19 How. Pr. (N. Y. Super. Ct.) 567, Bosworth, C. J., said: "The plaintiff's label is calculated to induce the belief, and probably was designed to induce the belief, that the article in the box on which it was pasted is manufactured in London; that the sole proprietors of it have their place of business at 24 Mark Lane, London; that it is intrinsically so excellent as to secure the patronage of Her Majesty, the Queen; and that the labels have paid the stamp duty required by some English statute. The truth is that it is made in *New York*, and that Her Majesty, the Queen, is probably ignorant of its virtues, or even of its existence. In this respect there is a manifest intention to deceive and mislead the public. . . . The plaintiff's labels, therefore, contain misrepresentations believed to be useful, and which must be known to be false; and to secure to the plaintiff by injunction an exclusive use of such a label, and the exclusive privilege of thereby deceiving the public, is an object to which a court of equity will not lend its aid. The court does not refuse its aid in such a case from

any regard to the defendant, who is using the same efforts and misrepresentations to deceive the public; but on the principle that it will not interfere to protect a party in the use of trademarks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly or in part such trade-marks."

1. In *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, Colt, J., said: "Again, it is said that the complainants deceive the public, in that they allow the boxes to be labeled with the names of dealers to whom the cigars are sold, or for whom they are made. But this is shown to be a custom in the cigar trade, and I do not think it results in any deception or false representation. All these cigars are in fact made at the Elk Factory, and they are so stamped, and when the public buy them, they are purchasing a genuine Elk cigar, made by these complainants; and I do not see that the additional label put on the box, in accordance with a custom of the trade, is in any just sense such a false representation as should invalidate the trade-mark." See also *Samuel v. Berger*, 4 Abb. Pr. (N. Y. Supreme Ct.) 88.

2. In *Stachelberg v. Ponce*, 23 Fed. Rep. 430, Colt, J., said: "The complainant, Stachelberg, obtained, by assignment from one Asher Bijur, of *New York*, the exclusive right to use this trade-mark ('La Normandi,' for cigars) and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants. . . . Whatever may be thought of the remaining defenses, there is one point which we think is well taken, and therefore fatal to any relief prayed for in the bill. In

the use of the trade-mark, the complainants do not state that it was obtained by assignment or purchase from A. Bijur. Bijur originated the trade-mark, and it thus became a sign of the quality of the article he sold, and an assurance to the public that it was the genuine product of his manufacture.

. . . Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser—*Sherwood v. Andrews*, 3 Am. L. Reg. N. S. 588—otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. . . . And so these complainants, in failing to give notice that they are the purchasers and assignees of the trade-mark from A. Bijur, are practising the same deception toward the public which they charge against the defendant. The fact that the name, 'M. Stachelberg,' is attached to the trade-mark, can no more relieve the complainants of the charge of misrepresentation as to the public than the use of the name 'E. Ponce,' or 'E. P.,' can relieve the defendant of such a charge. It is the use of the fanciful words 'La Normandi,' or words of substantial similarity, that is calculated to mislead. The supreme court, in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, declare that the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use, otherwise a deception would be practised upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer."

Complainants, a corporation, having succeeded by successive assignments to the business and trade-marks of "Hegeman & Co.," continued the use of the firm name in their trade-mark. Defendants answered, charging plaintiffs with misrepresentation in not designating themselves successors. *Daly, C. J.*, said: "And this [trade-mark containing name of maker not assignable] is equally so

with a trade-mark used and recognized, as denoting that the article or product is made by a particular person, whose skill, experience, or other personal quality, or whose personal experience in the fabricating, preparation or production of it, gives to it a peculiar value, which is distinguishable from a trade-mark used as a brand of quality, or of texture, fineness, or other characteristics; or to indicate that it is made in a particular establishment or manufactory; or where a name simply denotes an established business, with whatever advantages may accrue from its long establishment, the fact that it is generally or widely known, and the confidence it inspires from its duration." Relief was denied on above ground. *Hegeman v. Hegeman*, 8 *Daly* (N. Y.) 1.

Defendant, by assignment in bankruptcy, transferred his business and trade-marks to plaintiff, and lent his name to a company manufacturing the same article. Suit was brought to restrain this use of defendant's name. The court, by *Westbrook, J.*, in deciding that the defendant could not be involuntarily deprived of the use of his name, said: "If what the plaintiff states upon the wrappers of his bottles containing the medicine, and which has been hereinbefore set forth, is remembered, it will appear, as has also been stated, that he undertakes to sell his compound, not only under the name and alleged trade-marks which *Henry T. Helmbold* formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representation that said *Helmbold* superintends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle. This, clearly and confessedly, is false, and the plaintiff is entitled to no protection in a business carried on by means of untrue representations and statements. As *Henry T. Helmbold* is personally employed with the defendant, and whatever value his personal care and supervision give to the defendant's business fairly belongs to it, and not to the plaintiff, an order of court should not suppress the publication of the truth and allow the utterance of falsehood." *Helmbold v. Henry L. Helmbold Mfg. Co.*, 53 *How. Pr.* (N. Y. Supreme Ct.) 453.

In *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588, *Wilson, C. J.*, said:

entitled, but in others it has been disregarded.¹ A general rule deducible from the authorities is, that where the trade-mark or name under which the goods are sold does not contain any direct false statement, relief will not be refused, if purchasers of the goods could reasonably understand that the goods bearing the trade-mark or trade name are of a certain standard kind or quality, or are made in a certain manner, or after a particular formula, by persons who are carrying on the same business formerly carried on by the person whose name is in the trade-mark. It has been said in some cases that a trade-mark necessarily points to the original adopter, and cannot be used by others, and certainly not unless the successor designates himself as successor of the adopter. But this rule has been doubted, and it seems to be established, that if the plaintiff is really carrying on the business of the original adopter of the mark, so that the original meaning of the mark has been preserved, and the public are not misled, his rights will be sustained, notwithstanding the fact that he does not designate himself as assignee or purchaser of the original proprietor.

"All who use trade-marks, indicating that the articles were originally manufactured or owned by others, are practising an imposition upon the public. Every assignee and purchaser, who uses the trade-mark of the original proprietor, without indicating that he is the assignee or purchaser, is in this position; and thus an article which, by reason of the skill and integrity of the original proprietor, has justly acquired a reputation which insures the sale of the article at a large profit, is, by the aid of the courts, permitted to be adulterated and sold, by some dishonest assignee of the trade-mark, as made by the original owner."

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, Wood, V. C., said: "It is said that the Messrs. Taylor have retired, and they no longer manufacture these pins, the plaintiff having succeeded to their trade. That is so; and for the good-will and right to use the labels and machinery for stamping them, the plaintiff has paid £2,600. I do not think that the want of title to use the label, which was urged by the defendant against the plaintiff's application, can prevail. If the plaintiff, or those under whom he claims, has used this label continuously for a certain space of time, that is enough to enable him to prevent others from using it, and making a profit out of the reputation which that label has acquired in the market. But then it is said that the use of this

label by the plaintiff is a fraud . . . because it holds out that the article is manufactured by Taylor, when it is, in point of fact, manufactured by the plaintiff, Taylor having ceased to have anything to do with the business. But, to take the last point first, the firm of Taylor & Co. having originally made this article, and it being now made by the persons who have *bona fide* acquired the business, they are quite justified in using the name of the old firm. It would be going too far to say that this is a misrepresentation by the plaintiff, when he only uses the name which he has bought the right to use."

1. In *Jennings v. Johnson*, 37 Fed. Rep. 364, Colt, J., said: "The plaintiff, Jennings, was one of the firm of I. S. Johnson & Co. In stating on the label that the liniment is prepared by I. S. Johnson & Co., he merely retains the name of the firm of which he was a member. I cannot see how the public are deceived or injuriously affected by such a course. It is not uncommon, under such circumstances, to retain the old firm name. The facts in the case of *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, were quite different. In the present case I am satisfied that a decree should be entered for the complainant, and it is so ordered."

In *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149, in holding "*A. N. Hoxie's Mineral Soap*" and "*A. N. Hoxie's Pumice Soap*," to be assignable,

Allen, J., said: "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of the product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public. *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark, which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark."

In *Kidd v. Johnson*, 100 U. S. 617, Pike assigned his business and trade-mark, "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio," to the predecessors of complainants, who sued to restrain defendants from imitation. It was decided by the court that the transfer of the trade-mark was valid. Field, J., said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is the primary object of a trade-mark to indicate by its meaning or association the origin of the article to which it is affixed, but when the trade-mark is affixed to articles manufactured at a particular establishment, . . . and that establishment is transferred to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same

place and are of the same character as those to which the mark was attached by its original designer."

A. C. & Co. succeeded to the business of Stillman & Co., continuing the use of the trade-mark, "Stillman & Co.," on their goods. Defendants leased the mill formerly occupied by Stillman & Co. and marked their goods, "Stillman Mills." Suit was brought to restrain defendants. Durfee, C. J. (*concurring*), said: "There are cases in which a court of chancery refuses to protect a trade-mark, because it is an imposition on the public. The defendants contend that this is a case of that kind. I think, however, that there is little reason to doubt that purchasers who are looking for Stillman & Co.'s linseys get what they are looking for when they get the linseys manufactured by the plaintiffs. The firm of Stillman & Co. has ceased to exist, and, consequently, Stillman & Co.'s linseys, manufactured by Stillman & Co., can no longer be procured; but the plaintiffs are their successors by purchase, in the use of their firm name, and continue the same manufacture with improvement, and, therefore, I am reluctant to hold that a continuance of the old name upon their labels is intrinsically any fraud upon the public, who are interested to get the same or a better manufacture, but who, so long as they do get it, can have little care whether it comes from the original manufacturers or their successors." *Carmichel v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481.

B. conveyed to F. the right, upon the payment of an annual royalty for ten years, to make and sell, with the trade-mark, B.'s patent medicine. To a suit by F. to restrain defendant from simulation, he pleaded misrepresentation as to maker. Shipman, J., said: "This particular trade-mark, being the name of the inventor, was personal to Dr. Blackman, in its inception, but has been permitted by him to be applied, and to be appropriated, to the same article when manufactured by Filkins Bros. Under the circumstances in which the medicine has been manufactured and sold, the use of the trade-mark does not imply that the medicine was manufactured by Jonas Blackman, but that it is the same article which he originally invented and manufactured." *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440.

In *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 401, Rogers

6. **Wrongful Use of the Word "Patent."**—The Revised Statutes of the *United States* provide that every person who uses upon anything made, used or sold by him, for which he has not obtained a patent, the name, or an imitation of the name, of any person who has obtained a patent therefor, without the license or consent of such patentee or his assigns or legal representatives; or who, with intent to imitate the mark or device of the patentee, employs the word "patent" or "patentee" or who, for the purpose of deceiving the public, employs the word "patent," or any word importing that the article offered for sale is patented when such is not the fact, shall be liable for each offense to a penalty of one hundred dollars.¹ Under this provision, the use of the word "patent"

Bros., having acquired a reputation for the manufacture of plated spoons and forks, entered the employ of complainants, who then marked their spoons and forks "1847, Rogers Bros. A 1." Suit was brought to restrain imitation. The defense was misrepresentation as to manufacturer. Carpenter, J., said: "All that the public or the trade cared to know was that the goods were the production of their (Rogers Bros.) skill and experience. That fact, as it seems to us, clearly appears. The further fact that the petitioners furnished capital and machinery, employed and paid laborers, and sold the goods, is entitled to but little weight so far as this question is concerned; although it shows that, in another sense, the petitioners were the manufacturers of the goods. We are satisfied that there is no such misrepresentation as the cases contemplate, which hold that a trade-mark which states a falsehood is not entitled to protection."

In *Dixon Crucible Co. v. Guggenheim*, 2 Brew. (Pa.) 321, Paxson, J., said: "The difference between 'Joseph Dixon & Co.,' as printed on the labels, and 'The Joseph Dixon Crucible Co.,' is not of such a character as to destroy the plaintiff's right to equitable relief. Joseph Dixon & Co. is the name of the firm that has been for many years lawfully engaged in the manufacture of Dixon's stove polish. Since the formation of the new company and the death of Mr. Dixon in 1868, the name on the wrapper has not been changed. There is nothing here to indicate any attempt at deception or imposition. The trade-mark designates the place truly where the goods are put up and sold, and with sufficient certainty the ownership thereof."

In *Fulton v. Sellers*, 4 Brew. (Pa.) 42, Strong, J., said: "Nor do we think

the position tenable that the complainants are not entitled to relief because they are only assignees of the trade-mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it without giving notice that they are not the original owners of it, can be a fraud upon the public of which the defendant can avail himself. . . . Pirating the trade-mark of another is an infringement upon that other's rights, and the use which he may make of that right cannot be in issue when a court is asked to stay the piracy."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, The Lord Chancellor said: "The question then arises, what amounts to a material false representation? Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnership trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered without any doubt in the negative; for it is competent by the law of *England* to a partnership, to adopt any style or firm which does not involve a claim to incorporation or the assumption of what belongs to others, and the practice of the trading community in this respect is so common and general that no misleading of the public can result from it."

1. U. S. Rev. Stat., § 4901.

on an article which might be the subject of a patent, whether one ever existed upon it or not, in such a manner as to convey the idea that the article was subject to the protection of the patent, would be such a false statement as would disentitle a manufacturer to relief in equity. The word "patent," may be used, however, when done in such a manner as not to convey the meaning that the article is subject to the control of a patent, but only that the design is that of a certain patent or patentee, the patent for which may have expired. It has been held in one case that where the word "patented" was used erroneously, and with no intention of deceiving the public, upon an article, the trade-mark for which had been registered, such use would not disentitle the owner of the mark to relief in equity, as against a piracy.¹

1. The following constituted plaintiff's trade-mark for tobacco, "El Cabio De R. Solis, Habana, Copyrighted." Suit was brought to restrain imitation; the defense was misrepresentation by the plaintiff, and an injunction was granted. Bissell, C., said: "The other branch of the question—deceit of the public—is not so free from difficulty. If it be conceded that the trade-mark tended to deceive the public in any material particular, the relief must be denied. Below the picture of the tobacco plant, it will be remembered, were the words 'Habana,' 'Copyrighted.' . . . The word 'Copyrighted' meant the same to everybody. It implied that the protection of the statute applicable to such matters had been secured. This was probably believed to be true, but was without foundation. The misrepresentation, however, was unimportant. It did not tend to deceive the public in respect to any of those matters with which the law concerns itself. The public might buy with the same reliance on all the representations as to the place of production and ownership, whether the marks were protected by the statute or guarded only by the appropriation and user of its owner." *Solis Cigar Co. v. Pozo*, 16 Colo. 388.

In *Lauferty v. Wheeler*, 63 How. Pr. (N. Y. C. Pl.) 488; 11 Abb. N. Cas. (N. Y. C. Pl.) 220, Van Brunt, J., said: "The fourth ground of defense is that the plaintiff is violating the *United States* statute in having the words 'patent, Sept.' upon the goods sold by him. It is to be observed that it is not claimed that the use of the word 'patent' has been resorted to by the plaintiff until very recently. It appears that application had been made on the 9th of June, 1882, for a patent for an im-

provement in process of manufacturing of oleomargarine butter by Henry Lauferty, and that, on the thirty-first of August, notice was received from the *United States* Patent Office that the application had been examined and allowed, and under this process the plaintiff has been manufacturing. It further appears that Mr. Lauferty was informed that his letters patent would be forwarded to him in September, this motion being heard in that month, and there is no evidence that prior to that time the word 'patent' was used." It was accordingly held that plaintiff was not disentitled to the relief sought.

Plaintiffs used the abbreviation "Pat." on their labels, meaning "registered," and applying to their trade-mark and not the manufactured article. In deciding that this did not disentitle them to relief, the court, by Fenner, J., said: "Defendant urges that the use of the abbreviation 'Pat.' meaning patented, in the trade-mark, is a fraud on the public and a violation of law, which deprives plaintiff of the right to redress. It is undoubtedly true that the affixing of the word 'patent' to an unpatented article, 'for the purpose of deceiving the public,' is prohibited under penalties, by the laws of the *United States* (U. S. R. S., § 4901); and that a representation in a trade-mark that an unpatented article is protected by a patent '*prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the mark to relief in a court of equity, as against a pirate.' Browne on Trade-Marks, § 572; *Coddington's Dig. Tr.-M. Cases*, § 548; *Chapman v. Shepard*, 39 Conn. 450. But, to have such effect, the use of the word 'patented' must be 'with the purpose of deceiving the

The English courts have been less rigid on this subject than those of the *United States*, and in many cases the use of the word "patent," after the expiration of a patent on the product of the same manufacturer or factory, has been sustained by them.¹ The American rule seems to be the more logical one.

public,' and if such fraudulent intention does not exist, and the use of the word may be explained in any reasonable sense consistent with truth and honesty, the party will not be prejudiced. High on Injunctions, § 674; Coddington's Dig., §§ 570, 571." Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946; 39 Am. Rep. 286.

In Consolidated Fruit Jar Co. v. Darfinger, 6 Am. L. T. N. S. 511, concerning "Mason's Patent," "Mason's Improved," "The Mason Jar of 1858," Cadwallader, J., said: "The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity of his patent; and they do not now assert its validity. But they claim a trade-mark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words, the alleged trade-mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it." Protection of the trade-mark in this form was therefore denied.

In Richardson's Appeal, 3 Pat. Off. Gaz. 120, Leggett, Commissioner, said: "Applicant petitions for the registration of the words 'A. Richardson's Patent Union Leather-Splitting Machine.' It appears that the leather-splitting machine he proposes to manufacture and place this alleged trade-mark upon, has been patented, manufactured, and put upon the market under the above caption during the last twenty years, and that the patent has expired. The examiner has therefore held that the word 'patent' cannot properly be sanctioned as part of this trade-mark, because it would tend to deceive the public." Registration was accordingly refused.

1. Ransome v. Graham, 51 L. J. Ch. 897. In this case plaintiffs continued to use on their plows the word "patent," the patent having been taken out in 1803. Bacon, V. C., said: "The defendants insist that the plaintiffs have fraudulently stamped the word 'patent' on their plows, and they refer to cases well-known and of unquestionable au-

thority in which it has been decided that the fraudulent use of the word 'patent' will disentitle the person using it to relief which he might otherwise obtain.

. . . The word 'patent' was properly cast on and appeared on the face of the shares, for which, in 1803, one of the plaintiffs' predecessors obtained a patent, and upon the shares, and thenceforth only upon the shares, that word has since remained; but all the advertisements and catalogues of the plaintiffs plainly announce that they lay no claim to any patent right—they refer to a patent which had expired in 1817. They make their shares according to the invention in that expired patent, as everybody else may; but to suggest that they have in any manner claimed anything under or in respect of that patent, and that they have done this fraudulently and to deceive the public, is merely desperate and opposed to the truth of the case."

In Cheavin v. Walker, 5 Ch. Div. 850, Jessel, M. R., said: "No doubt a man may use the word 'patent' so as to deceive no one. It may be used so as to mean that which was a patent, but is not so now. In other words, you may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. . . . Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark. . . . The defendant's label is as follows: 'S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England.' This is to say, that the filter is manufactured according to Cheavin's expired patent by Walker, Brightman & Co. . . . This court ought not to interfere."

In Ford v. Foster, L. R., 7 Ch. App.

611, the plaintiff, whose trade-mark was otherwise valid, had falsely represented himself as "patentee." The court, by Mellish, L. J., in deciding that this did not disentitle him to protection, said: "Then would it be a defense to that action at law that the plaintiff has made false representations to the public that his article was patented, when in fact it was not? If the false representation was in the trade-mark itself, although I cannot find that that point has ever been decided or raised in a court of common law, yet I am disposed to think, and indeed I have a pretty clear opinion, that if that question were raised, it would be held that the fact of the trade-mark itself containing a false representation to the public would be an answer at law to an action brought for a deceptive use of the trade-mark by the defendant. . . . But where the trade is, as in this case, a perfectly honest trade, and where the trade-mark is, as in this case, a perfectly honest trade-mark, I am clearly of opinion that there is no common-law principle upon which it is possible to hold that the fact of the plaintiff having been guilty of some collateral fraud would be an answer to an action."

In *Marshall v. Ross*, L. R., 8 Eq. 651, plaintiffs had for forty years designated their thread as "Patent Thread." Defendants imitated it. A suit was brought to restrain the latter. James, V. C., said: "The word 'patent' may be used in such a way as not to deceive the public. For instance, the term 'patent leather boots' is in constant use, but no one supposes that it is thereby intended to convey the impression that the leather is protected by any patent. It is here stated in the bill, and verified by affidavit, that the term 'patent thread,' has been used in the trade for many years past, and is the name by which thread of a certain class is known by manufacturers and in the trade. It has, in fact, become a word of art. I am, therefore, only following the principle of the decided cases, for here there has been no such misrepresentation, designed or undesigned, as to deprive the plaintiffs of their right to an injunction."

In *Morgan v. M'Adam*, 36 L. J. Ch. 228, Wood, V. C., said: "The plaintiffs in this case aver themselves to be the makers of black-lead crucibles, under the style of 'The Patent Plumbago Crucible Company' . . . and the question now before me is whether the plaintiffs so averring are entitled to

maintain a suit in this court to prevent any other persons calling their articles 'Patent Plumbago Crucibles,' whether they can appropriate the name of 'Patent Plumbago Crucibles,' when it turns out to be the fact that there never was any patent, either in *America* or in *England*, or in any other part of the world, for the making of these crucibles. All those who are induced to buy these crucibles thus described as 'Patent Plumbago Crucibles,' are, to a certain extent, deceived, because they are led to believe that the article is protected by a patent, and thus may be induced to purchase it from the plaintiffs under the belief that there is a patent, and that the plaintiffs, or at least some limited number of persons, are the only persons authorized to sell it; and further, they are led to believe that if they should be minded to set up any manufactory of the same kind for themselves, they would be unable to do so in consequence of the plaintiffs being the possessors, either by way of license or ownership, of a patent preventing the world at large from imitating the article which is sold by them under this particular designation."

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, Lord Kingsdown said: "If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of a trade-mark to relief in a court of equity against anyone who pirated it. In *Flarel v. Harrison*, 10 Hare 467, Vice Chancellor Wood intimated his opinion that this would be so when there never had been any patent at all; but in the subsequent case of *Edleston v. Vick*, 11 Hare 78, he seems to doubt whether the rule would be the same if there had originally been a patent, and the statement in the trade-mark, being true when first introduced, had been continued after it had ceased to be true. I confess that I should have great difficulty in assenting to that distinction. If the word 'patent' be not so used as to indicate the existing protection of a patent, but merely as part of the designation of an article known in the market by that term (and this I collect to have been the main ground of his Honor's decision), then I quite agree in his view. In such case nobody is meant to be deceived, or is

7. Cases in Which Complainant's Rights Were Sustained Notwithstanding Apparent Deception; Purging Falsehood.—Cases have arisen in which the courts, being convinced that, although by a strict construction, a meaning might be given to the words used which would be false, there was no motive to deceive, and the likelihood of deception being very remote, have afforded relief to the aggrieved party, on the ground that his conscience was clean, although his hands might not be. These cases cannot be said to be a departure from the maxim so rigidly applied by courts of

deceived; a patent may have expired, and be known to have expired fifty years ago, and yet the name of 'patent' may have become attached to the article, and be used in the trade as designating it; but if the trade-mark represents the article as protected by patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist."

In *Edleston v. Vick*, 11 Hare 78 ("The Inimitable Patent Solid-Headed Pins"), Vice Chancellor said: "It has also been contended that the plaintiffs, by describing their manufacture as a patented article, without any explanation that the exclusive privilege of the patent had expired, were guilty of a misrepresentation, and did not, therefore, come into court with clean hands, or put forward a right which the court would respect. . . . It is no doubt to be much preferred, that no representation should be issued to the public which is not strictly true; but in a case in which the goods have become known by a description which was originally accurate in every part, if I were to hold that the continued use of this description disentitled the party to the assistance of the court, it would be going much farther than I did in refusing to interfere by injunction where the plaintiff had adopted and used the word 'patent' untruly and without foundation." An injunction was accordingly granted.

In *Flavel v. Harrison*, 10 Hare 467, the Vice-Chancellor said: "Plaintiff relies upon the title which he has acquired to this particular manufacture, and to the name by which it is known, that name being, as he states, 'Flavel's Patent Kitchener.' Now, it turns out that neither the plaintiff nor his father, the original inventor, ever had any patent in the article, and that it never was in fact a patented article. . . .

The plaintiff, by using this appellation, certainly misleads the public; although the extent to which any particular individual may be deceived may depend on a variety of circumstances. Everyone knows that patented articles are in proportion more expensive than articles which are open to the competition of the world; and purchasers are more readily inclined to give a higher price for an article protected by patent than if it were open to unrestricted competition. . . . I think, however, that the use of the word 'patent' operates to prevent the public from testing it as they otherwise might; they are dissuaded from examining the article with a view to imitation; and it is in evidence that persons were prevented from making that free use of it which every purchaser has a right to make of an unpatented article. The knowledge that there was no patent would enable and encourage every ironmonger who bought the article, to take it to pieces, and examine, and make copies and models of all the parts for the purpose of imitation, if he thought it likely to be useful, which he would never think of doing with regard to a patented article. . . . Here the plaintiff comes with a description for which there never was any foundation—which is, in fact, a direct misrepresentation—and he asks this court to protect him in continuing to use it." An injunction was denied, but a bill was held for an action at law.

In *Sykes v. Sykes*, 3 B. & C. 541; 10 E. C. L. 176, plaintiffs, manufacturers of shot-belts and powder-flasks, obtained a patent for their manufacture, which was subsequently judicially declared invalid. They continued the use of the words "Sykes Patent" as a trade-mark and sued defendants for imitation. The court, by Abbott, C.J., decided in their favor, the use of the word "patent" apparently not entering into consideration in the decision.

equity, namely: "He who seeks equity, must come with clean hands."¹

There is a class of cases in which there exists a seeming misrepresentation, but which has nevertheless received the protection of the courts. They are cases in which the name of an old firm is used by its successors in business, although no one of the names of the original founders of the business is connected with it; cases also in which a business is conducted under a fictitious name, where there is no claim to corporate existence. These cases have rested upon the ancient custom of merchants, which has existed from a very early period, of perpetuating the style of business houses of high reputation. In *Massachusetts*, a statute exists

1. In *Société Anonyme v. Western Distilling Co.*, 43 Fed. Rep. 416, plaintiffs, who had succeeded to the formula for the preparation of a particular wine, formerly made by a society of Benedictine monks in *France*, used, as a trade-mark, "Veritable Benedictine Liqueur des Moines Benedictins de l'Abbaye de Fecamp." Thayer, J., said: "According to the view which the court takes of the case, the only question deserving of serious consideration, is whether the complainant is not precluded from obtaining equitable relief by certain representations which it makes to the public concerning the manufacture of its own liquor. It is claimed by the defendants that the *société*, by its labels, seals, advertisements, etc., represents that the Benedictine by it sold is manufactured by Benedictine monks, and, if this contention is sustained by the evidence, it must be conceded that complainant is without right to equitable relief. . . . Evidently the phrase, 'Liquor of the Benedictine Monks,' etc., is one that may be interpreted in several ways without doing violence to the ordinary use of language; and I am of the opinion that people of ordinary intelligence would generally regard it as a representation that the liquor in question is compounded according to a formula invented or heretofore used by the monks of the abbey of Fecamp, rather than as a representation that the monks of that abbey are still engaged in the manufacture, and that the article is of their production." Protection was, for this reason, granted.

In *Ransom v. Ball*, 7 N. Y. Supp. 238; 54 Hun (N. Y.) 635, Dwight, J., said: "The only defense alleged is that the plaintiff corporation had no rights which the defendant was bound to respect, or which a court of equity will

interfere to protect, because its trade-mark was itself a fraud upon the public. This charge is founded upon two specifications, *viz.*: (1) That the plaintiff's label falsely described the medicine as 'Prepared by Dr. J. R. Miller,' and (2) that the use of the word 'Magnetic' in the name of the medicine was without foundation in fact.

The outer wrappers of the plaintiff's bottle bore the words, plainly printed, 'Prepared and sold by D. Ransom, Son & Co., Props., Buffalo, N. Y.' It was on an inner wrapper only, directly beneath the directions for the use of the medicine, that the words were printed, 'Prepared by Dr. J. R. Miller.' . . .

An intention to defraud by these means can hardly be imputed to the plaintiff, when we see that it took pains to inform purchasers of the actual facts by the inscription on the outer label, while the inscription complained of was concealed until after the medicine was purchased and the outer wrapper removed. As for the use of the prefix 'Dr.' to Miller's name, it must be said that the title is too common, and too indefinite in its meaning, to be likely to deceive anybody. It is as freely used as that of 'Professor,' and means as little. . . . It is not pretended that the liquid possessed any of the properties of magnetism, in the scientific sense of the word; nor do we think it clear that the use of the word 'Magnetic' in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific sense; and there was but little danger of its being misunderstood." Protection was therefore granted.

In *Buckland v. Rice*, 40 Ohio St. 526; 131 P. & S., Nash, J., said: "We

think that the word 'Trammer' was used by the defendants in error (plaintiffs below), so as to hold out to the public that they were making a malt extract like that made by Trammer. This was a deception. . . . There are, however, other distinctive features of the trade-marks, labels and circulars of the defendants in error which are not subject to the objection urged herein to the use of the word 'Trammer,' which the courts below were asked to and did protect by their decrees in this case. Some of these devices the plaintiffs in error wrongfully made use of, and in rendering the judgment which the district court should have rendered, we make our decree the same as that of the court below, except wherein it protects the defendants in the use of the word 'Trammer.'"

In *Read v. Richardson*, 45 L. T. N. S. 54, plaintiffs used on their labels "special registered trade-mark" before registration was obtained. Colton, L. J., said: "It is the name which is protected; and as far as the cases have hitherto gone, they decide simply that when a man comes to protect a label with anything like a misstatement upon it, the court will not interfere. If we thought that, *prima facie*, that destroyed the right of the plaintiffs, of course we ought not to grant an injunction. But all we know about it is that they had carried in an application to register this trade-mark, and before they got their certificate of registration, I do not know for how long or under what circumstances, they did use this label with these words 'special registered trade-mark.' In my opinion, that does not make it such a *prima facie* case against the plaintiffs as would prevent us from interfering for their protection."

In *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277, Bakewell, J., said: "It is contended that the law can afford no protection to plaintiff, because his so-called trade-mark or label was in itself a misrepresentation. This beer, it is said, was not Budweiser beer. That it was not Budweiser beer, in the sense that it was not made in Budweis, is true. Neither was it imported beer. But it does not appear that it was held out to the public, either as actually made in Budweis or as a foreign article. The statement on the label explains that it was not made at Budweis, but by the Budweiser process. . . .

If this was not literally true, the testimony is that it was a distinction without a difference. . . . There was no testimony tending to show any imposition upon the public by plaintiff." Protection was accordingly granted.

Misrepresentations by plaintiff, made after the institution of a suit, are collateral merely, and will not debar him from protection. *Siebert v. Findlater*, 7 Ch. Div. 801. Here Fry, J., said: "I cannot see that there is in fact anything in that wrapper amounting to a fraudulent misrepresentation by reason of which I ought to debar the plaintiffs from any right they would otherwise have. Further than that, it must be borne in mind that these alleged misrepresentations were made, if made at all, in a wrapper not composed till six or seven months after the institution of the action, *viz.*, in October, 1876, and I am at a loss to see how, even supposing that they were fraudulent misrepresentations, they could be a bar to the plaintiff's right of action. It seems to me that the case of *Ford v. Foster*, L. R., 7 Ch. App. 611, is decisive on that point."

In *Hennessy v. Wheeler*, 69 N. Y. 271; 25 Am. Rep. 188, in their complaint, plaintiffs described their bottles for brandy as quart and pint bottles; but they were shown to contain much less. The court below refused them protection on the ground of misrepresentation. On appeal, Earl, J., said: "Nothing appeared upon the bottles or the trade-mark to indicate that the bottles contained quarts and pints; and there was nothing in their appearance or form to deceive or impose upon anyone. They were transparent, and anyone looking at them could see the quantity they contained. . . . It is not questioned that their brandy is a genuine article, just what it purports to be, and while in their complaint the bottles are described as quart and pint bottles, they appear to be of the ordinary sizes used in the liquor trade, and I think we may assume that the brandy in them is sold by the bottle, and not in reference to measure. Anyone purchasing knows just what he is purchasing, and the price is regulated by the size of the bottles. . . . This is, therefore, not a case where it can be said that plaintiffs came into court with unclean hands and guilty consciences, and must therefore be denied equitable relief. It is not like the cases where the trade-mark is used to deceive or

prohibiting even successors to conduct business under a name which is not derived from at least one of the partners.¹

Cases sometimes arise in which a trade-mark owner, who has been guilty of misrepresentation, discovers the weakness of his position, and endeavors to overcome the evil by erasing from his labels and advertisements all false statements preparatory to bringing suit. It is a doubtful question how far this can be done with success. In one case it was allowed where done before suit was brought; but in another, relief was denied where a false statement was not altered until after suit was instituted; while in a third case it was held that the property rights sought to be protected, had been built up through the instrumentality of a long course of falsehood and misstatement, to which it owed whatever value it

impose upon the public, or where it is used upon a spurious, worthless or deleterious, compound, or where the business in which it is used is carried on systematically in a dishonest and fraudulent way. In such cases courts will not lend their aid to protect trade-marks."

False statements as to editions are insufficient to disentitle plaintiff to relief when they are justified by custom of trade. *Metzler v. Wood*, 8 Ch. Div. 608.

The fact that the subject-matter is a proprietary medicine will not disentitle a plaintiff to relief. *Ellis v. Zeilen*, 42 Ga. 91.

False statements in advertisements, not used upon, or in direct connection with, the sale of an article, but in newspapers, were considered insufficient to disentitle plaintiff to relief in *Curtis v. Bryan*, 2 Daly (N. Y.) 212; 36 How. Pr. (N. Y.) 33.

False assumption of the title "Professor" and extravagant claims of cures were held insufficient to disentitle plaintiff to relief in *Holloway v. Holloway*, 13 Beav. 209.

And in *Chappell v. Sheard*, 2 K. & J. 117, a false suggestion of authorship was held insufficient, although the words used were actually true. See also *Chappell v. Davidson*, 2 K. & J. 123.

Extravagant claims of the virtues of a medicine will not disentitle plaintiff to relief. *Comstock v. White*, 18 How. Pr. (N. Y. Supreme Ct.) 421.

Doing business under fictitious names will not disentitle to relief except where a statute exists prohibiting it. *Dale v. Smithson*, 12 Abb. Pr. (N. Y. C. Pl.) 237.

In *Hogg v. Kirby*, 8 Ves. 213, in reference to "The Wonderful Magazine, by William Granger," a nominal au-

thor, the Lord Chancellor said: "I have considerable difficulty as to the false colors under which the original publication appears. Though this is very usual, I cannot represent it to my mind otherwise than as something excessively like a fraud on the public. But it will be better to leave that as an ingredient in the action for damages." An injunction was granted.

1. *Edleston v. Vick*, 23 Eng. L. & Eq. 51; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; *Bowman v. Floyd*, 3 Allen (Mass.) 76; 80 Am. Dec. 55; *Rogers v. Taintor*, 97 Mass. 291. In *Oakes v. Tonsmierre*, 4 Woods (U. S.) 547, Bruce, D. J., said: "On the contrary, it is but common experience that articles bearing a particular name are not regarded by the public as being the actual manufacture of the person whose name they bear. It may have been so originally, for it is only natural that the article should be associated with, and called by, the name of its first maker or vendor; but generally speaking, unless in cases of inventions or articles produced by special skill, which are usually protected by letters patent, the public do not, in fact, and are not justified in the conclusion that, because articles bear a particular name, the person of that name is in fact the manufacturer or vendor of the article."

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "But where the trade-mark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the

had, and although the falsehood had been stopped before suit was brought, still the property could not be protected because tainted with fraud.¹

particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public."

1. **Purging Falsehood.**—*Alaska Packers' Assoc. v. Alaska Imp. Co.*, 60 Fed. Rep. 103. Here plaintiff was assignee of Aleutian Islands Fishing and Mining Co., of Kodiak, *Alaska*. The label used by it contained the following statement: "Packed at Kerlick, Kodiak Island, *Alaska*, by the Aleutian Islands Fishing and Mining Co., of San Francisco, *California*." The court said: "To correct the misstatement of the label, complainant, since the commencement of the action, has attached a circular label to the top of the can, stating that the salmon is packed by it as assignee of the Aleutian Islands Fishing & Mining Company. I do not think this cures the defect of the original label. It is the facts which existed before the suit was brought which make the cause of action and entitle to relief."

In *Symonds v. Jones*, 82 Me. 302, defendant, Jones, assigned the goodwill of his business and trade-marks to the complainant company, continuing some time in their employ, but subsequently leaving, and again beginning the use of the trade-marks. Suit was brought to restrain him. The defense was, misrepresentation as to manufacturer on part of plaintiff. Emery, J., said: "The facts do show that the limited company . . . used the 'red' or 'yellow' labels more or less without change up to 1885, when the latter company printed across the face of such of these labels as it did use, the words 'Winslow Packing Company, successor to.' Such use of the labels, without words indicating that Jones had personally left the business, and indicating a change of ownership, would evidently mislead the public as to the manufacturer of the goods, and hence should not receive protection from the court. It would wrong Jones, as well as the public. *Stachelberg v. Ponce*, 23 Fed. Rep. 430; 128 U. S. 686; *Manhattan Medicine Co. v. Wood*,

108 U. S. 218. It is plain, that while thus using the labels, the parties complainant in interest, could not maintain a bill for an injunction against their use by the respondent. The facts further show, however, that before the filing of the bill, the proprietors of the labels refrained from using them, or made such additions to those they did use, as clearly to indicate that the ownership of the business had changed, and that the successors to Jones, instead of Jones himself, were producing the goods. At the time of filing the bill, none of the complainants were offending in this respect, but all seem to have been dealing fairly with the public. Of course they cannot have any damages, or accounting for things done by the respondent while they were themselves offending; but if they are now themselves doing equity, they may ask the court to require the respondent to do equity also."

In *Seabury v. Grosvenor*, 14 Blatchf. (U. S.) 262, plaintiffs, proprietors of "Benson's Caprine Plaster," had advertised it as a recognized medicine, of wonderful curative power. In refusing to grant protection, the court, by Blatchford, J., said: "The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars, before this suit was commenced, yet if they have any property in the trade-mark which they claim the title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect of which the trade-mark is claimed. . . . Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as caprine known in chemistry, or medicine, or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity. *Lee v. Haley*, L. R., 5 Ch. App. 59; *Leather Cloth Co. v. American*

XII. PROCEDURE — 1. Jurisdiction — a. OF LAW AND EQUITY. — The jurisdiction of the courts of law and equity to award damages for the infringement of a trade-mark, and to enjoin its wrongful use, has been recognized by the courts of *England* and the *United States* for several hundred years. The early English practice required proof of title and infringement at law, before an injunction would issue, but with the general development of the jurisdiction of equity, the right of the chancery court to inquire into the whole case primarily and grant immediate and adequate relief was recognized; and it has never been doubted in the *United States*.¹ In addition to the common-law

Leather Cloth Co., 4 De G. J. & S. 142."

1. In a suit in the *United States* circuit court, Eastern District of *Louisiana*, to restrain the infringement of a trade-mark, Billings, D. J., said: "It is urged that since the decision of the Trade-mark Cases, 100 U. S. 82, this court can derive no jurisdiction from the *United States* statute concerning trade-marks, and therefore that the equity jurisdiction can exist only in case of fraud upon, and intended deceit of, the public by the defendants, which the solicitor urges are wanting upon the proofs in this case. The first proposition is correct. But the jurisdiction of the court is derived from the citizenship of the parties, the complainants being citizens of the State of *Missouri*, and the defendants being citizens of *Louisiana*. The equity jurisdiction of these trade-mark cases is founded upon a long line of English and American cases, even when the rights of the parties are to be determined entirely by the written and unwritten laws of the states. See Trade-Mark Cases, 100 U. S. 82." *Battle v. Finlay*, 50 Fed. Rep. 106.

In *Shaver v. Shaver*, 54 Iowa 208; 37 Am. Rep. 194, Beck, J., said: "For three hundred years the common law has recognized the right of a proprietor of a trade-mark to its exclusive use, and has awarded damages for the deprivation of such use. *Southern v. How*, Popham 144. The right has been, without interruption, recognized and protected by the courts of *England* and the *United States* from that day to the present, in the absence of statutes declaring the existence of such right, or providing regulations for its exercise, and remedies for its deprivation. Many cases involving the subject have been decided by the courts." The judge fur-

ther said: "The jurisdiction of chancery to restrain the use of a trade-mark, without the consent of the proprietor, was first recognized at a later day. In 1742 Lord Hardwicke denied it (*Blanchard v. Hill*, 2 Atk. 484), but within the last fifty years it has been repeatedly exercised in *England* and in this country. I have not found an American case denying it. It has been expressly held that the right to the exclusive use of a trade-mark, when statutes exist regulating and protecting it, does not depend upon such statutes. *Derringer v. Plate*, 29 Cal. 292; *Filley v. Fassett*, 44 Mo. 173; 100 Am. Dec. 275. . . . We may express with equal positiveness the conviction that the rule is firmly settled that chancery will, in a proper case, by injunction, protect the proprietor of a trade-mark in its exclusive use. Chancery affords protection to the exclusive use of a trade-mark upon the ground of the injury sustained by the proprietor when it is appropriated by another, and of the fraud and deception practiced upon the public. . . . Chancery will restrain the injury to the trader and public by such fraudulent acts."

In *U. S. v. Roche*, 1 McCrary (U. S.) 385, defendant was ordered to show cause why he should not be proceeded against for violating a decree of the circuit court restraining him from infringing a certain trade-mark. McCrary, C. J., said: "In answer to this rule, it is suggested that the Supreme Court of the *United States* having, in the recent cases of *U. S. v. Steffens*, 100 U. S. 82, and *U. S. v. Johnson*, 100 U. S. 82, held the existing congressional legislation on the subject of trade-marks to be unconstitutional and void, the decree of injunction above mentioned is a nullity and the defendant is not bound to obey it. Upon looking into the record, we find that the

injunction suit was not a proceeding instituted under the statute, but a bill in chancery brought to protect and enforce the plaintiff's exclusive right of property in their trade-mark, as that right exists at common law. In the opinion of the supreme court above referred to it is said: "The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of *England* and of this country, and by the statutes of some of the states. It is a property right, for the violation of which, damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage. These propositions are so well understood as to require neither the citation of authorities nor an elaborate argument to prove them.' It follows beyond all doubt that the validity of the decree heretofore rendered against the defendant is in no wise affected by the decision of the supreme court holding the trade-mark legislation of Congress to be unconstitutional."

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Protection for lawful trade-marks may be obtained by individuals, firms, or corporations entitled to the same, if they comply with the requirements prescribed by the act of Congress. . . . Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. . . . Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority. . . . Chancery protects trade-marks upon

the ground that a party shall not be permitted to sell his own goods as the goods of another; and, therefore, he will not be allowed to use the names, marks, letters, or other indicia of another, by which he may pass off his own goods to purchasers as the manufacture of another."

In *Wolfe v. Barnett*, 24 La. Ann. 97 (appeal from trial by jury), Howe, J. (quoting from *Upton on Trade-Marks*, p. 97), said: "The honest, skillful and industrious manufacturer or enterprising merchant, who has produced or brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise; and shall in no manner and to no extent be deprived of the same by another, who, to that end, appropriates and applies to his productions the same or a colorable imitation of the same name, mark, device, or symbol, so that the public are, or may be, deceived or misled into the purchase of the productions of one, supposing them to be those of the other."

Plaintiff was the proprietor of "Charter Oak" stoves, and R. & Co., apparently the real defendants, registered, under the state statute, the same trade-mark for stoves, claiming thereby the exclusive right thereto. Currier, J., said: "A glance at the statute, however, shows that it was intended for no such purpose. It was not designed in the slightest particular to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired in the usual way, or to legalize, in any form or measure, piracy in trade-marks. Property in a trade-mark is acquired at common law only by appropriation and use, and then only of such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods to which such marks are applied. . . . The statute has no application to the facts of the present litigation." *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275.

In *Derringer v. Plate*, 29 Cal. 292, Rhodes, J., said: "At common law the remedies for invasions of trade-mark

remedies, a statute exists in *England* requiring registration of trade-marks, and creating adequate criminal remedies for infringement.¹ In the *United States*, a national registration act was passed in 1881,² and many of the states have statutes creating criminal remedies for the infringement of trade-marks.³

b. OF UNITED STATES COURTS.—The *United States* courts have all the jurisdiction of common-law courts of law and equity in controversies between citizens of different states, or between citizens of a foreign nation and those of the *United States*.⁴ They are also given special jurisdiction of controversies between citizens of the same state, where the controversy arises out of the infringement of a trade-mark legally registered under the Trade-Mark Registration Act of 1881, 21 Stat. at Large, ch. 138, where the goods of the defendant in controversy, bearing the

property were an action at law for the recovery of damages, and an injunction, in which case pecuniary compensation might be incidentally awarded. Several of the states have, by statute, added a criminal prosecution as a further remedy or protection. The remedies at common law are still left by our statute in those cases where the trade-mark has not been registered according to the act, for not only is the right of property recognized and affirmed as it existed at common law, and the common-law remedies are not taken away, but the protection afforded by suits at law and bills for injunctions is expressly conceded. These provisions add nothing to the rights previously possessed by the owner of the trade-mark, and are only in affirmance of the common law. But he does not have the aid of a criminal prosecution for his protection. On the other hand, those owning trade-marks, who have filed their claims and affidavits and paid the fees, have the protection according to the other class of cases, and have also that arising from the criminal prosecutions, with penalties, upon conviction, of more than usual severity."

In *McAndrew v. Bassett*, 4 De G. J. & S. 380, the Lord Chancellor said: "It is impossible to say that a case so circumstanced has not all the elements of a case which requires the interposition of this court. There is the deliberate imitation of a mark previously existing in the market. The thing is done in order that the rival article of the defendants' manufacture may be brought into the market in competition with that which is already there. There is nothing, in a word, which is necessary for the interposition of the court

which is wanting on the present occasion."

In *Kinahan v. Bolton*, 15 Ir. Eq. N. S. 75, suit was brought to restrain an infringement of a trade-mark. The Lord Chancellor said: "In such suits, in order to found the jurisdiction of this court, there must be established, first, the existence of the trade-mark; next, the fact of an imitation, whether a direct imitation, or one with such variations that the court must regard them as merely colorable; and thirdly, the fact that the imitations were made without license, or anything that this court could regard as acquiescence in their use."

In *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452, Ames, C. J., said: "It never could have been a question that a designed imitation by the defendant of a trade-mark of the plaintiff, whereby the former fraudulently passed off his goods in the market as goods manufactured by the latter and to his injury, would support an action. Indeed, such a concurrence of fraud and injury constitutes the most flagrant form of this species of wrong; and this court can with no justice be said to have intimated the contrary, when it recognized in *Davis v. Kendall*, 2 R. I. 570, that equity would restrain the invasion of a trade-mark as well when the consequence of mistake, as when contrived of fraud."

1. Merchandise Marks Act, 1887, 50-51 Vic., ch. 28.

2. 21 U. S. Stat. at Large 502, ch. 138 (March 3, 1881).

3. See *supra*, this title, *Registration of Trade-Marks Under United States Statutes—State Statutes*.

4. *Blake v. McKim*, 103 U. S. 336.

registered trade-mark unlawfully, are intended to be transported abroad. The jurisdiction is based upon interference with plaintiff's foreign commerce, and the *United States* courts have no jurisdiction, unless the wrongful use of the registered trade-mark be proven to have occurred beyond the *United States* or in trade with an Indian tribe.¹ The acts of Congress of 1870 and 1876,

1. In *Graveley v. Graveley*, 42 Fed. Rep. 265, Bond, J., said: "If it be admitted that the complainants are entitled to the exclusive use of the trade-marks mentioned in the bill otherwise than by act of Congress—a matter which, in our view of the case, it is not necessary to determine—and that the defendants have used them upon tobacco of their manufacture without the consent of the complainants, they do not derive that right of exclusive use from any statute of the *United States*. Their right, under the laws of the *United States*, is the right to use these registered trade-marks in foreign commerce, Act March 3d, 1881 (21 U. S. Stat. at Large 502). The bill in this case nowhere asserts that the defendants have used these registered trade-marks in foreign commerce, nor does the proof show a single instance of such a use on their part. Under these circumstances, since the parties to the suit are citizens of the same state, and since the only right guaranteed to complainants by the laws of the *United States* is the right to use exclusively their registered trade-marks in foreign commerce, which right it is not alleged the defendants have infringed, it seems the court is without jurisdiction in the matter. The complainants may be entitled to the exclusive use of these registered trade-marks at common law, or under some state statute, and, if they were citizens of different states, might possibly file this bill here; but, under the state of facts above set forth, we think the bill must be dismissed for want of jurisdiction, and it is so ordered."

In *Ryder v. Holt*, 128 U. S. 525; *Cox Man. of Trade-Mark Cases* 708, Fuller, C. J., said: "It is now assigned for error that, as defendant and complainants below were citizens of the same state, and the bill did not allege that the trade-mark in controversy was 'used on goods intended to be transported to a foreign country:' Act of March 3d, 1881, ch. 138, § 11; 21 Stat. at L. 502, the circuit court had no jurisdiction, and the decree must be reversed for that reason. The objection

is well taken, and the decree is accordingly reversed."

In *Schumacher v. Schwencke*, 26 Fed. Rep. 818, suit was brought to restrain an infringement of a registered trade-mark. Both parties were citizens of the same state. Wheeler, J., said: "The courts of the *United States* have no jurisdiction of suits like this, unless it is given by statute under which the trade-mark was registered. *Trade-Mark Cases*, 100 U. S. 82; *Luyties v. Hollender*, 21 Fed. Rep. 281. That statute limits the jurisdiction under it so that it is not conferred, 'unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe.' It seems to be understood by the orator's counsel that jurisdiction is given if the trade-mark is used by the orator in foreign commerce, or upon goods intended to be transported to a foreign country. But the authority of Congress over this subject arises from the power to regulate commerce, and does not extend to the protection of trade-marks within a state. *Trade-Mark Cases*, 100 U. S. 82. The orator may have a valid trade-mark, and an exclusive right to its use in *New York*; but, if so, his rights in that respect do not rest upon the laws of the *United States*. The registration under the statute only confers a right to it in foreign commerce, and a claim for infringement, or to be protected against infringement, cannot arise under the constitution or law of the *United States*, unless the infringement is upon the right to use it in foreign commerce, which can only be by using the trade-mark without right in such commerce. The jurisdiction is not conferred at all by express words of the statute; but only by providing a mode of acquiring a right, a suit for the invasion of which would arise under the laws of the *United States* within the act of 1875. The clause quoted from is restrictive of that jurisdiction. . . . This court appears to be without jurisdiction to restrain the use which is alleged."

In *Glen Cove Mfg. Co. v. Ludeling*,

creating a criminal remedy for the infringement of trade-marks, and giving the *United States* courts jurisdiction of such cases, have been held to be void, in that they were so framed that their provisions were applicable to all commerce, and could not be confined to that property subject to the control of Congress.¹

The jurisdiction depending upon difference of citizenship is limited to cases involving \$2,000 and upwards,² but in cases based upon the registration statute, the jurisdiction is independent of the amount in controversy.³ Suit must be brought in the district of which the defendant is an inhabitant, and in the case of corporations, in the state of its organization.⁴

c. OF STATE COURTS.—The courts of law and equity of the several states of the *United States* have all of the common-law jurisdiction of the courts of law and equity in *England*,⁵ and in

22 Fed. Rep. 823; Cox's Man. of Trade-Mark Cases 695, Wallace, J., said: "But both parties are citizens of this state, and the jurisdiction invoked is, therefore, founded solely on the act of Congress for the protection of trade-marks, and can only be exercised according to the statute which invests the court with authority to hear the controversy. The complainant is here upon his statutory title to enforce his statutory rights in the enjoyment of his trade-marks, and the single question is, therefore, whether these have been invaded. If the defendant has appropriated either of these trade-marks, the complainant, as the party aggrieved, by the language of the act (section 7), 'shall have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark.' . . . The defendant insists that his certificate of registry is a decision of the commissioner of patents that he is entitled to use the word 'Maizharina,' in connection with his picture, as a trade-mark, notwithstanding the complainant's trade-mark is the word 'Maizena;' which is a judicial determination, and is conclusive as between the parties. The sufficient answer to this proposition is that the act of Congress makes the registration of a trade-mark only *prima facie* evidence of ownership. . . . In this view, the only office of a registration is to confer jurisdiction upon the court to protect a trade-mark when the proprietor has obtained the statutory evidence of title, and the only function of the commissioner of patents is to determine whether an applicant has a presumptive right to the trade-mark."

In *Luyties v. Hollender*, 21 Fed. Rep. 281, Wheeler, J., said: "Rights and

remedies pertaining to trade-marks, generally depend upon the laws of the state, common and statutory, and not upon the laws of the *United States*. Trade-Mark Cases, 100 U. S. 82. The laws of the *United States* now in force, under which this trade-mark was registered, relate only to trade-marks specially used in commerce with foreign nations, or with the Indian tribes. Act of March 3d, 1881 (21 Stat. at Large, ch. 137, § 1). They are particularly restricted so as not to give cognizance to any court of the *United States* in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe. *Id.*, § 11."

1. Trade-Mark Cases, 100 U. S. 82. See also *U. S. v. Sohn*, 39 Fed. Rep. 775; *U. S. v. Koch*, 40 Fed. Rep. 250; also *infra*, this title, *Criminal Remedy*.

2. *Symonds v. Greene*, 28 Fed. Rep. 834, U. S. Stat. March 3d, 1887, ch. 373 (24 St. at Large, p. 552), as corrected by 25 St. at Large 434 (Aug. 13th, 1888).

3. 21 U. S. Stat. at L. 502, ch. 138 (March 3d, 1881).

4. U. S. Stat. March 3d, 1887, ch. 373 (24 Stat. at L., p. 552), as corrected by 25 Stat. at L. 434 (Aug. 13th, 1888).

5. In *Small v. Sanders*, 118 Ind. 105, Elliott, C. J., said: "The state courts have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. The act of Congress assuming to confer exclusive jurisdiction upon the federal courts in trade-mark cases, has been pronounced unconstitutional. *U. S. v. Steffens*, 100 U. S. 82; *Leidersdorf v. Flint*, 7 Cent. L. Jour. 405" (13 Am. L. Rev. 390; Cox's Man.

addition thereto, in many states, they have a certain criminal jurisdiction conferred by local statutes.¹

d. CRIMINAL REMEDY.—In 1870, Congress passed a trade-mark registration act.² In 1876, an act was passed providing a criminal remedy for the infringement of trade-marks registered under the acts of Congress.³ In 1879, the act of 1870 was declared void by the Supreme Court of the *United States*,⁴ and the court also said that the act of 1876 fell with that of 1870. In 1881, Congress passed another registration act in accordance with the suggestions of the supreme court in the decision just referred to.⁵ The circuit court of the *United States*,⁶ following the *obiter*

of Trade-Mark Cases 629). "These decisions settle the question, and, beyond all doubt, settle it correctly, since Congress has no more power to deprive the state courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property. A trade-mark is not within the provisions of the federal constitution respecting copyrights and patents."

1. See *infra*, this title, *Criminal Remedy*.

2. Act of July 8th, 1870, 16 Stat. at L. 198; U. S. Rev. St., §§ 4937-4947.

3. Act of Aug. 14th, 1876, 19 Stat. at L. 141.

4. U. S. v. Steffens, 100 U. S. 82.

5. Act of March 3d, 1881, 21 Stat. at L. 502.

6. In U. S. v. Koch, 40 Fed. Rep. 250, Brewer, J., said: "This is an indictment under the trade-mark statutes of the *United States*. . . . The history of trade-mark legislation is this: In 1870, Congress passed a statute providing for the registration of trade-marks—a statute general in its operation. In 1876, it passed another statute imposing penalties for trespass upon rights obtained by the registering of trade-marks. Under those statutes, indictments were found, and on a certificate of division of opinion between the district and circuit judges, cases came to the supreme court, and in what is known as the Trade-mark Cases, reported in 100 U. S. 82, the supreme court decided that the act of 1870 was beyond the power of Congress. It suggested in the opinion that under the 'commerce clause,' perhaps, Congress had the power to legislate with reference to trade-marks used in commerce between this country and foreign nations, between the states, and with the

Indian tribes. Immediately thereafter the act of 1881 was passed by Congress, providing for the registering of trade-marks which might be used in foreign commerce, and commerce with the Indian tribes. It did not re-enact the penal statute of 1876, and the act of 1881 contains no direct reference to that penal statute. Now, the contention of the government is, that although the act of 1870 had no existence, never had any, having been declared beyond the power of Congress, and although by reason of that fact the penal statute of 1876 had nothing upon which it could operate, yet it stood as a valid enactment, suspended in operation until the act of 1881, providing for trade-mark registration, when it was verified, and became an act imposing penalties for trespass upon rights given by the act of 1881. In the Trade-Mark Cases, Mr. Justice Miller closed the opinion of the court with some reference to the penal statute of 1876, and his language is this: 'While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the act of 1870, and the civil remedy which that act provides, it was because the criminal offenses described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.' Now, that language is general, comprehensive, and if taken in its ordinary meaning, and as respecting a matter then rightfully before and rightfully passed upon by the supreme court, it is a decision of that court that the penal act of 1876 fell with the civil act of 1870. . . . It

would not be doubted that if an act were passed giving a statutory right, and in the same act was a section imposing penalties for trespass thereupon, when the portion of the act giving the right fell, the whole statute would fall. And is the rule any different when the penal provisions are in an independent statute enacted by a subsequent legislature? Of course, statutes having reference to the same subject-matter, though enacted at different times, are to be considered as in *pari materia*, and this is thus laid down by Dwaris in his work on statutes (Potter's Dwaris' Statutes), p. 189: 'It is therefore an established rule of law that all acts in *pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view;' citing certain cases. 'If one statute prohibit the doing a thing, and another statute be afterwards made whereby a forfeiture is inflicted upon the person doing that thing, both are considered as one statute.' Stradling v. Morgan, 1 Plow. 206. That fits this case. Where the right is created by one statute, and the penalty inflicted by a subsequent, they are to be considered as one statute. . . . Again, when the act of 1881 was passed, if Congress had intended that penalty should be imposed for a trespass upon the rights conferred by that statute, or if it had intended that the act of 1876 should be revived and operate upon the act of 1881, it was very easy to say so. Its silence in this respect is cogent evidence that it did not understand or intend that the penal statute should be considered a part of present and valid law. And that assumption is strengthened by the fact that it had before it for consideration this passage from the opinion of the supreme court, in which it is broadly stated that the act of 1876 had fallen with the act of 1870. Whatever may be true as to the full meaning of that decision, or as to the general power of Congress to impose penalties for trespasses upon rights having no existence, it had before it the general affirmation by the court that the law of 1876 had fallen, and it must be assumed that if it meant that it should stand and be revived, or that any penalties should be imposed for violations of the law of 1881, it would have so stated."

In *U. S. v. Braum*, *U. S. v. Sohn*, 39 Fed. Rep. 775, Thayer, J., said: "These are indictments under section 1 of the act of Aug. 14th, 1876, to punish counterfeiting of trade-marks that have been registered in accordance with the laws of the *United States*. . . . The law was evidently designed to punish those who, with fraudulent intent, pirated a valid trade-mark which has been duly registered by the commissioner of patents. If a person, by any means, secures the registration of a mark, symbol, word, or device, claiming it to be a trade-mark, which, according to the rules of the common law, is not a valid trade-mark, another person who affixes the same mark, symbol, or device to his own goods, and sells them, cannot be punished under the penal statute above quoted. . . . Admission to registration under the act of March 3d, 1881, is merely an admission on the part of the government that the applicant for registration is the owner of a valid trade-mark. The certificate of registration granted by the commissioner is only *prima facie* evidence of that fact, but it does not conclude a third party. . . . Necessarily, therefore, in a criminal proceeding under the act of Aug. 14th, 1876, the question whether the trade-mark involved (it having been admitted to registration) is valid, is an issuable question. . . . An indictment ought to allege facts showing the existence of a valid trade-mark, as well as the fact that registration has been obtained, inasmuch as the registration does not create a trade-mark. . . . Without such averments, a criminal offense is not stated with sufficient certainty. It is claimed by defendants' counsel that the indictments are bad for various other reasons, and among the number, because the trade-mark law of July 8th, 1870, was void, Congress having no power to pass such a law, as was held in the Trade-Mark Cases, 100 U. S. 82, and because at the time of the enactment of the penal act of Aug. 14th, 1876, under which the indictments are drawn, there was nothing upon which that act could operate, and it was, therefore, nugatory, and remained inoperative, even after the passage of the act of March 3d, 1881, *supra*. It is unnecessary, however, at this time to express any opinion concerning the novel question thus raised, as the indictments must be held bad for the reasons heretofore indicated. Demurrer sustained."

dicta of the supreme court, has held the act of 1876 to be inoperative.¹

Most of the states have statutes which provide a criminal remedy for the infringement of trade-marks; some limit the remedy to trade-marks registered under the local statute, others do not.

2. Parties—*a.* ALIENS (AS PLAINTIFFS).—Recent cases² in the

1. As stated in the text, the supreme court and circuit court have held that the act of Aug. 14th, 1876, is void, for the reason that it fell with the act of 1870, which was unconstitutional. This holding is based upon the ground that the act of 1870, creating the right to register, and the act of 1876, providing a remedy for infringement of registered trade-marks, were practically one statute, and when the first was declared unconstitutional the second fell with it. We are unable to yield an assent to this conclusion. If the act of 1870 was unconstitutional and void, it never existed as a valid act of Congress, and must therefore be considered as never having been passed. This leaves the question to be simply, "Had Congress the power to pass the act of 1876, entirely independent of all other legislation?" This power has never been questioned, and we have no doubt that Congress had such power. We have no doubt that if the act of 1876 had been passed in 1882, that it would be held to be entirely valid. The objections to the act of 1876 urged by the circuit court are three: *First*, that it has been held invalid by the supreme court. *Second*, that, had Congress intended it to apply to the act of 1881, they would have said so. *Third*, an act creating a remedy cannot be sustained independently of an existing right or statute creating a right. With reference to the first objection, it may be said that the supreme court has no power to declare a law void, if it was clearly within the power of Congress to enact it; and further, the expressions of the supreme court on this subject, in *The Trade-Mark Cases* 100 U. S. 82, are in the nature of *dicta*, for while the cases did arise on indictments under this act of 1876, the act expressly creates the criminal remedy for the infringement of trade-marks registered under the statutes of the *United States*, and if there was no valid statute, as the court held to be the case, there could be no valid indictment, entirely inde-

pendent of the question of whether the criminal statute was void or valid. Hence, any expressions of the court with reference to the validity of the act of 1876, were mere *dicta*. With reference to the second objection, we would say that no intention of Congress in passing the act of 1881, can affect the question, for the reason that if every member of Congress fully believed, when the act of 1881 was passed, that the act of 1876 was void, and omitted to re-enact it in the act of 1881 intentionally, no such intention or belief on the part of Congress could in the slightest degree affect the validity of the act of 1876. If it was valid when passed, it must be valid to-day. With reference to the third question, the cases indicate that statutes passed under similar circumstances have been sustained. See *Devar* 529; *White v. Bost*, 2 T. R. 274. Suspension of an act is not a repeal of it. *Brown v. Barry*, 3 Dall. (U. S.) 364; *Burnside v. U. S.*, 7 Cranch (U. S.) 382; *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735; *Rex v. Losdale*, 1 Burr. 447; *Williams v. Roughedge*, 2 Burr. 747; *U. S. v. Gear*, 3 How. (U. S.) 120; *Chew Heoug v. U. S.*, 112 U. S. 536; *Clay Co. v. Society for Savings*, 104 U. S. 579; *Red Rock v. Henry*, 106 U. S. 596; *Ex p. Crow Dog*, 109 U. S. 556; *U. S. v. Philbrick*, 120 U. S. 52. See *Ellison v. Jackson Water Co.*, 12 Cal. 542.

2. In *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455, Acheson, C. J., said: "We do not perceive any basis for the claim that, independently of his *United States* registrations, the plaintiff had acquired, as against the defendants, a common-law right to the exclusive use in the *United States* of the word 'Anchor' and its symbol, in connection with the manufacture and sale of medical compounds. As we have seen, prior to his first registration, the plaintiff had never sold in the *United States* any of his medicines. Nor had he himself made any importations thereof before that registration. Hav-

United States have established the rule that a foreigner, who has never introduced his goods or conducted trade in the *United States*, nor used his trade-mark in connection therewith, no matter how extensive his trade-mark rights or the extent of his trade abroad, cannot be considered as having any common-law trade-mark rights in the *United States*, except so far as these rights may be effected by the International Convention, Article 8.¹ An alien, however, who has sold his goods and used his trade-mark in the *United States*, enjoys all the rights of the citizens, both as to common-law rights and under the registration statutes.² The English rule at common law was different, but since the statutes of 1875

ing, then, no trade in this country, we do not see how the plaintiff could well have here a common-law trade-mark."

1. "The commercial name shall be protected in all the countries of the union, without obligation of deposit, whether it forms part or not of a trade or commercial mark." International Convention, art. 8. See *Vichy Case*, Trade-Mark Record, August 16, 1893.

2. In *La Croix v. May*, 15 Fed. Rep. 236, Wallace, J., said: "The fact that complainant is an alien does not affect his right of property in a trade-mark; but that fact, as it establishes the requisite diversity of citizenship between the parties to confer jurisdiction upon this (*i. e.* a U. S. Cir. Ct.) court, is indispensable to the cause of action alleged."

State v. Gibbs, 56 Mo. 133, was an indictment under the *Missouri Act* approved Feb. 22d, 1870 (Adj. Sess. Acts 1870), entitled, "An act to protect merchants and manufacturers against counterfeit trade-marks." The indictment charged the defendant with having in his possession a brand and printed wrapper for the purpose of using the same upon a certain article made by the defendant, and palming the same off as the wares of *Lea & Perrin*, of the city of London, *England*. *Wagner, J.*, said: "There is a well-known right of property in a trade-mark, which the law will protect, and which it was not the intention of the statute to abridge. The citizens of foreign states will be protected in their rights of property in trade-marks in our courts, the same as our own citizens."

In *Davis v. Kennedy*, 13 Grant Ch. (Up. Can.) 523, plaintiffs were citizens of the *United States* and sued Kennedy for infringement of the trade-mark "Perry Davis' Painkiller." *Spragge, V. C.*, said: "Their (the plaintiffs')

right at common law, seems to be clear, the right of an alien friend standing upon the same footing as that of a subject."

Taylor v. Carpenter, 2 Woodb. & M. (U. S.) 1, was an action on the case, brought by the plaintiffs, citizens of *Great Britain*, against a citizen of *Massachusetts*, for imitating, and using the trade-marks of the plaintiffs, on thread of the defendant, and selling large quantities thereof. *Woodbury, J.*, said: "The first inquiry under this head is, whether the subject-matter here is one over which this court has jurisdiction, and can be prosecuted here at all by an alien friend. Being an action for a tort or wrong to a foreigner, gives to this court general jurisdiction. But being an action for a particular kind of wrong, an injurious deceit to the damage of the plaintiffs, practised here, though they live abroad, is said to give them no cause of action. . . . In the next place, in this country, proceedings have been sustained in favor of aliens, as to their marks, as well as citizens, holding that the former have all the rights in such personal matters here, as citizens against forgery and deceit, and can resort to this court for their protection. . . . Here the wrong was committed, and the defendant found here. . . . I am not satisfied, then, that the judge at the trial did wrong in not charging on this point as desired by the defendants. The cannibal of the *Fejees* may sue here in a personal action, though having no court at home for us to resort to. . . . But an alien is not now regarded as 'the outside barbarian,' he is considered in *China*, and the struggle in all commercial countries has been to enlarge his privileges and powers as to all matters of property and trade. It was one of the grievances of *Magna Charta*,

and 1883, registration is necessary to support an action,¹ except so far as a commercial name is concerned, which is protected under Article 8, of the International Convention of which *Great Britain* is a member.

as well as the Declaration of Independence, that the naturalization of foreigners had been too much obstructed (4 Elliott's Debates, 167). . . . The progress of civilization and commerce, and the whole character of our civilization and laws are more and more friendly to foreigners, regarding them more as brethren of one blood and origin and hope rather than barbarians and enemies. . . . Comity and courtesy are due to all friendly strangers, rather than imposition or pillage. Taking their marks and using them as and for theirs, to their damage, is like preying on a visitor, or inhospitably plundering a wreck on shore. To elevate our own character as a nation and the purity of our judicial tribunals, it seems to me we ought to go as far in the redress of and punishment of these deceptions as can be vindicated on any sound principle."

See *Taylor v. Carpenter*, 3 Story (U. S.) 458, where there was a bill in equity for an injunction. The plaintiffs were subjects of *Great Britain*, and alleged that the defendant had manufactured and sold thread of inferior quality, and put up in envelopes resembling exactly the spools, labels, devices, trade-marks and envelopes used by complainants. Story, J., said: "But in the courts of the *United States*, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretense to say, that if a similar false imitation and use of the labels of a citizen put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated."

In *Taylor v. Carpenter*, 11 Paige (N. Y.) 296; 2 Sandf. Ch. (N. Y.) 603; 42 Am. Dec. 114, the Chancellor said: "The fact that the complainants are subjects of another government, and that the defendant is a citizen of the *United States*, as stated in the answer, cannot alter the rights of the parties, or deprive the complainants of the favorable interposition of this court, if

those rights have been violated by the defendant. So far as the subject-matter of this suit is concerned, there is no difference between citizens and aliens."

1. The Collins Co., of Hartford, *Connecticut*, filed a bill in *England* against Reeves, charging that he had imitated their marks on edge tools. Stuart, V. C., said: "The plaintiffs, if they had an exclusive right to the use of the trade-marks in question, were entitled to the protection of this court in the enjoyment of such use. Though they were aliens, they were entitled to sue in this court against any fraudulent invasion of their rights, and that notwithstanding the tools were stamped with the marks, the fraudulent use of which was complained of, were not usually sold by them in this country." *Collins Co. v. Reeves*, 28 L. J. Ch. 56; 4 Jur. N. S. 865.

Collins Co. v. Brown, 3 K. & J. 423; 3 Jur. N. S. 929; 29 L. T. 245, was a suit by a *Connecticut* corporation against a subject of *Great Britain*. Wood, V. C., said: "The point raised by this demurrer depends upon the question whether this is a personal right or not. If it be personal, the injured party may obtain a remedy against the defendant in the country where he resides, wherever the injury may have been done. The complaint is, that a fraud has been committed by the defendant by using the trade-mark of the plaintiff, and thus representing that the goods manufactured by himself were manufactured by the plaintiff. . . . The simple question in these cases is, 'Has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him?' and if so, and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it. . . . If a man has been in the habit of using a particular mark for his goods for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark, that can only be

b. VENDORS (AS DEFENDANTS).—A vendor of a spurious article, who knows it to be spurious, is a contributor to the fraud, and makes himself liable to an action for an injunction and damages and profits. If he sells it to another, accompanied by the statement that it is spurious, he cannot relieve himself, for the purchaser may not be so frank when he comes to sell the article.¹ But even ignorance of the fact that an article is spurious will not protect a vendor against an injunction; if, however, he stops at once upon being notified, the plaintiff generally cannot recover costs.²

with a fraudulent intent; and any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded." See also *Collins Co. v. Cohen*, 3 K. & J. 428.

1. In *Low v. Hart*, 90 N. Y. 457, Rapallo, J., said: "Although the proof does not establish an infringement by the defendant to any great extent, yet we think that where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved, that is sufficient to sustain an injunction against a continuance of the wrong, and that an action for such injunction will not be defeated solely on the ground that on the day it is brought, the dealer happens not to have any of the article on hand."

In *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586, the Assistant Vice-Chancellor said: "In this case the attempted imposition upon the public by the manufacturer of the simulated article, is too barefaced to be questioned. The defendants are merely vendors of the spurious goods, and they suppose that they are, on various grounds, exempted from the consequences which would be visited upon the manufacturer. Thus it is said that they have not used the trade-marks of the complainants; that they merely sold for McGregor on commission, in the usual course of their business, and have acted in perfect good faith. . . . Knowing all these things, they sold it, and so far as they could, put it in the way of imposing upon and swindling the community. But it is said that upon their sale to the jobber, by whom it was to be again sold to the retailer, the defendants told the jobber, truly, that it was an imitation of Coats' thread; in short, that they sold it as a spurious article. But what then? Did they imagine that the jobber would be equally frank and

communicative to the retail merchants and shopkeepers, and that every one of the latter would carefully inform every customer who bought a spool, that the thread was an imitation of Coats', made in *New Jersey*, and only three cord instead of six? The idea is preposterous. Trade-marks, names, labels, etc., are not forged, counterfeited, or imitated, with any such honest design or expectation. McGregor's thread was labeled and stamped with Coats' name and marks, so that it might be palmed off upon the customer as being made by Coats, and every man who sold it, whether he made five per cent. or fifty per cent. by the operation, lent himself to the perpetration of the fraud."

The plaintiff Gout had been accustomed to manufacture watches for the Turkish market, and to engrave upon the inside in Turkish characters his name, and the word "Pessendede," which signifies warranted or approved. The defendant afterwards got Messrs. Parkinson to manufacture watches for him, on which there were engraved in Turkish characters the words "Ralph Gout" and "Pessendede," which the defendant consigned to Constantinople, and sold there to the prejudice of the plaintiff's trade. The vice chancellor granted an injunction, restraining Aleploghi from sending or permitting to go to Constantinople and *Turkey*, or to any other place, and from selling and disposing of any watches with the name of the plaintiff thereon in Turkish characters, or any watches in imitation of the plaintiff's watches. *Gout v. Aleploghi*, 6 Beav. 69, n.

2. In *Moet v. Couston*, 10 L. T. N. S. 395, the Master of the Rolls said: "If a man manufactures goods himself and puts upon them the trade-mark of another, though he may not know to whom that trade-mark belongs, he must at least know that he has himself no right to the mark. That knowledge

c. PRINTERS OF LABELS AND MARKS (AS DEFENDANTS).—A trade-mark owner has a right to prohibit any act, the direct purpose and logical result of which is to enable others to palm off spurious goods on the public as and for his goods. A printer may be enjoined from printing and selling labels, which are fraudulent copies of those of a trade-mark owner, without his consent.¹

makes him liable to account for the profits he may have realized by his conduct. But if a man buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so, that he can be considered to be guilty of any fraud, or to be liable to render any account. In the present case the plaintiffs have failed to establish any such knowledge on the part of the defendants, and if, on the filing of the bill, the defendants had offered the plaintiffs their costs, and the plaintiffs had persevered with their suit, I should have given the defendants their subsequent costs. As it is, however, the plaintiffs can only be held to be entitled to an injunction."

1. Complainant, who was a manufacturer of cigars, and a member of the Cigarmakers' International Union of America, filed a bill to restrain defendants, who were not members thereof, from making and selling counterfeits of the union labels, with the alleged attempt to defraud complainant and the public. Thayer, J., said: "It is true that the bill does not show that the defendants have affixed any of the spurious labels to cigars of their own manufacture, or that they have sold any cigars bearing the counterfeit certificates or labels. But this is not important. From the fact that they have made and sold spurious labels and advertised them for sale the court must presume that defendants intend that they shall be used on cigar boxes by the persons who buy them, and that they manufacture and sell them for that purpose. The conduct of the defendants is equally as culpable as that of the manufacturers of cigars who buy and use the spurious labels, and the loss which complainant sustains by the use of the same on cigar boxes is as directly attributable to the persons who make and sell the counterfeit labels, as to the dealers in cigars who buy and use them." *Carson v. Ury*, 39 Fed. Rep. 777.

In *Du Kuyper v. Witteman*, 23 Fed. Rep. 871, Wallace, J., said: "Upon

the allegations of the bill, the defendants are actively engaged in assisting third persons to use the complainants' trade-mark in violation of their rights. The mere act of printing and selling labels in imitation of the complainants' might be innocent, and without evidence of an illicit purpose, would not be a violation of the complainants' rights. It is otherwise, however, when this is done with the obvious purpose of enabling others by the use of the labels to palm off their goods upon the public as the goods of the complainants."

In *People v. Molins* (N. Y. Co. Ct.), 10 N. Y. Supp. 130 (Ct. Gen. Sess.); 7 N. Y. Crim. Rev. 51, defendant was indicted and convicted for counterfeiting a trade-mark by printing copies of the labels used by the owners of the trade-mark, and also putting on the labels the name of the printer of the original. He was found in possession of counterfeits of other labels, showing his knowledge of the fraudulent use to which the labels were to be put. See charge of presiding judge in report of case.

In *Colman v. Crump*, 70 N. Y. 573, plaintiffs had, seventeen years before the bringing of the action, adopted, and from that time used, as their trade-mark, and to distinguish mustard of their manufacture from all others in the markets of this country, as well as other parts of the world, the symbol or device of a bull's head; and it had become a well-known sign and mark of their mustard, and had not before then been adopted or used as a trade-mark for the same article of merchandise by any one. Since the year 1860, defendant had been engaged in engraving, printing, and selling labels designed and intended to be affixed to packages of mustard for sale and consumption, not the product or manufacture of the plaintiffs. All the labels so engraved, printed, and sold by the defendant had been and were still in use by dealers in mustard and attached to mustard other than the plaintiffs', and kept for sale in various parts of the *United States*. The court found the following con-

d. MEMBERS OF UNINCORPORATED ASSOCIATIONS (AS PLAINTIFFS).—The cases are about equally divided with reference to the right of the members of an unincorporated association, which is not itself putting on the market a vendible commodity, to acquire a trade-mark and enjoin its use by others.¹

clusions of law, which were approved on appeal: That the plaintiffs are entitled to the exclusive use of the figure of a bull's head as a trade-mark on labels attached to mustard; that the engraving, printing, and selling of labels by the defendant, to be attached to packages of mustard, whether put up in tins, bottles, or otherwise howsoever, are violations of the plaintiffs' rights; that the plaintiffs are entitled to a perpetual injunction against the defendant, as demanded by them in their complaint.

In *Farina v. Silverlock*, 1 K. & J. 514; 3 Eq. Rep. 886; 24 L. J. Ch. 632, *Pagewood, V. C.*, said: "The bill does not contain a distinct statement that the defendant sold the labels for the purpose there mentioned, but only that parties purchased them for that purpose. But if it be stated that the defendant is manufacturing that which is known to be the trade-mark which the plaintiff alone has the right to use, and the use of which on the goods of a third party would be a fraud upon the plaintiff; and that the defendant is selling such labels to any one who asks for them, and is thus scattering over the world the means of enabling parties to commit frauds upon the plaintiff, and that such frauds have been committed; that is, I think, a sufficient averment to entitle the plaintiff to an injunction. The ground of the jurisdiction being fraud, if the defendant be committing fraud, either by selling goods under the plaintiffs' trade-mark, or enabling others to do so by distributing the means of doing so, it cannot be said that this court has no power to interfere by injunction to arrest the evil at its source, without compelling the plaintiff to wait until the whole fraud is brought to a completion by the sale of the goods."

1. It has been held that the individual members, who are merely workmen, making an article for a manufacturer, cannot enforce the trade-mark rights of the association in which they are interested, and of which they are members; but that a manufacturer who is a member, or whose workmen are

members, and who has used the association trade-mark and built up a valuable trade thereby, has a right to complain of a rival manufacturer or dealer who puts the same class of merchandise on the market bearing the association trade-mark without the license of the association, and thereby injures the trade of his rival. It is doubtful, however, if this view can be maintained, for since the leading case of *New York, etc., Cement Co. v. Copley Cement Co.*, 45 Fed. Rep. 212, a trade-mark owner, to maintain an action, must have an exclusive title to the trade-mark. It might be said that the general association had the exclusive title, but of the cases which have been brought by such associations, the well-considered ones have held that the association and its members could not maintain an action, because they are not manufacturers and put no goods on the market, and the trade-mark does not and cannot point to the origin and ownership of the goods upon which it is used. The goods are not the property of the association, nor are they sold by it or its members. There is also another reason why an association, such as the cigarmakers' union, should not be allowed to use a label. It would appear to be against public policy, because it enables the members of the union and their allied trades unions to boycott an honest and equally skillful manufacturer or dealer, by instructing all members not to purchase any goods which do not bear the union label. This course of action destroys competition, and takes an unfair advantage of those who are with honesty and industry seeking to do a legitimate business in a staple article.

In *Bloete v. Simon*, 19 Abb. N. Cas. (N. Y.) 88, plaintiffs were members of cigarmakers' unions under the jurisdiction of the Cigarmakers' International Union of America. The number of such unions in America exceeds twenty-six thousand. The unions are voluntary unincorporated associations of practical cigarmakers. The plaintiffs sued for an infringement of the label by Simon, who sold cigars not made

by the members of the union, and packed in boxes bearing a label, falsely purporting to be issued by the cigarmakers' unions, etc. The case came up on demurrer. O'Gorman, J., said: "The question is, 'Are they entitled to sue on their own behalf and that of others?' The case is provided for, either by section 1919 of the Code, or by sections 446 and 448. It is provided in section 448 that, 'Of the parties to an action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise prescribed in this act, and where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'" See also *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197, and *People v. Fisher*, 3 N. Y. Supp. 786; 50 Hun (N. Y.) 552.

In *McVey v. Brendel*, 144 Pa. St. 235, *Williams, J.*, said: "The plaintiffs represent neither the Cigarmakers' International Union, the alleged owner of the label, nor *Strasser*, the officer whose name appears on it, but a subordinate local organization, known as No. 126 located at Ephrata, Lancaster County, *Pennsylvania*. No. 126 did not devise or register the label, and does not claim to own it, but asserts the ownership of the international organization, to which it is a tributary. . . . The plaintiffs represent Union No. 126, which has no other ownership in or control over the International Union's label, than any others of the hundreds or thousands of subordinate unions scattered over the *United States* and the *Canadas*. If it can maintain this bill, then each and every subordinate union can do the same thing, although no one of these devised, registered, or claims to own the trade-mark; and may prevent its use by workmen and in shops which, under the general rules of the international body, are entitled to use it. But we are not disposed to impale this case upon what may be thought to be a technical point. On the other hand, we will consider whether the International Cigarmakers' Union is a trader, whether the label in question is a trade-mark. . . . The organization that devised, registered and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used. The second question would

seem to go with the first. Trade-marks are provided for by the act of Congress of July 8th, 1870. Registration is made under it by furnishing a statement, to be recorded in the Patent Office, showing the names of the parties applying for the registration, with their residences and places of business, the class of merchandise, and a description of the goods composing the class by which the trade-mark has been or is intended to be appropriated; together with a description of the trade-mark and fac-similes of it. This provision of the act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business, and its appropriation to a particular "class of merchandise" produced or sold by the parties making the registration."

In *Cigarmakers' Protective Union v. Conhaim*, 40 Minn. 243, *Gilfillan, C. J.*, said: "From the allegations of the complaint, it appears that cigarmakers throughout the *United States*, amounting to many thousand in number, have joined themselves into local associations called 'local unions,' of which this plaintiff is one, it being incorporated for the purpose of such association or union, and that the various local unions are in some way joined together, forming what is called, 'The Cigarmakers' International Union;' and that the latter and the state or local unions have devised and adopted a certain symbol, which the complainant claims to be a legal trade-mark, for the exclusive use and protection of the cigarmakers who are members of such unions, and of those manufacturers and others who employ them. . . . We gather from the complaint that anyone joining any of said local unions thereby acquires the right to use the device; and that his right continues so long as he remains a member of such union. . . . In other words, the symbol indicates only that the person using it is one of the many thousand members of the cigarmakers' union. The right in trade-marks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property. Hence the law affords a remedy to the owner against one who violates the right. A trade-mark consists of a word, mark, or device, adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article. . . . Apply the foregoing definition and essentials of a

legal trade-mark to the facts of this case, and it is apparent that the device in question cannot be a trade-mark, and the right to use, as such right is shown by the complaint, is not property, but a mere personal privilege; or, rather, the use of it on cigars is only an advertisement of the fact that the person using it is a member of one of the cigar-makers' unions. . . . It is only to indicate membership in the union. . . . It is true the members of the unions are all engaged in the same kind of business, to wit, the making of cigars. But they are not engaged in business together."

In *Schneider v. Williams*, 44 N. J. Eq. 391, Van Fleet, V. C., said: "This action is brought by three persons as members of a voluntary association called the Cigarmakers' International Union. . . . Action is brought to protect a right which, it is alleged, is held in common by all the members of the association (*i. e.*, to the exclusive use of a union label). . . . It would appear to be entirely clear, that a person who desires to acquire a right to a trade-mark must do three things, each of which is indispensably requisite to the acquisition of the right. First, he must select or adopt some sign not in use; . . . second, he must apply his mark to some article of traffic; and third, he must put his article, marked with his mark, on the market. Mere adoption of a mark or sign, and a public declaration, by advertisement or otherwise, that a person will, at a subsequent time, put a particular thing on the market, marked or distinguished in a certain way, create no right. Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises. Tested by the principle above stated, it would appear to be so clear as to be beyond all controversy, that the complainants have not acquired such a title to the mark in question as will enable them to maintain this action. Without stopping to consider whether it is possible for a voluntary association, not composed of traders, but of skilled workmen, who put nothing on the market but their skill as mechanics, to acquire title to a trade-mark, it is sufficient for present purposes to say, that the case attempted to be made by the bill is fatally defective in an important particular. The defect is this: the bill does not show that the complainants

have applied their mark or label to a vendible commodity, of which they are the owners, or in which they trade, and that they have put such commodity, marked with their mark, on the market. Such application and user constitute, according to the established law on this subject, the only foundation on which a title can rest. Without them it is impossible to acquire a title."

Weener v. Brayton, 152 Mass. 101, was an action for an infringement of a label of the International Cigarmakers' Union. Devens, J., said: "We are of opinion that the label, alleged by the bill in the case at bar to have been counterfeited, cannot be treated as a trade-mark. However disreputable and dishonest it may be falsely to represent goods made by other persons to have been made by members of the union, upon which subject there can be but one opinion, those who do not carry on any business to which the use of the label is incident, who have not applied it to any vendible commodity which has been placed upon the market, in which they deal, or of which they are the owners or manufacturers, cannot maintain a bill to restrain the use by the defendants of the label as a trade-mark. It wants many essential elements of such a mark. It does not indicate by what person articles were made, but only membership in a certain association. There is no exclusive use of it, but many persons not connected in business, and unknown to each other, may use it."

The Cigarmakers' International Union of America, an unincorporated association for mutual benefit, adopted a label purporting to be issued by the union, and to be placed on boxes of cigars made by members of the union. Complainant, who was a manufacturer of cigars and a member of the union, filed a bill to restrain defendants, who were not members thereof, from making and selling counterfeits of the union labels, with the alleged attempt to defraud complainant and the public. Thayer, J., says, after *citing* *Cigarmakers' Protective Union v. Conhaim*, 40 Minn. 246; and *Schneider v. Williams*, 44 N. J. Eq. 391: "In both of these cases the bill seems to have been framed upon the theory that the union label was a technical trade-mark, and that, as such, it was the property of the members of the union in the aggregate, and that any one or more members of the union; whether they were, or were

c. PUBLIC OFFICERS.—Public officers who acquire a reputation and trade growing out of their office, cannot acquire a property in the stamp or symbol of the office, as a private trade-mark.¹

not, engaged on their own account in the manufacture and sale of cigars and in the use of the label, might maintain a suit to restrain an unauthorized party from using the label. The decision in each case was adverse to such contention. The bills appear to have been filed by persons, and by an association, who were not engaged in the manufacture and sale of cigars on their own account. Hence, they were not injuriously affected by the fraudulent acts complained of, or, if they were liable to suffer a pecuniary loss to any extent, or at any time in consequence of such acts, the loss to be apprehended was indirect and speculative. It may well be conceded that the plaintiffs in those cases had no such property rights involved as would enable them to maintain, an action, even on the theory on which this decision proceeds. The case at bar differs from those cases, however, in the respect before mentioned, that complainant is himself a manufacturer of cigars, and, according to the averments of the bill, has built up a profitable trade by the use of the union label, which trade has been damaged, and is liable to be further damaged, by the fraudulent acts of the defendants." *Carson v. Ury*, 39 Fed. Rep. 777.

In *State v. Hagen* (Ind. 1893), 33 N. E. Rep. 223, Gavin, J., said: "The Cigarmakers' International Union of America is a voluntary, unincorporated association of practical cigarmakers and small manufacturers of cigars. . . . This national body adopted a label to be placed on all boxes containing cigars made by members of the union. . . . It is urged that neither this association nor its members can have any right to protection for this label, because they are only workmen, and not manufacturers or traders. . . . The cases of *People v. Fisher*, and *Bloete v. Simon*, take the position that such an association is entitled to hold and be protected in this label as a trade-mark; and it may be urged with considerable force that where the label indicates the origin of the goods, so far as the workmanship is concerned, guaranteeing that they have been made by one of a large association, which has acquired a high reputation for the skill of all its members, this is a sufficient

indication of origin, without its pointing out the particular individual from whom it emanated, and that an association may acquire such a general reputation for the high character of its workmanship, as that its mark may be such an assurance of the worth of the goods as makes it a property right in the association or membership in general. . . . We do not here have occasion to determine whether, to enforce this right in equity, an action must necessarily be brought by some member who is actually engaged in manufacturing or selling on his own account, or whether any member who is actually engaged at his trade of making cigars, and is, or is liable to be, specially injured by the use of the false labels, may maintain his action in equity, although it is difficult to perceive why the latter is not, upon principle, the proper view of the law."

The plaintiffs were officers and members of the Cigarmakers' Protective Union, No. 98, of the State of *Minnesota*, a branch of the Cigarmakers' International Union of America, and filed a bill to restrain defendant from putting up, selling, stamping, or offering for sale any boxes containing any cigars whatever, having placed thereon a label or trade-mark in imitation of plaintiffs' label, and having thereon the words "Union Made Cigars." The defendant demurred upon the grounds that upon the face of the complaint (1) the plaintiffs have not legal capacity to sue, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled in the lower court and appeal was taken. The four judges in the appellate court were equally divided upon the question whether the plaintiffs, by their complaint, showed themselves entitled to assert a proprietary claim or interest in the device. The order was therefore affirmed. *Allen v. McCarthy*, 37 Minn. 349.

1. Plaintiff was engaged in the business of packing and selling fish, and was also a deputy inspector of fish for the city of Portland, *Maine*. He was accustomed to inspect the fish packed by him in his business, as required by the laws of that state, and to brand upon the packages thereof, a brand, showing his name as deputy inspector and the

f. PERSONS INDIRECTLY CONNECTED WITH TRADE-MARK INFRINGEMENT.—All persons indirectly connected with the infringement of a trade-mark are responsible to the owner thereof for the injury done to his rights, and may be sued jointly or separately, at the option of the latter.¹

quality of the fish contained therein. He alleged that the defendants (citizens of *Mussachusetts*), well knowing the facts stated above, branded a number of packages of fish with a brand precisely similar in appearance to his. The court held: "That upon the facts alleged in the declaration, the mark used by the defendant was his official brand as a public officer, and could not be his private trade-mark, in which he could claim property for his own benefit." *Chase v. Mayo*, 121 Mass. 343. See also *Ex p. South Carolina*, 64 Pat. Off. Gaz. 1395.

1. In *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. Rep. 296, McKenna, J., said: "Respondent urges that there is a misjoinder of parties defendant. I do not think so. The bill alleges that the respondents, Bishop *et al.*, are using the corporation but as a means of infringement; that they are substantially the corporation. In the case of *Nerve Food Co. v. Baumbach*, the Star Bottling Works, a corporation, was joined with the respondent Baumbach, under the same circumstances, the corporation, namely, belonging to him."

In *Armstrong v. Savannah Soap Works*, 53 Fed. Rep. 124, Speer, D. J., said: "The plaintiffs have brought their bill against the defendants named, and are met by a demurrer. . . . A ground of demurrer is that the directors of the defendant corporation are joined as parties defendant, which, it is insisted, is a misjoinder. . . . The current of authority in this country seems clearly to justify the plaintiff's action in joining the directors. In the case of *Poppenhausen v. Falke*, 4 Blatchf. (U. S.) 493, it was held that, where persons were acting in concert in infringing a patent, although they act merely as employés of a corporation, they are liable to be sued therefor jointly in one suit. (Also *cites Estes v. Worthington*, 30 Fed. Rep. 465.) It is true that there is a class of agents—such as mere workmen in the employ of a manufacturer—against whom there can be no recovery, although they may have participated in the acts of in-

fringement; but ordinarily the infringer cannot escape the responsibility by showing that he was acting for another."

In *Cuervo v. Henkel*, 50 Fed. Rep. 471, Lacombe, J., said: "There is no dispute as to the facts of this case. The complainant, a manufacturer of cigars, is conceded the owner of a trade-mark, which as an entirety is embodied in four separate labels placed inside and outside the boxes containing his cigars. The goods thus marked and put up have obtained a wide celebrity, and for the last twenty-five years have had an extensive sale in this and other states of the Union. The defendants do not make or deal in cigars. They manufacture cigar boxes, which they sell to cigarmakers. They also procure from lithographers labels which are almost an exact reproduction of those used by the complainant, even the signature being copied therein. . . . Nor is there anything to the suggestion that injunction will not lie against defendants, because they do not themselves make, pack, or sell the fraudulent cigars. No doubt they may make the boxes without objection. There is no trade-mark, so far as appears, in the style, size, or shape of a cigar box. But they do much more. They procure labels counterfeiting the complainant's, and assemble these labels with their boxes, with the obvious purpose of enabling others, by the use of the labels, to palm off their goods upon the public as the goods of the complainant. Complainant is clearly entitled to an injunction against all who knowingly combine together to accomplish that purpose."

In *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. Rep. 188, Thayer, J., said: "The proof does not establish that defendant has itself sold a spurious article of bitters put up in bottles made in imitation of those in use by complainant, or that it has counterfeited the complainant's labels, trade-marks, etc.; but the proof does show that defendant manufactures an article of bitters which closely resembles Hostetter's Bitters in appearance and flavor, and that it has sold the same in bulk to

3. Evidence—*a.* EXPERT TESTIMONY.—The question of what evidence is requisite to make out a case of infringement of a trade-mark is often a difficult one. This difficulty, however, arises in great measure from the fact that considerable confusion exists with reference to the fundamental basis of trade-mark law. If the idea of property in a trade-mark be admitted, and followed to its logical conclusion, no evidence in technical trade-mark cases should be required beyond proof of ownership of the particular trade-mark, and its use by the defendant. Generally this use can be seen by the court at a glance, and if the trade-mark of the plaintiff is found upon defendant's goods, this wrongful use of the plaintiff's property should be enjoined without further inquiry. Many judges, however, have refused to act in this summary way, and have required proof, either of actual deception of plaintiff's customers, or the probability of deception. The latter inquiry, which is the usual one, opens the door to evidence of a most unsatisfactory character. It has been decided in some cases that

its customers, advising them at the time of such sales to refill bottles that originally contained Hostetter's Bitters, with the spurious article, and to put the bottles thus refilled on the market as containing genuine Hostetter's Bitters.

Under these circumstances, I think the complainant is entitled to an injunction restraining the defendant from selling a spurious article of bitters as and for Hostetter's Bitters. Customers of defendant, who have thus been advised and induced to use genuine bottles and labels in the manner above mentioned, are clearly guilty of a wrongful act which a court of equity will enjoin; and a person who counsels and advises another to perpetrate a fraud, and who also furnishes him the means of consummating the same, is himself a wrongdoer, and, as such, is liable for the injury inflicted. The defendant cannot shield itself from an injunction by the plea that it has not itself sold a spurious article in a false dress. The fact that it has advised its customers to perpetrate a fraud of that description, and that it has furnished them the spurious article, and that some of its customers have probably acted on the suggestion, is sufficient to render them liable to an injunction."

In *Estes v. Worthington*, 30 Fed. Rep. 465, Wallace, J., said: "No person should be made a party who has no interest in the suit, and against whom no decree can be had at the hearing; and for this reason a person who is a mere agent for another in the transactions in controversy ought not generally

to be made a party defendant, unless his presence is necessary for the purposes of discovery. And it has been held in suits for infringements of patents that there is a class of agents, such as mere workmen in the employ of a manufacturer, against whom there can be no recovery, although they may have participated somewhat in the acts of infringement. But ordinarily the infringer cannot escape responsibility by showing that he was acting for another. In torts of misfeasance, like the violation of a trade-mark, agents and servants are personally liable to the injured party. All persons procuring or assisting in the commission of a trespass are principals in the transaction, and both the master who commands and the servant who does the act of trespass may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect. A joint action will lie against the principal and agent. . . .

It follows that the defendants, although they were only the agents or servants of Richard Worthington, in doing the wrongful acts sought to be restrained and for which damages are claimed, are responsible to the complainant, and the complainant has the right to pursue them."

In *Estes v. Belford*, 30 Pat. Off. Gaz. 99, Wheeler, J., said: "The infringement of a trade-mark is a trespass upon the rights of the owner by using it as a false representation that the wares of the infringer are those of the owner, for which an action of trespass

experts might be called in,¹ but the later, and possibly the better rule, excludes such evidence, first, because all such evidence is the merest speculation and expression of opinion, and quite as many witnesses will be produced on one side as on the other; but the best reason for rejecting such evidence is given in a recent case,² in which it was said that everyone in such a case must give an opinion based upon the effect that the articles and marks of the contending parties may make upon their minds, and if the parties be of a standard of intelligence, such as

on the case would lie at common law, in which all participating would be principals and proper defendants."

In *Sawyer v. Kellogg*, 7 Fed. Rep. 720, Bradley, J., said: "All who are concerned in the commission of a tort are alike amenable to the party injured."

In *Maltby v. Bobo*, 14 Blatchf. (U. S.) 53, Johnson, J., said: "The defendant presents no denial of any of the alleged facts, by affidavit or otherwise; but only alleges, by way of plea, that, in selling the nail pullers mentioned in the bill, he was acting as salesman for one Dickerman, the owner of the nail pullers, and that he had no interest in the nail pullers, or in the sale of them, except as the employé of Dickerman, to dispose of the same. . . . A wrongdoer cannot set up that he is doing wrong on account of the third person, as a bar to his own responsibility. The principal, also, may be liable, if the injured party elects to look to him; but the person who is actually doing the wrong cannot escape liability."

1. In *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642, Pardee, J., said: "For the purpose of proving that the defendants' ounce packages of hair-pins so closely resembled those of the plaintiffs as to mislead an ordinary purchaser and consumer, the plaintiffs offered the testimony of several persons, who were or had been wholesale dealers in hair-pins in New York and Philadelphia, as experts. The committee received the evidence, notwithstanding the defendants' objection. We see no error in this."

In *Mitchell v. Henry*, 15 Ch. Div. 181, Cotton, L. J., said: "In the present case, however, the question seems to me to be essentially a question for experts, for when the goods are placed side by side there is great difficulty in arriving at a conclusion whether the triple thread used by the defendants and the selvaige altogether is not calcu-

lated to deceive. . . . But there is a conflict of testimony between the expert witnesses, and there is, so far as I am concerned, a difficulty in arriving at a satisfactory conclusion, and I think the better course is to let the motion stand to the hearing, and then, after cross-examination of the witnesses, and after hearing the evidence in court, the court can decide whether the defendants' goods are so manufactured as to be calculated to be passed off as the goods of the plaintiffs." *Thesiger, L. J.*, said: "With great respect to the master of the rolls, I cannot come to the same conclusion merely by looking at the exhibits themselves. In the first place, although the selvaige of the dyed goods is not anything approaching to pure white, yet, at the same time, I cannot say that it is not such as might reasonably be described by the trade generally, and not merely by the particular manufacturers residing in Bradford, as a white selvaige. Secondly, although the defendants are using a mottled thread made up of three distinct colors, instead of a mottled thread made up of two distinct colors, yet I cannot say, by the evidence of my own eyes, whether the three-fold thread used by the defendants might not, even to the eyes of an expert, be a colorable imitation of the two-fold thread used by the plaintiffs. It appears to me that that must be a matter of evidence, and evidence of experts." See also *Cope v. Evans, L. R.*, 18 Eq. 145.

2. In *Radam v. Microbe Destroyer Co.*, 81 Tex. 122, Collard, J., said: "We doubt the propriety of taking the opinion of an expert in such a case. He was called on for his opinion as to whether persons of ordinary intelligence and care would be deceived by the trade-marks of the parties, or the packages and the trade-marks, into the belief that they were the same. We do not see how the evidence of an expert could aid the court in determining this ques-

will justify them in speaking as experts, they are entirely unfit to testify with reference to the impressions the marks would make upon the minds of persons of ordinary and presumably less intelligence than themselves. This line of argument brings us, however, to the question of "How competent are the judges, who are presumed to be of more than ordinary intelligence, to pass upon these questions?" This only shows how utterly unsatisfactory this method of proof is, and how little reliance is to be placed upon it, or in fact upon the opinions of the judges, when based upon nothing more than their individual opinion of whether deception is likely or not. In cases of technical trade-marks, therefore, much the safer rule is to eliminate all question of the deception of the public and to rest entirely upon the ground of property. In cases of unfair competition in business, the motive and intention to deceive is the first inquiry, and after that is established, an inferior class of evidence is required to show the likelihood of deception. The question of injury of the plaintiff will, as a general rule, be presumed in technical trade-mark cases, and in cases of unfair competition the same evidence which will establish likelihood of deception will also establish probability of injury sufficient to maintain the action.

tion, or how there could be an expert in such a matter. What ordinary intelligence might think of facts before the eye, it seems to the writer, should be left to the judgment of ordinary intelligence, with at least as much confidence as to one calling himself an expert. Such evidence has, however, been admitted and approved. *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642; reported in *American Trade-Mark Cases*, p. 661. . . . Identity of design might require an expert's testimony—an expert in designs—but that is not the question here. Expert testimony is resorted to for the purpose of informing the court or jury upon subjects not commonly understood; but where the nature of the inquiry appeals to the common understanding and ordinary intelligence of mankind, it would be improper to admit opinions of experts or other persons. *Shelly v. Austin*, 74 Tex. 612. This witness was not called as an expert, and his opinion was not admissible, nor would it have been, in our judgment, if he had been an expert. All the facts were before the court—the trade-marks, the labels, the jugs, and the packages, as presented for sale in the market; it was his province to decide what impression would be made by them upon persons of ordinary intelligence and care. In such a case, an expert should not be

allowed to decide for him. *Cooper v. State*, 23 Tex. 331; *Turner v. Strange*, 56 Tex. 142; *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481; *McKay v. Overton*, 65 Tex. 85; *Shelly v. City of Austin*, 74 Tex. 612; 1 Whart. on Ev. 436. Similar testimony was offered by plaintiff by other witnesses, which was met by the same ruling. The assignments of error involve the same principles that have been above disposed of. It is useless for us to repeat them or the reasons in favor of the court's ruling. All such testimony was inadmissible, and there was no error in rejecting it."

In *In re Jelley*, L. T., 51 Ch. 640, n, Jessel, M. R. said: "You can always get as much evidence on one side as you can on the other; one set of experts say that the marks are alike, and the other set say they are not; one side say that they are practically indistinguishable in the stamping, and the other side say that if the stamping is carefully and well done they may be distinct; whereas, in practice, they are particularly well struck, and one must, therefore, have regard not merely to the theory on the subject."

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 392, Monell, J., said: "Upon the trial, the devices of the respective parties were produced, upon barrel heads branded and prepared as for sale. A considerable

b. DISCOVERY.—Discovery in trade-mark cases is seldom resorted to, except where the defendant seeks to develop a defense to an action of infringement by requiring the plaintiff to disclose secrets with reference to his processes of manufacture or the ingredients of his article. In some cases such discovery has been permitted, but only in cases where the plaintiff has himself opened the door to the inquiry by introducing evidence which made the inquiry pertinent; such, for instance, as a calculation of the cost of manufacture without disclosing ingredients or proportions. In cases, however, where the inquiry is resorted to by the defendant simply for the purpose of seeking to force the plaintiff to disclose his trade secrets or dismiss his bill, the courts have refused to require the plaintiff to answer. A defendant has been required to answer and disclose the names of his customers, to whom he has sold goods bearing an infringing trade-mark, so as to give the plaintiff who is successful against him the means of following his customers.¹

amount of testimony was taken as to the effect of the defendants' devices. Dealers in whisky were examined who, upon inspection of the two devices, gave their opinions. The plaintiffs' witnesses stated their opinion to be that the public would, and the defendants that it would not, be misled or deceived by the defendants' devices; and that description of evidence may be said to have been fairly balanced. There is nothing much more difficult than to decide upon the kind of evidence which is proper in this class of cases. The best evidence, of course, would be instances of actual deception. But if none such can be furnished, the opinions of witnesses, formed from a mere inspection of the genuine and the imitation, are of little weight. They may or may not be deceived, but they are wholly unable to do more than express an opinion as to the effect in the community, the force or correctness of which is not increased or strengthened by the peculiar business in which they are engaged. An expert can easily detect a counterfeit bank-bill, but his opinion as to whether the public could detect it is not entitled to any more weight than the opinion of any other person."

In *Lee v. Haley*, L. R., 5 Ch. App. 155, Giffard, L. J., said: "The first thing to be observed in cases of this description is, that it would not be safe for any plaintiff to come into court until he could prove instances of persons having been actually deceived, for the court would have to try a hypothetical

case, and a number of people would be brought forward by the defendant to say, and probably truly, that the thing done would never have deceived them, and in their opinion was not calculated to deceive. I think, therefore, that the plaintiffs were quite justified in waiting until they could collect a sufficient number of cases to prove to the court that the proceedings complained of actually do deceive the public."

1. In *Humphries v. Taylor Drug Co.*, 39 Ch. Div. 693, Kekewick, J., said: "He says, not only is the use by the defendant of this trade-mark calculated to induce divers persons to buy the defendant's goods as and for the plaintiff's, but he also says that it has in fact induced divers persons to do so. The defendant then asks, 'Who are those divers persons?' The question I have to decide is, whether he is entitled to be told who those divers persons are. The courts have uniformly endeavored to prevent the plaintiff, or the defendant, as the case may be, from prying into the brief of their opponent or finding out what is to be the evidence which is to be produced at the trial. On the other hand, the courts have uniformly said that the plaintiff, or the defendant, is entitled to be told any and every particular which will enable him to properly prepare his case for the trial, so that he may not be taken by surprise, or may, if he sees he has been wrong, give way at once."

In *Tetlow v. Savournin*, 15 Phila. (Pa.) 170, the case being before an

4. **Demurrer.**—There are two classes of trade-mark infringement cases:—one in which the offense consists of the use by the defendant of a trade-mark claimed to be that of a plaintiff or a colorable imitation thereof, without fraud or intention to deceive; and a second in which the defendant, by the use of trade-mark, labels, wrappers, or general dress or marking of goods, seeks to perpetrate a fraud upon the plaintiff and sell his goods unlawfully as and for those of the plaintiff. In the former case, the question of

examiner, the plaintiff was asked by his adversary of what ingredients his goods were composed, which he, under instruction of counsel, declined to disclose, whereupon this rule was taken. Counsel for the rule claimed the right to show what substances were contained in the cosmetic made by the plaintiff, in order that the court might judge whether it was such a preparation as ought to be protected. No one can give the information better than the man who makes it. Counsel against the rule replied that the whole commercial value of such proprietary manufactures depends upon secrecy as to their composition, and protested against depriving a man of his property by such a proceeding as this. If these questions must be answered, every manufacturer will be at the mercy of any one who desires to extort from him an account of his process, for an attempt to restrain an infringer would result in a disclosure of all that makes the invention valuable. The unreported case of *Brooks v. Schofield*, C. P., No. 4, Dec. T., 1877, was referred to as in favor of the objection. In *Burnett v. Phalon*, 21 How. Pr. (N. Y. Super. Ct.) 100, a similar question was allowed, but only on the ground that the plaintiff, in his examination in chief, had opened the subject, and had thus made the question relevant on cross-examination.

In *Orr v. Diaper*, 4 Ch. Div. 92, Hall, V. C., said: "The plaintiffs applied to the defendants to give them the names of the persons who shipped the goods with those counterfeit marks upon them. The defendants would not give the names, but required more particulars. . . . In this case the plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs."

In *Carver v. Pinto Leite*, L. R., 7 Ch.

App. 90, James, L. J., said: "It is important to adhere to the rule of the court, that where the defendant cannot protect himself from giving discovery, there should be a full discovery of anything which is reasonably material to the plaintiff's case at the hearing, and which may be produced without any overwhelming amount of injury to defendant. Generally speaking, as the lord chancellor, if I may venture to say so, well expressed it, the court does not weigh in golden scales the materiality or immateriality of the discovery in considering whether the rule is to be applied—that he who discovers at all must discover fully; but, as he goes on to say, there are cases in which it is important that the court should so weigh it, namely, cases in which the discovery is such that the plaintiff, though failing at the hearing, may afterwards use in a way prejudicial to the defendant. In such cases it is important to consider whether the discovery is material for the purpose of enabling the plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in case the plaintiff should succeed. I am not at all disposed to grant discovery, where I am satisfied that it is likely to be injurious to the defendant, and am not satisfied that there is any real prospect of its being of material service to the plaintiff at the hearing. Upon that ground, I think the vice chancellor's order in this case should be varied by not compelling the defendants to discover the names of customers, nor to discover the prices at which the goods were sold to them or bought from anybody else. . . . I think that the plaintiffs also have a right to see what directions were given to the defendants with respect to those marks. That may have a very considerable bearing, if not immediately on the relief, certainly upon the costs to be given at the hearing. Then the defendant seeks to avoid discovery as to what the circumstances were under which the marks were put on the cloth.

similarity of marks, and likelihood of the deception of the public, may be raised and decided on demurrer,¹ then, in the latter case the fraudulent intention and acts are of the essence of the offense, and to admit those by demurrer is to admit the charge; hence, a case of this kind cannot be decided on demurrer. A demurrer to a bill or declaration will submit to the court the question of infringement on inspection; but as a demurrer confesses fraud and intention to deceive on the part of the defendant, if these are alleged, but slight imitation is necessary to entitle the plaintiff to have the demurrer overruled, and then an injunction will issue.²

I cannot see what possible harm such discovery can do the defendants if plaintiffs fail at the hearing, and it may materially help the plaintiffs; and so with regard to what the marks were which were actually put on, and what directions were given as to that. Then, as to the names of the people to whom the goods were sent, it does seem to me that there can be no harm in the defendant showing the names of the places in *Portugal* (he admits they all went there), to which the goods were sent. It is not like the case of a trade secret of any kind."

In *Moore v. Craven*, L. R., 7 Ch. 96, n, Lord Hatherley, L. C., said: "The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs."

In *Burnett v. Phalon*, 21 How. Pr. (N. Y. Super. Ct.) 100, Moncrief, J., said: "This court has held that one of the plaintiffs offering himself as a witness, and testifying on behalf of the plaintiffs, and having been asked and answered on his direct examination the question, 'What profits have been realized by your firm on each dozen of the article sold?' was bound upon the cross-examination to have answered the question, 'In making up your estimate of profits as you have given, what materials do you calculate the cost upon?'"

1. *Enoch Morgan's Son's Co. v. Hunkele*, 16 Pat. Off. Gaz. 1092.

In *Desmond's Appeal*, 103 Pa. St.

126; 49 Am. Rep. 118, the court said: "The original bill declares 'that the said medicines have been and are distinguished by the names of "Samaritan's Gift," and "Samaritan's Root and Herb Juices," and that the said names are the trade-marks of the same, together with certain labels and wrappers hereto annexed, marked "Exhibit A," and by the said trade-marks the same are distinguished from all other compound medicines.' It does not aver an imitation or similarity in the appearance of the labels and wrappers. An examination of the two shows they are quite dissimilar in names and appearance. It is true each has the word 'Samaritan,' but in such different form and combination of words as to preclude one medicine being taken for the other. We do not think the amended bill removes the difficulty of the appellant."

2. In *LaCroix v. May*, 15 Fed. Rep. 236; 113 P. & S., Wallace, J., said: "The theory of the demurrer is that the complainant's statutory title upon allegations of the bill is invalid. It is not necessary to decide the questions raised, because, as the demurrer is to the whole bill, the bill is sufficient, if all the allegations concerning a registration of the trade-mark were eliminated."

In *Leidersdorf v. Flint*, 50 Wis. 401; 71 P. & S., Lyon, J., said: "It may well be that two trade-marks are so entirely dissimilar that a court can properly say on demurrer that one is not and cannot be an infringement of the other, and this, although the pleading demurred to avers that it is an infringement and misleads the public. But to justify such a ruling the dissimilarity should be so marked as to leave no doubt in the mind of the court."

In *Enoch Morgan's Son's Co. v. Hunkele*, 16 Pat. Off. Gaz. 1092, Nixon, J., said: "The defendant insists

5. Preliminary Injunction.—Where the title of the plaintiff is clear and the infringement reasonably clear, and there has been no unreasonable delay in bringing suit, a preliminary injunction will be granted.¹ If, however, there be a denial of plaintiff's

that there are such differences in his mode of using and combining the colors on the wrapper that no careful purchaser need be deceived, if he exercise ordinary care and prudence. This may be true, and in the absence of fraud, and upon the merits, the court may not be willing to hold that an infringement has been shown. But the fraud has been confessed by the demurrer, and such confession entitles the complainant to an injunction. The counsel for the defendant says that the demurrer was filed after duly considering the authority of *Ellis v. Zeilin*, 42 Ga. 91, and *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452, and yet it was held in both of these cases, that where a fraudulent intent was admitted, the imitation need only be partial to sustain the action." The demurrer was overruled. See also *Miller Tobacco Manufactory v. Commerce*, 45 N. J. L. 18; 46 Am. Rep. 750.

In *Ellis v. Zeilin*, 42 Ga. 91, *Lochrane, C. J.*, said: "To this bill the defendants filed a demurrer, and it is upon the judgment of the court below, overruling the demurrer, that error is assigned, and the question now comes before this court. Our judgment is invoked upon the facts admitted by the demurrer as they are alleged to exist in the bill; and one main distinguishable criterion in all cases of this character is the intention of the parties in using the similarities of trade-marks claimed by another, which, by the pleadings, is admitted to be 'to take advantage of the reputation' of the manufacture of *Zeilin & Company*. The language is, 'that the said *Ellis* is imitating the form and style of the package and wrapper used by your orator as aforesaid to take advantage,' etc. . . . We do not think there was equity in this bill on the mere question of similarity in the trade-marks. But, as the demurrer admits that what was done was done intentionally to take advantage of the reputation of his '*Simmon's Liver Medicine*,' we cannot hold the judge below erred in restraining the bill for a hearing to let the whole matter be determined upon its merits."

In *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452, *Ames, C. J.*, said: "The declaration further alleges, in substance,

that the defendant, well knowing the plaintiff's said mark, and for the purpose and with the effect of such deception, did stamp the words '*Roger Williams*' upon cotton cloth not manufactured by the plaintiff, and to his serious injury. Certainly, under the rule, so well settled, that a partial imitation of a trade-mark, if calculated to deceive, will support an action, this is a sufficient allegation of an invasion of the plaintiff's rights. The court cannot, as a matter of law, decide that such partial use of the designation of his goods appropriated by the plaintiff was not designed, calculated, and effectual to carry out the fraud charged, and must leave that, as well as the prior allegation, to be settled upon the evidence by the jury. The demurrer is therefore overruled; but under the agreement of the parties, suggested at the argument, the defendant has leave to withdraw his demurrer without costs, and to plead over to the merits."

1. In *G. G. White Co. v. Miller*, 50 Fed. Rep. 277, *Colt, C. J.*, said: "A glance at the two marks shows that the defendants have taken bodily the picture or representation which forms the complainant's trade-mark, and appropriated it to their own use. To my mind the infringement is so clear that it requires no further discussion; and, if there is any defense to this motion, it must rest upon some other ground. . . . The granting of a preliminary injunction depends upon the special circumstances of each case. This case has been fully tried upon affidavits. I do not see what new proof could be brought forward by either side at final hearing. There is little dispute of fact, and the question is mainly one of law, namely, whether the two marks are so similar that the defendants should be enjoined from the use of the one they have adopted. In a case of this character, if the court has no doubt on the question of infringement, an injunction should be granted at this stage of proceedings, unless there are special circumstances which take the case out of the general rule. I do not find any such special circumstances in this case. The defendants contend that it would work irretrievable injury to them to

grant this motion, but this position is not supported by the proofs."

In *Price Baking Powder Co. v. Fyfe*, 45 Fed. Rep. 799, Nelson, J., said: "A motion is made for a preliminary injunction to restrain the use of the word 'Cream' in connection with the words 'Baking Powder,' which is manufactured and put upon the market by the defendant, and, as is alleged, in packages having labels and wrappers similar in design to those upon the goods of complainant, and exact enough to deceive. . . . The complainant is certainly entitled to protection in the use of this word, in connection with the baking-powder it manufactures, unless it is adopted and used as descriptive of the article, its ingredients or characteristics. . . . Although this decision was prior to that of the *United States* Supreme Court in the *Trade-Mark Cases*, 100 U. S. 82, the court in *Illinois* could not have upheld the trade-mark if the word 'Cream' was descriptive of the quality of the article. While this decision is not conclusive and binding on this court, it is persuasive and of great weight, and on a motion for a preliminary injunction, especially when it sustains the impression of the court on the hearing, is decisive. It is unnecessary to consider the other ground urged, that the form in which the article manufactured by the defendant is put upon the market, its wrappers and labels and other devices, are of a similitude exact enough to warrant the relief asked. Motion granted, with leave to defendant to move to dissolve the injunction at the next June term of this court after the answer is filed."

In *Symonds v. Greene*, 28 Fed. Rep. 834, Wheeler, J., said: "This is a motion for a preliminary injunction to restrain the use of the word 'Eureka,' in trade, in connection with steam and hydraulic packing. There is no question but that the orator commenced using that name for packing made by him in 1875, and has continued that use since that time, nor but that the defendants use that name in connection with that kind of packing, not of the orator's make, in trade; nor but that a firm known as *Sellers Bros.* gave that name to a kind of steam-packing patented by *William Beschke* in 1872, at Philadelphia, and used it in connection with that packing until early in 1874; nor but that the profits on the sales of defendants are much less than \$500. . . .

On the whole case as it now stands, the orator appears to be entitled to the injunction asked. Motion granted."

In *Hill v. Lockwood*, 62 Wis. 507; 154 P. & S. (Super. Ct.), Lyon, J., said: "The learned counsel for the defendant invokes the rule that 'It is only when the legal title is clear that a court of equity will interfere by injunction to restrain the use or colorable infringement of a trade-mark.' We are of the opinion that the allegations of the complaint show a clear legal right in the plaintiff to the exclusive use of the trade name 'Clysmic,' and hence that the injunction was properly allowed in the first instance. . . . We believe it the safer and better course to let the injunction stand until the proofs are in. The court can then determine the facts intelligently, but cannot do so on these affidavits alone."

In *Read v. Richardson*, 45 L. T. N. S. 54, James, L. J., said: "The defendants say that they have not had a sufficient opportunity of testing the evidence, and have not had an opportunity of bringing evidence to contradict what the plaintiffs say as to the name, or the nickname, which the plaintiffs say their beer has acquired. The case will have to be fully disposed of at the hearing, if the parties are still minded to carry on the litigation to that extent. What we have now to consider is the balance of inconvenience and convenience in dealing with the thing in the meantime, before it is heard. If the plaintiffs should happen to be right at the hearing, and we should in the meantime, upon this interlocutory application, confirm the view of the master of the rolls, that the plaintiffs are not entitled to an interlocutory injunction, the injury to them would be irremediable and incalculable. Their particular trade-mark, their particular reputation, in the meantime would be utterly destroyed. Upon the balance of convenience and inconvenience, it seems to me better that the defendants should abstain from doing that which is a novelty, and that they should not during the litigation interfere with the names the plaintiffs say they have got." Brett, J., said: "There is another question as to the convenience and inconvenience of granting an interlocutory injunction. The plaintiffs having established a trade, the evidence is to be taken to show very strongly that their beer had acquired the name in the trade; and what my lord has said seems to be perfectly true, that if

the defendants were allowed to interfere with them in carrying on that trade (on the supposition that they are right) up to the hearing, and then up to an appeal to the House of Lords, by that process the defendants could destroy the plaintiff's trade beyond remedy, whereas, according to the defendants' own showing, and according to their own allegation, stopping them from using the dog's head would do no injury to them if their allegation be correct." Cotton, L. J., said: "As to the question of convenience or inconvenience in granting the injunction, I have no hesitation in coming to the conclusion that, if there is a *prima facie* case made out by the plaintiffs, although it is not as fully made out as it possibly might have been, we ought to grant the injunction. The plaintiffs, in obtaining an injunction upon an interlocutory application, must give an undertaking as to damages. If there is no injunction granted, and they are in the right, the trade name, which they say is valuable to them, it seems, when they come to protect it, will be absolutely gone before they can ascertain their rights. Therefore, if the plaintiffs have made out a *prima facie* case, the strong balance of convenience and inconvenience is in favor of granting the injunction."

In *Carroll v. Ertheiler*, 1 Fed. Rep. 688, Butler, J., said: "He knew it to be the recognized designation of the plaintiff's tobacco, which had become popular with consumers and the trade. Did he not expect the public to be influenced thereby and his business increased? An affirmative answer cannot well be avoided. If he did not, however, the injunction will do him no harm, for he has not yet had time to establish a reputation of his own under this name. . . . A preliminary injunction as prayed for will be granted."

In *Robertson v. Berry*, 50 Md. 591, Miller, J., said: "In determining whether this order shall be affirmed or reversed, this court is confined to the case made by the bill and exhibits, without reference to the averments of the answer which appears in the record. *McCann v. Taylor*, 10 Md. 418."

In *Enoch Morgan's Son's Co. v. Hunkele*, 16 Pat. Off. Gaz. 1092; 31 P. & S. Am. Trade-mark Cases, Nixon, J., said: "The defendant insists that there are such differences in his mode of using and combining the colors on the wrapper, that no careful purchaser need be deceived, if he exercise ordi-

nary care and prudence. This may be true, and, in the absence of fraud, and upon the merits, the court may not be willing to hold that an infringement has been shown. But the fraud has been confessed by the demurrer, and such confession entitles the complainant to an injunction. The demurrer is overruled, and twenty days' time is given to the defendant to answer the complainant's bill on the merits." See also *Hennessey v. Rohmann*, 36 L. T. N. S. 51.

In *Frese v. Bachof*, 13 Blatchf. (U. S.) 234, Johnson, J., said: "To a preliminary injunction the plaintiffs are not, on this branch of the case, entitled. Neither party has any exclusive right in the article known as Hamburg tea, which appears to be a compound known in the German books of medicine; nor do the plaintiffs at present appear to have any special right in respect to the form, size, and color of the packages, the labels upon which are sufficient to distinguish, even to a careless observer, the one from the other. A preliminary injunction must issue against the defendant, restraining him from the use of the name of 'J. C. Frese & Co.,' and from that of the trade-mark, or label, 'J. C. Frese & Co., Hopfensack, 6 Hamburg,' on packages of Hamburg tea, and the residue of the injunction asked for is denied."

In *Lee v. Haley*, L. R., 5 Ch. App. 155, Giffard, L. J., said: "Then, further, in cases of delay, we must consider whether the nature of the injunction is such that if it is granted the defendant will have been injured by the delay. It has been strongly urged here that if this injunction is sustained the defendant's trade will be stopped, but that is not so; his trade will not be stopped in the least, he will only be restrained from selling under this particular name. . . . Considering the nature of the injunction, such an amount of delay as has taken place here would, even if unaccounted for, be immaterial. . . . I think this injunction has been properly granted upon the well-known principles of this court, which are applicable to all cases of this description, viz., that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person. That being so, this application must be dismissed with costs."

title,¹ and equity,² and reasonable doubt of either,³ or reasonable doubt of infringement,⁴ or if it appears that the plaintiff has been

1. In *Portuondo v. Monne*, 28 Fed. Rep. 16, Wheeler, J., said: "The plaintiff shows that he has used the symbols mentioned in his bill of complaint to designate cigars made by him; and that the defendants make use of the same. But the affidavits of defendants show that the same symbols were used by others upon cigar boxes before, or about the time the plaintiff began to use them. These affidavits make it doubtful whether the plaintiff has so had the exclusive use of the symbols that the use of them by the defendants serves to pass their cigars as those of the plaintiff. This question cannot safely be determined upon the affidavits, but should be established by evidence regularly taken in due course. The plaintiff does not appear to be entitled to a preliminary injunction. Motion denied."

2. *Green v. Rooke*, L. J. N. C. 1872, p. 54. In *Leclancha Battery Co. v. Western Electric Co.*, 21 Fed. Rep. 538, Wheeler, J., said: "The orator seeks by motion for a preliminary injunction, to have the defendant restrained from using the words 'Pile Leclancha' and 'Disque,' and the orator's style of label, upon batteries of the defendant's manufacture. . . . As the medals were awarded to the patented batteries, the representation of them upon the labels would be indicative of the reputation of these batteries rather than of their origin. Under these circumstances and authorities, the question whether these things all together amount to an unlawful representation of the source of the batteries, is so doubtful, that the granting of a preliminary injunction does not appear to be warranted."

In *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169, Rapallo, J., said: "In the case of *McHenry v. Jewett*, 90 N. Y. 58, this general rule was qualified to the extent of holding that where it clearly appears that the complaint shows no cause of action, a preliminary injunction is unauthorized, and the granting of it is an error of law which may be reviewed in this court on appeal. The principle established in the case above cited does not apply where a doubtful question of law arises upon the complaint. The decision of such a question would be deferred until the hearing of the case upon its merits, and would not be summarily disposed of on

a motion to dissolve the injunction. The case must be very clear to justify this court in deciding the merits of the controversy on a mere motion, and it would ordinarily decline, in a case presenting any serious question, to deprive either party of the privilege of having the merits of his case deliberately heard and passed upon on appeal from the final judgment."

3. In *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337, Johnson, J., said: "In trade-mark cases, it is by no means of course to grant preliminary injunctions, even where the plaintiff's case seems to be made out; and I shall, therefore, leave the further consideration of the case to the final hearing, when the question as to the defendant's claim of right to the use of the words 'Fairbanks' patent' and the other questions of fact just referred to, and the unexplained circumstances and terms of the writing claimed to have extinguished the right of Chamberlain, can, if necessary, be further considered. The motion for an injunction must be denied, and the order heretofore made, granting an injunction till the decision of the motion, must be vacated."

4. In *Brown v. Doscher*, 20 N. Y. Supp. 900; 66 Hun (N. Y.) 626, Lawrence, J., said: "No case was made out in the court below for the granting of an injunction *pendente lite*. The second wrapper of the defendant cannot, we think, be regarded as such an imitation of the plaintiff's wrapper as to be likely to deceive a purchaser of ordinary care and caution; and as to the first wrapper adopted by the defendant, but abandoned by him before the motion was heard, we deem it sufficient to say that, in view of the allegations in the defendant's affidavits, that the plaintiffs were themselves guilty of attempting to mislead the public, by a statement upon the label used by them that their form of cake and title were protected by a trade-mark secured, which statement is shown by the papers to have been false, the plaintiffs have not shown such a superior equity as entitles them to a preliminary injunction. We think that the rights of both parties can be more accurately determined and adjudicated upon the trial of the action than upon a hearing on affidavits, and are therefore of the

guilty of laches in bringing suit,¹ the preliminary injunction will be denied.

opinion that the order below should be affirmed, with costs and disbursements."

In *Lies v. Daniel*, 82 Ga. 272, Blackley, C. J., said: "The question of fact, whether the cigar boxes held for sale and being sold by the defendant, with the marks, devices and designs thereon, are such colorable imitations of the complainant's goods as to be likely to deceive or mislead purchasers to the injury of complainants, being for the jury on final hearing of the bill, and irreparable damage not being probable, there being no charge that the defendant is insolvent, there was no error in denying an interlocutory injunction. Injunctions in restraint of trade should be sparingly granted before final decree. *Foster v. Blood Balm Co.*, 77 Ga. 216. Judgment affirmed."

In *Foster v. Blood Balm Co.*, 77 Ga. 216, Blackley, C. J., said: "We are, however, satisfied that in this case, the injunction, if to be granted at all, ought to await the result of a trial upon the merits. It is a grave matter to petrify in an instant a living business by a mere interlocutory order. If the use of a particular label is important to the complainants, so is it to the defendants. And, at last, the facts have to be found by a jury; the chancellor, under our system, has no power to settle them in vacation or even in term. Any injunction which he, unaided by a jury, could grant, would be only a temporary expedient. It would prevent neither the delay nor the expense of a jury trial. At the trial, it will be for the jury to say by their verdict, not only whether the label used by the defendants resembles the complainant's, but whether the imitation is such as to deceive, and whether its use, if continued, will probably have that result. . . . It is not shown that the defendants are insolvent, or that for any cause the denial of a preliminary injunction will produce irreparable damage. There would be much more danger of such damage to the defendants from a mistaken grant of an injunction at this stage of the proceedings than there is to the complainants from the refusal to grant it. We think the judge below acted wisely and prudently in forbearing to interfere. He not only exercised a sound discretion, but, so far as we

can discern, made a perfectly accurate decision—the very one he ought to have made."

In *Mitchell v. Henry*, 15 Ch. Div. 181, James, L. J., said: "Probably a large percentage of purchasers would not be deceived, but there is such a conflict of evidence that in my opinion the matter cannot be safely dealt with upon an interlocutory application when the witnesses have not been cross-examined. In order to come to a satisfactory conclusion, it is necessary to know what the witnesses would say when they are using their own words in answer to questions not leading, whereas we have before us only affidavits which are answers in the solicitor's words to questions the most leading possible. Then, with regard to the balance of convenience and inconvenience, it seems to me by far the most convenient course that no injunction should be granted, and that the motion should stand over to the hearing, the defendants undertaking to keep an account." Cotton, L. J., said: "I will say a few words as to the reason why I think we cannot interfere by granting an injunction. If there is a conflict of testimony on the question whether or no goods are calculated to deceive or to be passed off as those of the persons by whom they are not manufactured, the court very often is in a position to judge by its eyes where the truth lies and what ought to be the result. In the present case, however, the question seems to me to be essentially a question for experts. . . . But there is a conflict of testimony between the expert witnesses, and there is, so far as I am concerned, a difficulty in arriving at a satisfactory conclusion, and I think the better course is to let the motion stand to the hearing, and then, after cross-examination of the witnesses, and after hearing the evidence in court, the court can decide whether the defendant's goods are so manufactured as to be calculated to be passed off as the goods of the plaintiff. On that ground I think that we ought not to grant any interlocutory injunction, but that the motion should stand over to the hearing, the defendants being put on an undertaking to keep an account."

1. In *Estes v. Worthington*, 22 Fed. Rep. 822, Wallace, J., said: "The only

6. Decree and Permanent Injunction.—Injunctions have been granted in trade-mark cases to restrain:

First. The infringement of a technical trade-mark, the dress of goods, wrappers, bottles, seals, signatures and indicia which enable a dishonest defendant to sell his goods as and for those of the plaintiff.¹

doubt as to the complainants' right to a preliminary injunction is suggested by the fact that the various publishers of such books since 1876 have been permitted without prosecution to apply the word to their publication of juvenile books in this country, and have used it as a trade-mark in hostility to the real proprietors; and among them were the complainants themselves, who did so for two or three years before they purchased the right of Johnstone. Laches in prosecuting infringers has always been recognized as a sufficient reason for denying a preliminary injunction; sometimes, apparently, by way of discipline to a complainant who has manifested reluctance to burden himself with the expense and vexation of a law-suit, and delayed legal proceeding until his patience was exhausted. See *Bovill v. Crate*, L. R., 1 Eq. Cas. 388. When delay of the owner of a patent or trade-mark to prosecute infringers has been of a tendency to mislead the public or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing."

In *Isaacson v. Thompson*, 20 W. R. 196; 41 L. J. Ch. 101, Bacon, V. C., said: "The present application cannot be granted. The plaintiff admits that he was aware that the objectionable styles were written over and upon the defendant's shops as long ago as February and November, 1870, and the other cases of deception that have been adduced were committed between February, 1870, and May, 1871. The information collected by May was sufficient. Parties seeking an injunction must come forward speedily. If done in time, the application might have been acceded to. The motion will stand to the hearing, and if the plaintiff dismisses his own bill before the hearing, the defendant's costs will be costs in the cause."

1. *Parlett v. Guggenheimer*, 67 Md. 543.

In *Johnston v. Orr-Ewing*, L. R., 7

App. Cas. 219 n, the injunction, as varied by the House stood as follows: "To restrain the defendants, Robert Johnston & Co., their servants, workmen, and agents, from affixing, or causing to be affixed, to any Turkey-red yarn not dyed by the plaintiffs, Archibald Orr-Ewing & Co., the ticket marked B, and from using two elephants on any ticket used on Turkey-red yarn, without clearly distinguishing such ticket from the plaintiffs' ticket, mentioned in the pleadings, being the exhibit marked A, referred to in the said depositions, or so as to represent or induce the belief that any of the said yarn was dyed by the plaintiffs." See also *Caruncho v. Stephenson*, 25 Sol. J. 929.

In *Read v. Richardson*, 45 L. T. N. S. 60 (Ct. of Appeal), the following order was made: "The plaintiffs by their counsel undertaking to abide by any order this court may make as to damages, in case this court shall hereafter be of opinion that the defendants have sustained any by reason of this order which the plaintiffs ought to pay, this court doth order that the defendants, E. Richardson and Co., their servants and agents, be restrained from using the figure of a dog's head upon any labels, tickets, or wrappers affixed or applied to bottles of beer or stout sold for exportation, or exported by the defendants to any of the Australian colonies or *New Zealand*, and from selling for exportation or exporting to any of the said colonies any bottles of beer or stout, having affixed or applied thereto any such label, ticket, or wrapper, until judgment in this action or further order; and it is ordered that the plaintiff's costs of this motion be their costs in the action."

In *Sawyer v. Horn*, 4 Hughes (U. S.) 239, Morris, J., said: "We have come to the conclusion in the case before us that the respondent should be enjoined from putting up his goods in the manner in which he has been doing, as shown by the exhibits, or in any other manner so simulating the form, color, labels and appearance given by the complainant to his goods as to

mislead purchasers, into mistaking one for the other." See also *Carroll v. Ertheiler*, 1 Fed. Rep. 688; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226.

In *Robertson v. Berry*, 50 Md. 591, Miller, J., said: "This appeal is from an order granting an injunction restraining the appellant from publishing and circulating a certain almanac for the year 1879, known as 'T. G. Robertson's Hagerstown Almanack,' with the same emblems, devices, marks, representations, title and back, outside pages, style, shape, and general appearance, as have characterized the publications of the same for previous years, and from printing, publishing and circulating any other almanac in colorable imitation of the almanac of the complainants, known as 'J. Gruher's Hagerstown Town and County Almanack,' and calculated to deceive and impose upon the public, and to create in their minds the belief that such almanac is really and truly the almanac of the complainants. . . . The order appealed from will, therefore, be affirmed. . . . The averments of the bill are sufficient to justify the granting of the injunction prayed for."

In *Consolidated Fruit Jar Co. v. Thomas, Cox's Man. of Trade-Mark Cases* 665, Nixon, J., said: "There is no difficulty about this case in regard to the infringement. The embarrassment arises in determining to what extent the injunction should go, or what it should include. . . . The court is of the opinion that the complainants are entitled to an injunction restraining the defendant *pendente lite* from the use of the monogram on the fruit-jar caps, and on the ends of the boxes, and from circulating the printed circulars so closely resembling the circulars of the complainants, and it is ordered accordingly."

In *India Rubber Co. v. Rubber Comb, etc.*, Co., 45 N. Y. Super. Ct. 258, Sedgwick, J., said: "The judgment should have been confined to the use of an imitation, colorable or other, of the picture of a factory, used by plaintiffs. This is, however, hardly more than a matter of form, which could have been corrected upon suggestion, on the settlement of the judgment. The judgment should be modified by striking out the absolute prohibition of the use of a picture of a factory, and confining the imitation to a picture like that used by the plaintiffs."

In *Siegert v. Findlater*, 7 Ch. Div. 801, Fry, J., said: "The injunction will,

therefore, be to restrain the defendants, their servants and agents, from using the words 'Angostura Bitters,' or the word 'Angostura,' on any bitters or other fluids contained in bottles, not made by the plaintiffs, so as to induce the belief that such bitters or fluids are made by the plaintiffs, and further, from selling or offering for sale any bitters or other fluids in the bottles, in the wrappers, and in the general form in which the defendants were selling the bitters called by them 'Angostura Bitters,' at the commencement of this action, or in any other wrappers or form contrived or designed to represent and induce the belief that the bitters or fluids sold by the defendants, and not made by the plaintiffs, are the goods of the plaintiffs."

In *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 244, Bacon, N. C., said: "An injunction is granted accordingly, restraining the defendants, their servants or agents, from selling, etc., 'any mineral or other waters not being the genuine Apollinaris Water, under the name of Apollinaris Water or London Apollinaris Water, or under any other name of which the word Apollinaris so forms part as to be calculated to deceive the public.'" See also *Apollinaris Co. v. Edwards, Seton* (4th ed.) 237; *Millington v. Fox*, 3 Myl. & C. 338; and *Pemberton* (3d ed.) 238; *Edelsten v. Vick*, 11 Hare 78; *Collins Co. v. Walker*, 7 W. R. 222; and *Seton* (4th ed.) 235; *Harrison v. Taylor*, 11 Jur. N. S. 408; *Braham v. Bustard*, 1 H. & M. 447; *McAndrew v. Bassett*, 4 De G. J. & S. 380; *Mickle v. Emery, Seton* (4th ed.) 234; *Siegert v. Findlater*, 7 Ch. Div. 801-814; *McLean v. Fleming*, 96 U. S. 245; 13 Pat. Off. Gaz. 913, 914.

In *Ford v. Foster*, L. R., 7 Ch. App. 611, James, L. J., said: "The form of the injunction will be to restrain the defendants from applying the mark or title of 'Eureka' to any shirts manufactured by them or to any shirts sold by them, unless manufactured by the plaintiffs, and from selling any shirts already marked with the mark and title 'Eureka,' unless such mark or title has been applied with the sanction of the plaintiff; and from issuing any boxes or packages on which the mark or title of 'Eureka' shall be applied to shirts not of the plaintiff's manufacture; and from affixing or using any label or card or other mark containing the word 'Eureka' to or upon any shirts not of the plaintiff's manufacture."

Second. The use of the same collocation of words, names, descriptions, size, shape, and color of package.¹

Third. The use of the name of a person who has sold his business, but without granting the right to use his name, and the use of signs and other means of identification connected with a building, which might give the idea that a later occupant was the successor in business of the former occupant; also to restrain per-

In *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 523, it was said: "Injunction granted restraining the respondent, his servants and agents, from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch,' or starch manufactured by the appellants; the respondent to pay the costs of the appellants in the court below." See also *Stephens v. Peel*, 16 L. T. N. S. 145.

In *Swift v. Dey*, 4 Rob. (N. Y.) 614, Robertson, C. J., said: "The injunction must, therefore, be continued against the employment by the defendants of the words 'Parlor Match,' inclosed in a lozenge-shaped frame or design, similar to that in the label of the plaintiffs, in any label used by them in the sale of matches; and also of the word 'Diamond,' or the words 'Diamond State,' in any labels used to designate such matches, and of any strip or border on their labels similar to that on which such word 'State' is printed in the labels of the plaintiffs; and from selling any matches with labels having such prohibited insignia of ownership thereon."

In *Seixo v. Provezende*, L. R., 1 Ch. App. 194, Wood, V. C., said: "Injunction to restrain the defendants, etc., from affixing or causing to be affixed to any casks of wine shipped to their orders the brand or marks of a crown and the word 'Seixo,' or any other combination of marks or words so contrived as, by colorable imitation or otherwise, to represent the marks or brands of the plaintiff, and from employing any marks or words which shall be so contrived as to represent, or induce the belief, that such wines are Crown Seixo, or the produce of the Quinta do

Seixo, or otherwise using the word 'Seixo,' without distinguishing the same from the wine produced by the Quinta do Seixo." Affirmed by Lord Cramworth, V. C. See also *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 601.

In *Farina v. Silverlock*, 1 K. & J. 509, Wood, V. C., said: "Injunction to restrain the defendant, his workmen, etc., from printing or selling, or exposing for sale, or procuring to be printed or sold, any label similar to those in use by the plaintiff, as in the bill in this cause mentioned, or containing copies of the signature, or address, or flourish, seal or stamp, or other marks invented and used by the plaintiff, as therein mentioned, or any signature, address, flourish, seal, or other mark merely colorably differing therefrom, or any other papers or labels so printed or contrived as, by colorable imitation or otherwise, to represent or lead to the belief that Eau de Cologne prepared by other parties was Eau de Cologne prepared by the plaintiff." See also *Franks v. Weaver*, 8 L. T. 510.

In *Knott v. Morgan*, 2 Keen 219, Langdale, M. R., said: "To restrain the defendant, Robert Morgan, his servants and agents, from running, or in any manner using or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, or any other omnibus, having painted, stamped, printed or written thereon the words or names 'London Conveyance,' or 'Original Conveyance for Company,' or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs; and let the defendant pay to the plaintiffs their costs of this application."

1. In *Landreth v. Landreth*, 22 Fed. Rep. 41, Dyer, J., said: "An injunction, *pendente lite*, will issue, restraining the defendant from placing on the bags

sons from soliciting customers of a firm for orders under a guise which might mislead them into the belief that they were dealing with the same firm as formerly.¹

used by him in putting his peas on the market, a label or inscription resembling in design, form, and arrangement, or collocation of identical words, the label or inscription of the complainants, as does the label now used by the defendant."

1. In *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748, James, L. J., said: "An injunction will be granted to restrain the defendant company, their servants, workmen, agents and travelers, and representatives respectively, from selling, exporting, or shipping, or causing, or procuring, or allowing to be sold, shipped, or exported, and from in any manner representing, or causing, or procuring to be represented, any goods manufactured by the defendant company as the manufacture or goods of the late Joseph Thorley, or of the plaintiffs, his trustees and successors in business; and also from in any manner representing, or causing or procuring to be represented, or doing anything which shall lead to the belief, that the defendant company have been or are carrying on the business of the late Joseph Thorley, or are the successors in business of the late Joseph Thorley; and also from affixing, or permitting or causing to be affixed, to any goods or articles manufactured or bought, or procured, or sold, or shipped, or exported by the defendant company, or otherwise using or employing, or permitting to be used or employed, any labels, wrappers, or marks used by the late Joseph Thorley and the plaintiff, his trustees and successors in business, or so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured, or sold, or shipped, or exported by the defendant company are the goods or manufacture of the late Joseph Thorley or of the plaintiffs; and also from employing, using, or circulating, or causing to be employed, used, or circulated, any circulars, pamphlets, notices, or advertisements of the late Joseph Thorley or of the plaintiffs, or which shall in any manner represent or lead to the belief that the defendant company have been or are carrying on the business of the late Joseph Thorley, or that they are his successors in business." See also *Selby v. Anchor*

Tube Co., Cox's Man. of Trade-Mark Cases 566.

"Order that an injunction be awarded against the defendant, Edwin Popplewell Dawson, to restrain him, his partners, servants, or agents, from applying to any person who was a customer of the firm of Benjamin Dawson & Co., prior to the 12th of June, 1871, privately by letter, personally, or by a traveler, asking such customer to continue to deal with the defendant, or not to deal with the plaintiffs, the Kirkstall Brewery Company, Limited." Minutes by Romilly, M. R., in *Labouchere v. Dawson*, L. R., 13 Eq. 326. See also *Leggott v. Barrett*, 15 Ch. Div. 306; *Selby v. Anchor Tube Co.*, W. N. (1877), p. 191; *Schelle v. Brakell*, 11 W. R. 796; *Witt v. Corcoran*, Seton (4th ed.) 257; *England v. Curling*, 8 Beav. 129; *Burrows v. Foster*, 1 N. R. 156; *Wheeler, etc., Mfg. Co. v. Shakespear*, 39 L. J. Ch. 38.

In *Scott v. Scott*, 16 L. T. N. S. 145, Wood, V. C., said: "Injunction granted to restrain the defendants from allowing or permitting the brass plate so affixed by the defendants to the door of the premises in Regent street, to remain affixed with any inscription thereon representing or holding out to the customers of the late partnership of Robert and Walter Scott, or to any other persons whatsoever, that they are carrying on business in continuation of or in succession to the business carried on by the late firm of Robert and Walter Scott." See also *Hoffman v. Duncan*, Seton (4th ed.) 256; *Witt v. Corcoran*, Seton (4th ed.) 257; *Graveley v. Winchester*, Seton (4th ed.) 257; *England v. Curling*, 8 Beav. 129; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Hookham v. Pottage*, L. R., 8 Ch. App. 92; *James v. James*, Seton (4th ed.) 237; *Montagne v. Moore*, Seton (4th ed.) 238; *Cave v. Myers*, Seton (4th ed.) 238; *Fullwood v. Fullwood*, 38 L. T. N. S. 381.

In *Routh v. Webster*, 10 Beav. 563, Langdale, M. R., said: "Restrain the defendants from printing, publishing, or circulating any prospectus or other document of or relating to a certain company called the Economic Conveyance Company, mentioned and referred to in plaintiff's bill in this cause, with the plaintiff's name thereto, and from, in any manner, using the name of the

Fourth. The use of plaintiff's corporate name.¹

Fifth. The wrongful use of the name of a publication, such as a newspaper.²

plaintiff, so as to identify him as a party interested or associated with the said company."

1. In *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 223; 52 Am. Rep. 811, Cooley, C. J., said: "The circuit court enjoined the defendants, 'from conducting the business of manufacturing carriages, buggies, wagons and cutters under the name of the Kalamazoo Buggy Company, either as designating a corporation or other business association of said defendants, and from issuing and distributing circulars and business cards under that name, and from soliciting custom by the agency of traveling salesmen or otherwise from the customers of the firm known as the Kalamazoo Wagon Company, who were customers of this firm on the 5th day of April, 1883, in any manner, under the name of the Kalamazoo Buggy Company.'"

In *Hendricks v. Montagu*, 17 Ch. Div. 638, Jessel, M. R., said: "The writ which I have got before me is this: 'For an injunction to restrain the defendants from applying to the Registrar of Joint-Stock Companies in *England* for registration under the Companies Act of a company to be incorporated under the name of the Universe Life Assurance Association, or any other name likely to mislead or deceive the public into the belief that the company, being incorporated as aforesaid, is the same as the Universal Life Assurance Society, . . . from issuing or publishing any advertisements, circulars, or prospectuses representing that a company is to be incorporated, pursuant to the Companies Act, 1862, under the name of the Universe Life Assurance Association, Limited, . . . or any such other name as aforesaid, and from carrying on or commencing any business under the name of the Universe Life Assurance Association, Limited, or any such other name as aforesaid.'" See also *Estcourt v. Estcourt Hop Essence Co.*, 31 L. T. N. S. 571; L. R., 10 Ch. 276.

In *Lee v. Haley*, L. R., 5 Ch. App. 155, there was an order by Malins, V. C., "restraining him from continuing to use, and from exhibiting or using, the name 'The Pall Mall Guinea Coal Company,' in Pall Mall, or any other

name or style so framed as to be a colorable imitation of the name or style in which the plaintiffs' branch business mentioned in the bill was carried on, or as to deceive the public, or lead to the belief that the business carried on by the defendant was the same as the business carried on by the plaintiffs under the name or style of 'The Guinea Coal Company,' or was in any way connected therewith." See also *Colton v. Thomas*, 2 Brew. (Pa.) 308.

2. In *Walter v. Head*, 25 Sol. J. 757, the court said: "The order, as varied, restrained the defendant from printing or publishing any newspaper, or other publication in the form of a newspaper, with or under the name or title of the 'Times,' and from doing any other act or invasion or infringement of the plaintiffs' right or interest in the name or title of the 'Times.'"

In *Ainsworth v. Bentley*, 14 W. R. 630, Wood, V. C., said: "That the defendant, Richard Bentley, his servants, etc., be restrained from carrying on, etc., the said Temple Bar Magazine; but the order to be without prejudice to the publication of the said magazine until the hearing of cause, so as the name of Bentley do not appear either in the title-page or in any other part of the said publication, or in any advertisement of the said publication, and this order to be without prejudice to the right (if any) of the plaintiff to damages or profits in respect of any publication of the work."

See also *Chappell v. Sheard*, 2 K. & J. 122; *Emperor of Austria v. Day*, Giff. 628-631; 3 De G. F. & J. 217-219.

In *Clement v. Maddick*, 1 Giff. 101, Stuart, V. C., said: "That the defendants, their servants, workmen and agents, may be restrained from printing, publishing, or continuing to print or publish any newspaper or other periodical paper with or under the name or style of the 'Penny Bell's Life and Sporting News;' or with or under any name or style of which the name, style, or words of 'Bell's Life,' shall form a part, or in any way occur; and from using the said name, style, or title of 'Bell's Life' by way of name, style or title to any newspaper or periodical, without the license or consent of the plaintiff." See also *Edmonds v. Ben-*

Sixth. The use of a secret obtained through confidential relations and the sale of the article made thereby under its trademark name.¹

bow, Seton (3d ed.) 905; *Corns v. Griffiths*, Pemberton (3d ed.) 238; *Mack v. Peter*, 41 L. J. Ch. 782; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Prowett v. Mortimer*, 2 Jur. N. S. 414.

In *Prince Albert v. Strange*, 2 De G. & S. 717, the court said: "By the decree it was declared, that the plaintiff was entitled to have delivered to him the impressions (by the answer of Judge admitted to be in his possession), of such of the several etchings in the pleadings mentioned, as in the catalogue and in the pleadings were stated to have been etched by the plaintiff; that is to say [they were described by reference to the numbers in the catalogue], and it was ordered that Judge should, within four days after the service of the decree, deliver up the impressions above specified on oath, and leave them with the clerk of records and writs, at the record office. And it was ordered that the defendant Strange should, within four days after service of the decree, deliver to the clerk of records and writs, at the said office, the twenty-three copies of the catalogue, being the same as were mentioned in the decree in the other suit, of even date. And the decree contained similar directions as to six copies of the catalogue admitted by Judge to be in his possession. And the clerk of records and writs was ordered to destroy these copies of the catalogue, giving notice to the solicitors of the several parties of the time and place at which he intended to do so. And it was ordered that the defendants, their servants, etc., should be restrained from making, or permitting to be made, any engraving or copy of such etchings, or any of them; and from publishing the same; and from parting with or disposing of them, or any of them, except in obedience to the decree; and from selling, or in any manner publishing the catalogue, or any work being or purporting to be a catalogue of the etchings made by the plaintiff. And the plaintiff, waiving any costs against Strange, it was ordered that Judge should pay the plaintiff's costs to the 22d of May, 1849, when Judge obtained the order to defend *in forma pauperis*. Liberty to apply was reserved.

In *Hogg v. Kirby*, 8 Ves. 227, an

order was made declaring that "the defendants, their agents, etc., be restrained from publishing or exposing to sale, any copy or copies of the defendant's said work, and from printing, publishing, or exposing to sale, any other work or publication as or being a continuation of the plaintiff's work, or of the defendant's work, which had been so published as such continuation, as aforesaid; and from printing all or any part or parts of the plaintiff's said work; and that the injunction should be continued as to any letters, etc., admitted by the answer to have been received from correspondents by the defendant, while publishing for the plaintiff."

1. In *Weston v. Hemmons*, Cox's Man. of Trade-Mark Cases 517, Molesworth, J., said: "The plaintiff being the inventor of a secret medicine, called 'Weston's Wizard Oil,' and the defendants having manufactured this medicine by agreement with him, after the termination of the agreement the defendants continued to use the recipe and name. Injunction granted to restrain the defendants from using or imparting the secret recipe, and from using the name, except in respect of medicines manufactured before the termination of the agreement; but the order to be discharged if the plaintiff should fail to pay for any ingredients, etc., purchased by the defendants for the purpose of the medicine, and which would have been charged in account against the plaintiff if the connection had continued."

In *Morison v. Moat*, 9 Hare 267, Turner, V. C., said: "Restrain the defendant, his agents, etc., from selling, or causing or procuring to be sold, under the title or designation of 'Morison's Universal Medicine,' or 'Morison's Vegetable Universal Medicine,' any medicine made or manufactured by the defendant, or by or under his order or direction; and restrain the defendant, his agents, etc., from making or compounding any medicine according to the secret in, etc., and from in any manner using the secret of compounding the said medicine, or any part thereof." See also *Ansell v. Gaubert*, Seton (4th ed.) 235; *Weston v. Hemmons*, 2 Vict. L. R. Eq. 121.

In *Croft v. Day*, 7 Beav. 90, Lang-

Seventh. Statements by defendant that plaintiff's article is not genuine.¹

Eighth. Defendant from using any name or words which will falsely state that his business or the source of his goods is the same as that of plaintiff.²

Ninth. Coupled with the injunction order in some cases is an

dale, M. R., said: "By the terms of the injunction, the defendant, his servants, etc., were restrained from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day & Martin, in bottles, having affixed thereto such labels as in the complainants' bill mentioned, or any other labels, so contrived or expressed as, by colorable imitation or otherwise, to represent the composition or blacking sold by the defendant, to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards, so contrived or expressed, as to represent that any composition or blacking sold or proposed to be sold by the defendant, is the same as the composition or blacking manufactured or sold by John Weston."

1. In *Thomas v. Williams*, 14 Ch. Div. 875, an order was made by Fry, J., "To restrain the defendants, their servants, etc., from issuing or permitting the issue of the circular dated the 6th of February, 1879, and from in any manner representing or suggesting that the goods now made or sold by the plaintiff are imitations of the goods made or sold by J. Thomas & Sons, or Edmund Holyoake."

In *Thorley's Cattle Food Co. v. Masam*, 14 Ch. Div. 781, Malins, V. C., said: "The injunction will be to restrain the defendants from 'advertising, or representing or suggesting in their advertisements or circulars, that they, or such proprietors, are alone possessed of the said secret, and from representing or suggesting, or doing anything calculated to represent or suggest, that the cattle food manufactured and sold by the plaintiffs is spurious or not genuine.'"

In *James v. James*, 41 L. J. Ch. 358, an order was made by Romilly, M. R., to "restrain the defendant from using the name of Robert James singly, instead of Robert Joseph James, or R. J. James; also from stating or inserting in his advertisement or circular any

words or expressions asserting or suggesting that the ointment manufactured and sold by the plaintiffs is spurious and not genuine."

2. In *Wheeler v. Johnston*, L. R., 3 Ir. 284, Chatterton, V. C., said: "I think it would be also going too far to hold that a manufacturer who has really one of these Cromac springs on his premises should be restrained from stating that his waters are manufactured at one of the springs, or from the springs, or celebrated springs, or celebrated Cromac springs, or anything of that kind. The injunction which I am about to grant to the plaintiffs in this case must be guarded and limited, so as not to interfere with the right of the defendant and others to use this name in the way which I think they have a right to use it. I shall restrain the defendant from using the words 'Cromac Springs' in connection with his trade or business as a manufacturer or seller of mineral waters, so as to represent that his said waters are so manufactured or sold by the plaintiffs at their works in the bill mentioned, called 'The Cromac Springs,' or from using the words 'Cromac Springs' as the name of defendant's place of business, so as to represent as aforesaid."

In *Braham v. Beachim*, 7 Ch. Div. 848, Fry, J., said: "The injunction will be, to restrain the defendants, unless and until they shall acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style of 'The Radstock Colliery Proprietors,' or any other name or style signifying that the defendants, or either of them, are proprietors of any colliery or collieries at Radstock; and to restrain the defendants, unless and until they shall become authorized to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of Radstock from using any style or name signifying or implying that the defendants are selling or supplying, or are authorized to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of Radstock."

order requiring infringing labels, wrappers, prints, cuts, engravings, stones, blocks, casks, books and papers to be delivered up to be destroyed.¹

7. Damages and Profits.—The English rule for estimating profits and damages in trade-mark cases is to give the plaintiff his election to seek either profits or damages.² If he takes profits, he can recover such an amount as would appear as profit of a

1. In *Edelsten v. Edelsten*, 1 De G. J. & S. 196, the prayer of the bill was, that an account might be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade-mark, or a trade-mark in imitation of, or only colorably differing from that of the plaintiff stamped or impressed thereon; and that the defendants might be ordered to pay to the plaintiff the amount of such gains and profits. That the defendants might be restrained by injunction from attaching to wire not the manufacture of the plaintiff any tally or label with the plaintiff's trade-mark, or any mark in imitation thereof, or only colorably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade-mark, or any mark in imitation thereof, so as to denote or represent that the said wire was the "Anchor Brand Wire," or was the manufacture of the plaintiff, and from selling or offering for sale, or procuring to be sold any wire not being of the plaintiff's manufacture, bearing a tally or label attached thereto with the plaintiff's trade-mark, or a mark in imitation thereof, or only colorably differing therefrom, stamped or impressed thereon, or otherwise in any manner having the said trade-mark or a mark in imitation thereof, or only colorably differing therefrom, attached thereto. That the defendants might deliver up to be canceled all tallies, labels and papers in their possession, or in the possession of their servants or agents, bearing the said trade-mark so in colorable imitation of the plaintiff's as therein before mentioned, and also all tallies, labels and papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade-mark or any mark in imitation thereof, or only colorably differing therefrom, stamped or impressed thereon, and also all dies for stamping or impressing the same; and that the defendants might pay all the costs of the suit. A decree was made in the terms of the prayer of the

bill, which was affirmed by the chancellor. See also *Foster v. Megevand*, *Pemberton* (3d ed.) 239; *Ford v. Foster*, *Seton* (4th ed.) 236; *Henderson v. Jorss*, *Seton* (4th ed.) 236; *Upmann v. Elkan*, L. R., 12 Eq. Cas. 140; 7 Ch. App. 130; *Rivero v. Norris*, *Seton* (4th ed.) 236; *Del Valle v. Mayer*, *Seton* (4th ed.) 236; *Moet v. Pickering*, 6 Ch. Div. 770-1; 8 Ch. Div. 372; *Guinness v. Ullmer*, 10 L. T. 127.

2. In *Lever v. Goodwin*, 4 L. R., P. C. 492; 36 Ch. Div. 1; 57 L. T. 583, *Cotton, L. J.*, said: "It is well known that, both in trade-mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief: he may either say, 'I claim from you the damage I have sustained from your wrongful act,' or 'I claim from you the profit which you have made by your wrongful act.' Mr. Healey contended that the only profit which the plaintiff could call for was that profit which arose from the sale of this soap, where the ultimate purchaser bought it, not as the defendant's, but as the plaintiff's soap. But, in my opinion, that is mistaking the whole gist of this action. The defendants, as I understand, do not sell anything to retail purchasers; what they sell, they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the defendants is this: 'You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs.' The profit for which the defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as *Goodwin's*, that cannot affect the question, whether the sale by the

whole business, when calculated as a business man would estimate the profit of any mercantile or manufacturing business, allowing all reasonable and proper deductions, the amount to be recovered will be the whole profit of the defendant's business in the infringing article.¹ If the plaintiff elects to take damages, it lies with him to show by distinct evidence the actual damage which he has suffered. The courts will not presume that the plaintiff would have made all the sales made by the defendant, but if plaintiff's sales have fallen off approximately to the same extent as defendant's have increased in the same region, this will be sufficient to entitle the plaintiff to recover this loss.² If the plaintiff has been guilty of laches in bringing suit, he may have an injunction, but cannot have an account for infringement prior to the filing of his bill.³

defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs, by selling the soap of the defendants as the soap of the plaintiffs."

1. *Edelsten v. Edelsten*, 10 L. T. N. S. 780.

2. *Tonge v. Ward*, 21 L. T. N. S. 480. In *Leather Cloth Co. v. Hirschfeld*, L. R., 1 Eq. 299; 13 L. T. N. S. 427; 14 W. R. 78, there was evidence to prove that the defendants manufactured several different qualities of leather cloth, and that they had at times sold pieces of cloth of three qualities impressed with the pirated trade-mark; but no evidence could be obtained by the plaintiffs, or was offered by the defendants, to show on what number of pieces the mark had been impressed. There was evidence to show what number of pieces of the different qualities was sold by the defendants, and the profit made by them on such sales, and it was shown that the prices were lower than those which used to be received by the plaintiffs for the goods marked with their marks, and that the profit was less. The Vice-Chancellor said:—"The plaintiffs had their election to have taken an account of profits or of what damages had accrued, and preferred the latter alternative; they now require the court to assume that they would have sold all the pieces of cloth which the defendant actually did sell. But how can the court assume that the persons who bought what the plaintiffs aver were inferior articles at an inferior price, would necessarily, if they had not done so, have bought the

superior article at the higher price? Surely this would be an absurdly strong assumption, and that in the absence of any evidence that any of the purchasers had at any time been customers of the plaintiffs. But even supposing that such an assumption were possible, why is the court to assume that, even if the purchasers would have bought the higher-priced article, they would have bought it of the plaintiffs? There were or there may have been persons licensed by the plaintiffs to use their trade-mark and to sell goods manufactured by their process, or there may have been, and doubtless were, persons who had purchased from the plaintiffs, with a view of selling again. How can the court assume that the supposed purchasers would have passed by all these persons and have purchased direct from the plaintiffs? Yet this is what the court is called on to infer from the mere fact that certain goods were sold by the defendants, and that some of those goods were marked with imitations of the plaintiffs' marks. Principle would seem to determine that no such assumption can be made, and that it lies on the plaintiffs to prove some distinct damage from the use of their trade-mark by showing the loss of custom or something of that kind, which has not been done in this case. I must therefore hold that the plaintiffs have suffered no damage by the defendants' use of their trade-mark." See also *Rodgers v. Nowill*, 5 M. G. & S. 109; 17 L. J. C. P. 52; 11 Jur. 1039; 10 L. T. 88; 57 E. C. L. 111; *Blofeld v. Payne*, 4 B. & Ad. 410; 6 Hare 325; 24 E. C. L. 87.

3. In *Ford v. Foster*, L. R., 7 Ch. App. 616; 27 L. T. N. S. 220; 41 L.

In the *United States* the rule is even more liberal: where a trade-mark is proven to have been infringed, the owner is entitled to recover the entire profit realized by the defendant on the sale of the article bearing the infringing mark, or upon his work in connection therewith; but defendant is only accountable for sales actually made, or for work actually done for an infringer. Where a lawful and unlawful business are so mixed that the actual expense of conducting the unlawful business cannot be ascertained, the expenses of the general business will not be allowed as deductions.¹ Plaintiff may also recover such actual damages to

J. Ch. 680, James, L. J., said that the question remains as to what ought to be done with respect to the account. Having regard to this, that what we are doing is establishing a legal right, and giving an equitable remedy ancillary to and consequent upon that legal right, and having regard to the fact that the plaintiff did certainly make a misrepresentation which he was not justified in making, in his advertisements and invoices to the effect that the shirt was protected by patent; having regard to that, and having regard also to the fact that the plaintiff seems not to have been very vigilant in endeavoring to ascertain who were interfering with his trade, and having regard also to the probability that the extent of the trade of the defendants would by no means be a measure of the injury done to the plaintiff himself, because the plaintiff has not anything like such an extensive trade as the defendants; having regard to all these circumstances, we are of opinion that the account should not begin from an earlier period than the filing of the bill and that the plaintiff is entitled to the ordinary account from the filing of the bill.

1. In *Société Anonyme v. Western Distilling Co.*, 46 Fed. Rep. 921, Thayer, J., said: "The chief contention in this case arises over the refusal of the master to make allowance for certain expenses, in his computation of the profits realized by the defendant by imitating complainant's labels, brands, trade-marks, etc. . . . While it is customary in the computation of profits in this class of cases to make allowance for expenses, yet the expenses so allowed must be expenses necessarily incurred in the unlawful venture, which would not have been incurred but for engaging in such venture. When an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are em-

ployed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business."

In *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, Mitchell, J., said: "In the case at bar the bill prays for discovery, an accounting of profits, injunction, damages, and general relief, and the only ground of objection to the bill raised by the second ground of defendant's demurrer is that the bill prays damages. That a man whose trade-marks have been infringed upon, as in this case, is entitled to compensation for the infringement, is unquestionable; and it strikes us that it makes no difference whether the compensation to which the complainant is entitled is called 'profits' or 'damages.' What is an accounting, but the method by which to ascertain the complainant's damages or compensation for the wrong and injury done him by the defendants? . . . A party whose trade-mark has been violated is entitled to recover all profits realized by the wrongdoer from sales of the spurious article, and also damages resulting from such violation. . . . The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damages, and although the defendant's articles are not inferior in quality to his own."

In *Benkert v. Feder*, 34 Fed. Rep. 534, Sawyer, J., said: "The boots and shoes sold were not manufactured by defendants, but purchased from other manufacturers at the East, and then sold by them with the simulated trade-mark of plaintiff stamped upon the soles and on the inside of the boot top. . . . The defendants insist that the measure of damages or profits should be limited to the difference in price for which the goods would sell with the

trade-mark upon them and the price for which the same goods would sell without it. I am unable to adopt any such rule. It would be exceedingly indefinite, and equivalent to giving no damages or profits at all. How would it be possible for anyone to say how much less a pair of boots or shoes would sell without, than with the trade-mark upon it? There would be no definite measure of compensation for the injury. One who deliberately and knowingly uses another's trade-mark, commits a palpable and unmitigated fraud, for which there is no possible excuse. He seeks to avail himself of the good reputation of another's goods.

. . . . To adopt as the measure of compensation for such injuries the difference between the price for which the spurious goods would sell without the trade-mark and for which they will sell with it imprinted thereon, would be a mockery of justice. In my judgment, the infringer should at least account for the entire profits made upon the goods wrongfully sold with the trade-mark impressed thereon. . . . There may also be damages beyond the mere profits resulting to the owner of the trade-mark infringed, which he may recover. . . . The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount; at least, that is the fraudulent purpose, and the natural tendency, whether always accomplished or not; and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damage may be much more arising from destroying the reputation of the owner's goods. . . . Let reference be made to a master to ascertain and report the amount of profits and damages."

In *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24; P. & S. Am. Trade-Mark Cases 1063, Wheeler, J., said: "The final decree establishes the right of the orator to the use of the word 'Champion' as a trade-mark for flour; that the defendants have infringed upon that right; and that the orator is entitled to recover of them the profits to the defendants, and damages to the orator, due to the infringement. . . . It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the

rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them, whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both."

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601; P. & S. Am. Trade-Mark Cases 564, Nixon, J., said: "This is a motion to strike from the decree entered in the above case the clauses which direct an accounting and the payment of costs.

"1. As to the accounting. The counsel for the defendant rests his application to strike out on two grounds: First, because the proofs show that the defendant is not the person liable to account to the complainant. The evidence is that the defendant was largely engaged in packing blues on his own account and for others in the trade; that all the blues covered by the infringing trade-mark were put up by him for the firm of James S. Barron & Co. . . . who placed the same upon the market; that he made no sales to any one of the articles thus packed, but received pay from his employers solely for the work and labor of packing. The bill of complaint prays for an injunction, and for profits and damages. Having been adjudged an infringer of the trade-mark of the complainant, an injunction has been issued against him. Under the above state of facts, should he be compelled to account for profits and damages? We have no doubt about the propriety of the reference or of the liability of the defendant, if it can be shown on the accounting that profits were made by his work and labor, or that damages resulted to the complainant therefrom. If he did not sell, the profits on the sales are not chargeable to him; but if any profits came to him for preparing the article for those who did sell, they belong to the complainant, and the object of the accounting is to ascertain that fact. And if the defendant has damaged the complainant by the unlawful use of his trade-mark, the nature and extent of the damage is a proper subject of inquiry. Second, because the complainant has forfeited his right to an account by laches in bringing his suit. In *England* the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are

more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrongdoer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant. Such is not the present case. Although the defendant began the packing of bluing in the packages complained of early in the year 1878, there is no evidence that the complainant knew it until a short time before the suit was brought." See also *Enoch Morgan's Son's Co. v. Troxell*, 57 How. Pr. (N. Y. Supreme Ct.) 121; *P. & S. Am. Trade-Mark Cases* 140.

In *Graham v. Plate*, 40 Cal. 593; 6 Am. Rep. 639, *Crockett, J.*, said: "It clearly appears in proof, that the defendant has made a profit of \$1,770 by the sale of pistols made in imitation of the Deringer pistol, and bearing Deringer's trade-mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is insisted, on behalf of the defendant, that the profit realized by him from sales of the spurious article, under the simulated trade-mark, is not a proper measure of damages. It is conceded, that this is the proper rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale of it in violation of the rights of the patentees; but that one, who has acquired an exclusive right to use a particular trade-mark, has not thereby acquired an exclusive right to make and vend the commodity to which the trade-mark is affixed; that any one has the right to make and vend the same commodity, in exact imitation of that made by the owner of the trade-mark, and that the offense consists, not in imitating the commodity, but the trade-mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the damages; but the party is entitled to only such damages as resulted from a piracy of the trade-mark; and the profit realized by a sale of the commodity does not establish the

amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrongdoer is not the only measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, whilst the wrongdoer has made little or no profit. But whilst the profit made by the latter does not limit the recovery, the owner of the trade-mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade-mark, it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices, except for the use of the trade-mark. No one will deny that, on every principle of reason and justice, the owner of the trade-mark is entitled to so much of the profits as resulted from the use of the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who, in no degree, contributed to the wrong. I think, therefore, there was no error in awarding to the plaintiff the whole profit made by the defendant. This view of the law appears to be supported by authority. . . . But if there were no authorities on the point, every consideration of reason, justice and sound policy, demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark,

himself as he is able to prove by direct evidence;¹ and in any case he may recover nominal damages and costs. Exemplary or

and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit, renders it just that he should lose the whole."

In *Stonebraker v. Stonebraker*, 33 Md. 269, Brent, J., said: "The decree of the court below is correct in so far as it proceeds to restrain and enjoin the appellants. But that part of it which directs an account, is in some respects, erroneous. Samuel Stonebraker and Hoffman, by the terms of dissolution of the partnership between themselves and Henry Stonebraker, . . . reserved the right to sell under these trade-marks the stock on hand or in the hands of agents at the time of dissolution, and for the sales of such stock, no matter by whom made, whether by themselves or their vendees, no account can be demanded. The other parties, Passano, Abraham Stonebraker and the Clotworthys, not being bound by any contract to the contrary, had the right under the law, as we have stated it, to manufacture the medicines or preparations to whatever extent they chose, and no accounting for such, as they manufactured simply, can be required of them. Their liability to account is limited to sales, under the prohibited use of the protected trade-marks, of such articles as were not part of the stock referred to. The decree is undoubtedly erroneous in requiring an account, as by its terms it clearly does, from these parties, of articles which they have manufactured and not sold, and should more clearly except from all accounting, by any of the parties, for sales of such articles as constituted part of the stock on hand and held by the Stonebrakers and Hoffman at the time of the dissolution of that firm."

1. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *P. & S. Am. Trade-Mark Cases* 904; *Julian v. Hoosier Drill Co.*, 78 Ind. 498; *Conrad v. Uhrig, Brewing Co.*, 8 Mo. App. 279.

The case of *Peltz v. Eichele*, 62 Mo. 179, was a suit for the defendant's breach of his covenant that he would not engage in the manufacture of matches for a stipulated time. The principles which controlled the decision are closely analogous to those involved in trade-mark cases. Hough, J., said: "The object in purchasing the good-will undoubtedly was to retain

the old customers of A. Eichele & Co., and the labels or wrappers bearing the name of the firm, or other brands or marks, by which the goods manufactured by that firm might be identified, are *quasi* trade-marks. But there is no allegation that the good-will transferred to the plaintiffs was in any way injured or impaired by defendant having used his trade-mark or labels. The profits made by the defendant, therefore, to which the plaintiffs claim they are entitled, are not the profits made on articles, the exclusive right to manufacture and sell which belonged to the plaintiffs, nor the profits derived from the use of the label or trade-mark, the exclusive right to which was in the plaintiffs, though the exclusive right to make the goods on which it was used, was not in the plaintiffs; but the profits realized from the general decline and diversion of the plaintiff's business, occasioned by defendant. If plaintiffs lost less than defendant made, they cannot recover the whole of defendant's profits; if plaintiffs lost more than defendant made, they would not be limited to defendant's profits. What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal measure of damages in this case. If the plaintiffs had manufactured matches to the utmost capacity of their factory, and sold all they made at unreduced prices, notwithstanding the defendant may have, in violation of his covenant, engaged in the same business in St. Louis and realized large profits, the plaintiffs could only have recovered nominal damages, for, in that case, they would have lost nothing.

. . . In ascertaining the amount of this damage, the profits made by the defendant constitute an element; but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of in the petition. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiffs' factory and the amount of their sales, and the reduction in price of the articles sold, if any, in

vindictive damages cannot be recovered.¹ When the plaintiff has

consequence of the unlawful competition of defendant."

In *Hostetter v. Vowinkle*, 1 Dill. (U. S.) 329, Dillon, C. J., said: "The law is well settled that a party who has appropriated a particular trade-mark to distinguish his goods from other similar goods, has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it by injunction from invasion, and if it has been invaded, the wrongdoer is liable for the damage he has thereby caused the party whose trade-mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. . . . Applying these principles to the present case, the defendants are liable to the plaintiffs, not only in respect of the bitters which they sold prior to Oct. 1st, using the plaintiff's trade-mark in full, but for those which they sold after making the alterations above mentioned, such as changing the name 'Hostetter' to 'Holstetter,' etc. From the evidence of one of the defendants, I find that he admits sales at least to the extent of two hundred dozen bottles. The evidence shows that the sales of the plaintiffs, in Omaha, fell off during the time the defendants were manufacturing and selling their imitation bitters to even a greater amount than this. I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been, on each case of one dozen bottles, the sum of four dollars, which would make in all the sum of eight hundred dollars. A decree will be entered for this amount and also making perpetual the injunction."

In *Marsh v. Billings*, 7 Cush. (Mass.) 332; 54 Am. Dec. 723, Fletcher, J., said: "Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House as stated, they had, under and by virtue of that agreement, an exclusive right to use the words 'Revere House,' for the purpose of indicating and holding themselves out as having the patronage of that establishment . . . that if the defendants used these words, . . . that would be a fraud

on the plaintiffs, and a violation of their rights, for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damages would not be confined to the loss of such passengers as the plaintiff could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case."

In *Thomson v. Winchester*, 19 Pick. (Mass.) 216; 76 Am. Dec. 733, Shaw, C. J., said: "The court are of opinion, that if the defendant made and sold medicines, calling them 'Thomsonian Medicines,' and sold them, or placed them in the hands of others to sell, as and for the medicines made and prepared by the plaintiff, so that persons purchasing the same supposed and believed that they were purchasing the medicines made and prepared by the plaintiff, it was a fraud upon the plaintiff, and an injury to his rights, for which the law will presume some damage. Such a case, therefore, being proved, the plaintiff will be entitled to recover nominal damage, at least, and something more, if he can make it appear to the satisfaction of a jury that he has sustained more than nominal damage."

1. In *Addington v. Cullinane*, 28 Mo. App. 241, Lewis, P. J., said: "There was a jury trial (below) and a verdict in favor of plaintiffs for three hundred and fifty dollars. . . . The court (below) gave for the plaintiffs the following instruction: 'If they (the jury) find for the plaintiffs, the measure of damages of the plaintiffs is the actual net profits made by the defendants on the goods sold by them prior to Sept. 3d, 1886, unless the jury further believe, from the evidence, that the act or acts of the defendants were willful and malicious; then the jury may find exemplary damages in addition to the above.' If the plaintiffs had demanded an accounting of the profits made by the defendants, on the equitable ground that those profits were made by the use of the plaintiffs' property, the instruction might have been substantially ap-

been guilty of laches in bringing suit, he may, in some cases, forfeit his right to an account.¹

plicable. But in a common-law action for damages, in cases of this class, such a method of arriving at the plaintiffs' rights has never been sanctioned. In 3 Sutherland on Damages, pp. 630, 631, the law is explained . . . thus: 'The compensation to the owner of a trade-mark, for the injury he suffers from a wrongful and unauthorized use of it by another, is ascertained and computed on substantially the same principles as damages for infringements of patents and copyrights. . . . The net profits may be recovered in equity, as profits made by the use of the plaintiff's property, and the defendant, as constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss and not by the defendant's gain; the profits are there held not to be the measure of damages, nor an element of them, where there is any other method of ascertaining and measuring them.

Nor will the proof of the defendant's profits warrant a legal presumption that the plaintiff's loss is a corresponding amount.' Another elementary writer says, in the same connection: 'But the damages must be proved from the evidence. A mere possible injury furnishes no ground of damages. . . . The patentee may sue at law for the damages which he has sustained, and those damages he is entitled to recover, whether the defendant has made any profits or not. In trade-mark cases, the rule is much the same.' Browne on Trade-Marks, §§ 505, 507. In *Leather Cloth Co. v. Hirschfield, L. R., 1 Eq. 298*, it was held that the law would not presume that the plaintiffs would have sold the amount of goods sold by the defendant; but the burden of proof was on the plaintiffs to show special damage by loss of custom or otherwise. *Peltz v. Eichele*, 62 Mo. 161, was a suit for the defendant's breach of his covenant that he would not engage in the manufacture of matches for a stipulated time. The principles which controlled the decision were closely analogous to those involved in the present case. Said the court: 'What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal measure of dam-

ages in this case.' It was there in proof that the plaintiff's sales had been reduced about one-half after the defendant embarked in the business in violation of his covenant. There seems to be no disagreement among the authorities on this question. In the present case, even if the erroneous instruction had not been given, the plaintiffs could have recovered no more than nominal damages, since there was no testimony tending to show that they had sustained any actual loss by the facts proved."

In *Taylor v. Carpenter*, 2 Woodb. & M. (U.S.) 21; 11 Paige (N. Y.) 292; 2 Sandf. Ch. (N. Y.) 603, Woodbury, J., said: "On the question of damages, however, in respect to giving 'exemplary' ones, there is some doubt, whether the charge was in the exact form deemed proper under modern analyses and decisions on this point. . . . That the jury should have given more than nominal damages, I have no doubt, and I have as little doubt that there were materials enough in the case, from which to estimate actual damages, such as the probable extent of sales by the defendant under these marks, and the loss of sales and profits therein by the plaintiffs. The jury would, in a case like this, if a known and deliberate imitation, often renewed and very prejudicial to the plaintiffs, not be very nice in their data and inferences, but be sure to give enough to cover all losses, and prove an ample indemnity. . . . Not 'smart money' or 'vindictive damages,' but full atonement for the wrong done. . . . In a case like this, if in any, no reason exists for giving greater damages than have actually been sustained or what have been called compensatory."

1. In *Low v. Fels*, 35 Fed. Rep. 361, Butler, J., said: "The complainants are not entitled to an account. For nearly four years prior to the date of suit they had notice that their trade-mark was in common use by dealers in soaps in this country, and did nothing to prevent it until about the time of filing this bill. . . . There is no evidence of fraud on the respondent's part. He did not even know of the complainants' existence, or of the existence of the rights they set up. To hold him liable to account for his past sales, and

8. *Costs*.—The English rule as to costs is framed with great strictness for the purpose of preventing litigation and protecting an innocent defendant. The chancellors, as well as the common-law judges, take wide latitude in awarding costs, and seem to regard it as a duty on the part of the plaintiff to at least notify an infringing defendant of his intention to bring suit, and if the defendant at once abandons the use of the mark and offers to make all reparation, the plaintiff will be allowed an injunction, but at his own cost. In some cases, however, it has been

damages to the complainants, in view of such laches, would be unjust."

In *Menendez v. Holt*, 128 U. S. 514, Fuller, C. J. (*affirming Holt v. Menendez*, 23 Fed. Rep. 869), said: "Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by laches, and the desire is intimated that we should reconsider *McLean v. Fleming*, 96 U. S. 245, so far as it was therein stated that, even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against further infringement might properly be awarded." After stating the rule of reasonable diligence and applying facts of case the court further said: "It is idle to talk of acquiescence, in view of these facts. Delay in bringing suit there was, and such delay as to preclude recovery of damages for prior infringement; but there was neither conduct nor negligence which could be held to destroy the right to prevention of further injury."

In *Holt v. Menendez*, 23 Fed. Rep. 869; 32 Pat. Off. Gaz. 136; P. & S. Am. Trade-Mark Cases 986, Coxe, J., said: "Upon the question of laches, however, I am constrained to say that the complainant's conduct has been such that the relief granted must be limited to an injunction. Ryder commenced using the brand in 1869, and has used it continuously since. That the complainants knew of this, certainly as early as 1871, is not disputed. That they protested at all is denied. Certainly there was no vigor or courage shown by them until just prior to the commencement of this suit, in 1882. That they did not consent is true, but it is equally true that, for men who believed their rights invaded, their course was inconsistent and misleading. Ryder might well have imagined that they did not intend to call him to an account. The circum-

stances were such as to justify the belief on his part that he was licensed, by silence, to use the trade-mark. It would be inequitable to compel him to pay for its use during the long years that the complainants slept upon their rights. In endeavoring to reach a just result, the court should not overlook the fact that the delay in commencing the suit was unreasonable, and that some of the evils of which the complainants complain are attributable to their own laches in this regard."

In *McLean v. Fleming*, 96 U. S. 257, Clifford, J., said: "Cases frequently arise where a court of equity will refuse the prayer of the complainant for an account of gains and profits, on the ground of delay in asserting his rights, even when the facts proved render it proper to grant an injunction to prevent future infringement. . . . Relief of the kind is constantly refused, even where the right of the party to an injunction is acknowledged because of an infringement, as in case of acquiescence or want of fraudulent intent. . . . Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits."

In *Weed v. Peterson*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 178, Learned, J., said: "Now, without going over in detail the cases on this subject, it will be found that they all speak of 'imitation of trade-marks,' 'adoption of trade-marks,' 'colorable resemblances,' and the like; implying in all instances that the acts of the party charged with doing a wrong are intentional. To illustrate: if a manufacturer had adopted and for a long time used a trade-mark, so that he had acquired an undoubted right to protection, and another manufacturer, in ignorance of this fact, should accidentally 'adopt precisely the same mark, there would be no intentional injury.

held, and it seems the better rule, that a plaintiff has an undoubted right to begin suit at once, and if defendant at once submits and offers to pay costs to that time, as well as allow an injunction to issue as prayed, and the plaintiff rejects this offer, he does so at his peril; and if an account of profits and damages is subsequently denied, as it is likely to be when an innocent defendant at once submits, the plaintiff will be required to pay all costs from the date of defendant's offer. If, however, the defendant contests the plaintiff's claim to an injunction, he must pay costs, when a permanent injunction issues.¹

The rightful owner of the trade-mark, by giving to the other person notice of his right, could place the latter in the wrong in respect to anything thereafter done in violation of the owner's rights. But as to all previous acts, it could not be said that there was any 'imitation,' or 'adoption,' or 'colorable resemblance.' There would have been, previous to such notice, none of that intent to palm off the manufactures of one man for those of another, which appears in all cases on this subject. The case is still stronger where the defendants not only are ignorant of the plaintiffs' claim, but have been induced, by a previous litigation, to acknowledge a similar claim made to the same trade-mark by a third party. I think, therefore, that the plaintiffs should have a permanent injunction, as prayed for, and that they should recover costs; but I do not think that they are entitled to any damages, and in that respect the prayer of the complaint is denied."

1. *Monson v. Boehm*, 28 Sol. J. 361; *Wylam v. Clarke*, W. N. (1876), p. 68; *Cox's Man. of Trade Mark Cases* 488; *Robinson v. Charbonnel*, L. J. U. C. 104; *Estcourt v. Estcourt*, L. R., 10 Ch. App. 276; *Upmann v. Elkan*, L. R., 7 Ch. App. 130; *Tonge v. Ward*, 21 L. T. N. S. 480; *Leather Cloth Co. v. Lonsont*, L. R., 9 Eq. Cas. 345; *Bass v. Dawber*, 19 L. T. N. S. 626; *Maxwell v. Hogg*, L. R., 2 Ch. App. 307; *Hudson v. Bennett*, 12 Jur. N. S. 519; *Ainsworth v. Walmsley*, L. R., 1 Eq. 518; *Standish v. Whitewell*, 14 W. R. 512; *Beard v. Turner*, 13 L. T. N. S. 746; *Munn v. D'Albuquerque*, 34 Beav. 595; *Williams v. Osborne*, 13 L. T. N. S. 498; *Chubb v. Griffiths*, 25 Beav. 127; *McAndrews v. Bassett*, 33 L. J. Ch. 561; *Brown v. Freeman*, 12 W. R. 305; *Moet v. Conston*, 33 Beav. 578; *Woollam v. Ratcliff*, 1 H. & M. 259; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Cartier v. May*, *Cox's Man. of*

Trade-Mark Cases 200; *Brook v. Evans*, 2 L. T. N. S. 740; *Collins Co. v. Walker*, 7 W. R. 222; *Wallis v. Wallis*, 4 Dr. 458; *Burgess v. Hill*, 26 Beav. 244; *Burgess v. Hateley*, 26 Beav. 249; *Farina v. Silverlock*, 1 K. & J. 509; *Chappell v. Davidson*, 2 K. & J. 123; *Geary v. Norton*, 1 De G. & S. 9; *Rodgers v. Nowill*, 6 Hare 325; *Pierce v. Franks*, 15 L. J. Ch. 122; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586. In *Upmann v. Forester*, 24 Ch. Div. 231, *Chitty, J.*, said: "The only question I have to decide is who is to pay the costs of this action. The plaintiffs say they are entitled to costs, and the defendant says that, even if he does not get costs, he should not be called upon to pay the plaintiffs' costs. . . . Ought I to deprive the plaintiffs of their right to costs because they did not give the defendant notice before commencing their action? I do not think that this is a case where it would be just for me to deprive the plaintiffs of their costs. . . . In *Upmann v. Elkan*, L. R., 7 Ch. App. 130, 132, *Lord Hatherley*, referring to the argument that mere carriers of goods bearing a fraudulent trade-mark are guilty of no offense which could support an injunction, says: 'I cannot conceive a doctrine more dangerous or mischievous, or more fatal to the authority of the court with respect to trade-marks,' and the decision that the plaintiffs were not entitled to costs rested upon the fact that inasmuch as the plaintiffs had given notice, and had obtained all possible redress before bill filed, they ought not to have filed a bill for an injunction. Had the plaintiffs given no notice, but forthwith commenced their suit, the decision, as to costs, would have been the other way. . . . I have heard the late master of the rolls say that if you did give notice before action and get an undertaking from the defendants, as you have the defendants'

In the *United States* the simple rule, that the losing party pays all costs, prevails with few exceptions. It has been held that where defendant's infringement was inadvertent, and he at once discontinued the same upon being notified, and plaintiff subsequently brought suit, that he was entitled to an injunction,

submission, you would be wrong in moving; therefore, if the plaintiff moves after notice and submission, he would not get his costs. . . . In the case of *Cooper v. Whittingham*, 15 Ch. Div. 501, it was held that the defendant must pay the costs of the action, because the importation of the spurious articles was an infringement of the plaintiffs' copyright, and an unlawful act, for the consequences of which the defendant must be held liable, notwithstanding that he determined not to sell the articles as soon as he recognized that their importation was an infringement. The fact that the act is wrong by statute is immaterial; it is sufficient if the act is wrong, whether it be so by statute or common law, or an infringement of equitable rights. As I have already said, here there had been a wrongful user prior to the commencement of the action, and the plaintiffs, therefore, were entitled to an injunction or undertaking. They are, therefore, also entitled to costs. Although as against the defendant the case may be a hard one, he must not on that account be excused from payment of costs. As the late master of the rolls said in *Cooper v. Whittingham*, he cannot be allowed to escape by saying, 'I never intended to do wrong,' and to use an observation of the same learned judge, as there is no fund out of which successful plaintiffs can receive costs, their costs must be paid by defendants, although they may be innocent." See also *Caruncho v. Highmoor*, 27 Sol. J. 199.

In *Cooper v. Whittingham*, 15 Ch. Div. 501, Jessel, M. R., said: "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion, and cannot take away the plaintiff's right to costs. . . . There is but one thing more. I have often remarked that there is an idea prevalent that a defendant can escape paying costs by saying, 'I never intended to do wrong.' That is no answer, for, as I have often

said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them." See also *Wheeler v. Johnston*, L. R., 3 Ir. 284; *In re Hyde*, 7 Ch. Div. 724; *In re Brandreth's Trade-Mark*, L. R., 9 Ch. 618; *In re Kuhn*, Cox's Man. of Trade-Mark Cases 637; *Moet v. Pickering*, 8 Ch. Div. 372; *Metzler v. Wood*, 8 Ch. Div. 606; *Rose v. Loftus*, 47 L. J. Ch. 576; *In re Kuhn*, 53 L. J. Ch. 238.

In *Twentsche Stoom Bleekery Goor v. Ellinger*, 26 W. R. 70, Malins, V. C., said: "There had been a clear and fraudulent infringement of the plaintiff's mark; there would be a perpetual injunction against the defendant. Considering his conduct since the writ was issued, he must pay all the costs of the action; although, had he not opposed the motion, and having regard to the fact that the plaintiffs had not given him proper notice before issuing the writ, the decision as to the costs might have been different."

In *Colburn v. Simms*, 2 Hare 560, Wigram, V. C., said: "If a plaintiff, immediately after the suit is commenced, is offered and may obtain all he seeks, and still thinks proper to go on with his suit, the court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted. I think that is the whole principle of the judgment in *Millington v. Fox*, 3 Myl. & C. 338. Lord Cottenham had not his attention called to the fact, that the expense of filing the bill had been incurred before the plaintiffs received the letter offering compensation, and he certainly forfeits his judgment by saying that the defendants in that case were innocent parties, having committed the wrong ignorantly, which cannot be said of Dr. Granville in this case; but I think I am justified by that authority in saying, that where a defendant offers to give all that a plaintiff is entitled to, and the plaintiff refuses the offer, and says, 'Because you have committed a fraud, I will exercise my power of hearing you with a chancery suit,' this court will refuse the plaintiff his subsequent costs." See

but without damages or costs. In some cases, where both plaintiff and defendant are in fault, costs will be divided.¹

9. *Appeal*.—Appeals in trade-mark cases in the state courts follow the same course as all other cases under the existing local practice. In the *United States* courts, the question of appeals is regulated by the act of March 3d, 1891, 26 U. S. Statutes at Large, p. 826, ch. 517. This act creates the circuit court of appeals and prescribes its jurisdiction. This jurisdiction, as applicable to trade-mark cases, is peculiar. Section 5 provides for appeals to the Supreme Court of the *United States* direct from the circuit courts, in some cases omitting the circuit court of appeals. Such a case is one in which the jurisdiction of the court is in issue. "This question would arise in a suit on a registered trade-mark where the infringer was not using the trade-mark in trade with a foreign nation." A second case would be one "in which the constitutionality of any law of the *United States* is drawn in question." Such a question would probably arise where the construction or constitutionality of a trade-mark statute was involved. Section 6 provides that the decision of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the difference of citizenship. In all trade-mark cases cognizable by the courts of the *United States*, except such as are based upon the registration statute, the jurisdiction will depend upon the fact that "the suit or controversy . . . is between aliens and citizens of the *United States*, or citizens of different states." In such a case, all the parties on one side must be citizens of a different state or states from all the parties on

cases cited in note to *Pemberton v. Topham*, 1 Beav. 316; *Holden v. Kynaston*, 2 Beav. 205. *Morison v. Salmon*, 2 Scott N. R. 449.

In *Millington v. Fox*, 3 Myl. & C. 338, Cottenham Lord Chancellor, said: "The question remains, what is to be done as to the costs? Now, the question of costs in chancery is left to the discretion of the court. That discretion ought to be exercised, as far as possible, according to some principle; and I am very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him. But then there is another object which the court must keep in view, namely, to repress unnecessary litigation. It strikes me, therefore, that this is exactly a case in which the court is repressing useless litigation by refusing the plaintiffs the costs of the cause. They

waive the account. They must have a perpetual injunction against the use of the marks in question, but without the costs of the cause." See also *Fradello v. Weller*, 2 R. & M. 247.

1. *Weed v. Peterson*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 178.

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601, Nixon, D. J., said: "As to the matter of costs, we find nothing in this case to take it out of the ordinary rule that a decree for an infringement and an injunction carries costs. The only reason suggested by the counsel for the defendant was that no demand was made before suit that the defendant should cease to use the label. We have never understood that in such cases a demand was necessary, nor that an infringer, who stoutly contests the suit to the end, should be relieved from the payment of the costs which have been incurred in consequence of his wrongdoing and his litigation."

Plaintiff used as a trade-mark for his whisky the words "Chesnut Grove," defendants inadvertently employed the

the other side.¹ In all such cases the decision of the circuit court of appeals will be final, unless a division is certified to the supreme court, or a writ of *certiorari* is granted by the supreme court to review the decision.

This section does not provide that cases arising under the trade-mark registration statute of the *United States* shall be finally decided by the circuit court of appeals, hence, under the last clause of this section, an appeal will lie in trade-mark cases arising under the registration statute from the circuit court of appeals to the Supreme Court of the *United States* without regard to the amount in controversy.

Section 7 provides for appeals from interlocutory orders or decrees, granting injunctions or continuing the same, provided the appeal is taken within thirty days of the entry of such order or decree. It has been held by the circuit courts of appeal that this section of the act means, all interlocutory orders or decrees passed on the merits of the final hearing, and not mere discretionary orders, such as preliminary injunctions *pendente lite*.²

same designation, but, upon being notified, discontinued its use. An action for an injunction was brought, and an injunction was granted, but without costs or damages. *Wharton v. Thurber*, Cox's Man. of Trade-Mark Cases 663.

In *McLean v. Fleming*, 96 U. S. 245, Clifford, J., said: "Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven, showing that the injunction was properly ordered, he is entitled to the costs in the circuit court; but the decree for an account and for the supposed gains and profits being erroneous, the respondent, as appellant, is entitled to costs in this court."

In *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y. Supreme Ct.) 297, Barrett, J., said: "There is, therefore, no just reason why the injunction, at least, should be refused upon the ground of laches. It was properly refused *pendente lite*. The plaintiff's case was not so clear as to warrant the interference of the court before the hearing upon the pleadings and proofs. As to the correctness of that interlocutory decision, there can scarcely be two opinions; that is, as to the result. Much of the reasoning upon the general merits of the case was unnecessary, and it certainly is not binding upon the special

term, sitting to try the issues, especially as the facts fairly deducible from the testimony now before the court differ in many respects from what appeared in the *ex parte* affidavits read upon the motion. There must, therefore, be judgment for the plaintiff, enjoining the defendants from the use of the word 'Amoskeag,' but without damages or account of profits, and, under all the circumstances of the case, without costs."

In *Fetridge v. Wells*, 4 Abb. Pr. (N. Y. Super. Ct.) 144, Duer, J., said: "Certainly the plaintiff, in the present case, has no better right, and hence the injunction that, if continued, would secure to him such a monopoly, must be dissolved. The motion for its dissolution is, however, granted without costs, since, although the plaintiff might be justly required to pay costs, the defendants have certainly no title to receive them. They represent Rice, whose conduct and proceedings have been just as blamable as those of the plaintiff—there is not a shade of difference between them."

1. *Blake v. McKim*, 103 U. S. 336.

2. In *Richmond v. Atwood*, 52 Fed. Rep. 10, Aldrich, D. J., said: "Upon reargument of the foregoing motion, the question is raised as to the right of this court to entertain an appeal at the stage of the proceeding reached in this cause; and, in the event that jurisdiction exists, the further question is presented, whether the mandate of this

court should direct a final disposition of the cause in the court below. After considering the briefs and rearguments, we find no reason for doubting the correctness of the conclusion stated in the former opinion as to the merits, and the motion for a rehearing and the petition for certification to the supreme court are denied, and we do not feel called upon to add anything to the reasons already stated upon this branch of the case. . . . Of course, in our endeavor to ascertain the meaning of this section of the statute, we must bear in mind that, prior to its enactment, an appeal from an interlocutory injunction order was unknown in the federal courts. Having in view, therefore, this rule of law and the plain language of the statute; considering also that the purpose of the law-maker, plainly expressed, was to give a right of appeal, not conferred by the general provisions of the statute as to appeals from final decision—it seems to us evident that it was intended to remove the restriction, and extend the right to all that class of interlocutory orders or decrees which interfere with the possession of property, or operate in restraint of a party's business. . . . It will be observed, from an examination of the cases in the Supreme Court of the *United States*, that a decree in patent cases, declaring the patent in question valid, and that it has been infringed, and for an injunction and an accounting, has uniformly been referred to as an interlocutory decree, and the cases are numerous, like *Barnard v. Gibson*, 7 How. (U. S.) 650; *Forgay v. Conrad*, 6 How. (U. S.) 201; *Humiston v. Stainthorp*, 2 Wall. (U. S.) 106; *Milwaukee, etc., R. Co. v. Soutter*, 2 Wall. (U. S.) 510, 521; *Beebe v. Russell*, 19 How. (U. S.) 283; *Keystone Manganese and Iron Co. v. Martin*, 132 U. S. 91, where, upon an appeal from a decree determining the general property right granting an injunction, and an order for an accounting before a master, it has been held that the decree was not final or appealable. It is true, that the cases in the supreme court are based upon a different statute, and in unmistakable language deny the right of appeal from interlocutory decrees. But they are for that reason none the less significant, as showing what has been understood as the line between interlocutory and final decrees. We must assume that Congress used the term 'interlocutory order or decree,' in this con-

nection in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts; and it follows that all injunction orders and decrees which were interlocutory, and not final, within the meaning of the old statute, and for that reason not appealable, are interlocutory under the new statute, and therefore, by the same logic and upon the same reasoning, are appealable. . . . It is quite probable—indeed, quite clear—that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate court interferes reluctantly with injunctions granted *in limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause."

In *Jones v. Munger Improved Cotton Mach. Mfg. Co.*, 50 Fed. Rep. 785, *Pardee, C. J.*, said: "An examination of the decree rendered by the court below shows that, while it adjudges the validity of the patent sued on and directs an injunction termed 'perpetual' against the defendants as infringers, it refers the matter to a master for taking an account. It is well settled that such a decree is not a final decree from which an appeal could be taken, or of which this court would have jurisdiction, under the sixth section of the judiciary act of 1891. *Keystone Manganese, etc., Co. v. Martin*, 132 U. S. 91, and cases there cited. We are, however, of the opinion that it is an interlocutory decree granting an injunction, from which an appeal would lie under the seventh section of the said judiciary act. . . . An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the judiciary act of 1891, is a new feature of the practice in the *United States* courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the lawmaker. The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of property, were, under the practice of the courts,

TRADER.—(See *BANKRUPTCY*, vol. 2, p. 85; *EXECUTIONS*, vol. 7, p. 135; *INDIANS*, vol. 10, p. 446; *INSOLVENCY*, vol. 11, p. 171; *LIVING*, vol. 13, p. 971; *MARRIED WOMEN*, vol. 14, p. 667; *MERCHANT*, vol. 15, p. 305.)

TRADE, RESTRAINT OF.—(See *ILLEGAL CONTRACTS*, vol. 3, p. 884.)

TRADE UNIONS.—(See also *ASSOCIATIONS*, vol. 1, p. 881; *BENEFICIAL OR BENEVOLENT ASSOCIATIONS*, vol. 2, p. 171; *BOYCOTT*, vol. 2, p. 512; *CORPORATIONS*, vol. 4, p. 184; *CRIMINAL CONSPIRACY*, vol. 4, p. 582; *SOCIETIES AND CLUBS*, vol. 22, p. 803; *STRIKES*, vol. 24, p. 123.)

I. Definition, 526.

II. Rules and Regulations, 526.

I. DEFINITION.—A trade or trades union is a combination or association of workmen of the same or of several allied trades, united for the purpose of securing the most favorable conditions as regards wages and hours of work, etc., and regulating generally the relation between employer and employé.¹ The legality of the methods pursued by such organizations is fully treated elsewhere.²

II. RULES AND REGULATIONS.—Wherever an association is recognized by law as legal, it may make such rules and regulations

frequently rendered long before the final hearing in the case, and operated, to a great extent, in the nature of execution before judgment. This mischief was as great in patent cases, where parties on hearings, preliminary to the final decree, were enjoined, pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunction. The case of *Richmond v. Atwood*, decided in the first circuit, and reported in 48 Fed. Rep. 910, was a case on all fours with the present one, and therein the court took and exercised jurisdiction, apparently without question. The suit was one for an infringement of letters patent wherein an appeal was taken from a decree sustaining the patent, holding the defendant to be an infringer, awarding an injunction, and ordering an account. This court, having jurisdiction of the appeal under the seventh section, and having jurisdiction under the sixth section, if a final decree had been rendered in the circuit court, it would seem to have been competent for the appellee to waive a formal final decree, and submit the cause to this court on the merits. Our conclusion in the mat-

ter is that in this case the circuit court of appeals was seized of jurisdiction under the seventh section of the act of 1891, and that, as the appellee submitted the case without objection, it is now too late to question the jurisdiction of the court, even if doubtful. . . . The order of the court is that the motion to vacate the proceedings in this cause, and to dismiss the appeal for want of jurisdiction, be denied; that our former decree, remanding the cause, with directions to dismiss the bill, with costs, be, and the same is, modified so as to direct the cause to be remanded to the circuit court, with instructions to dissolve and dismiss the injunction granted in said court; and that appellee pay the costs, and that the rehearing applied for be denied."

1. Cent. Dict.; Bouv. L. Dict.; Anderson's L. Dict. Associations of a like character, but with broader aims and more extensive power and influence, existed in mediæval times under the name of guilds. See Black's L. Dict., "Guild."

2. See *STRIKES*, vol. 24, p. 123. See also *Rex v. Batt*, 6 C. & P. 329; 25 E. C. L. 425; *McCandless v. O'Brien*, 21

concerning its internal government as may seem fit, with some restrictions; as, that they be consistent with the law of the land, reasonable, etc., and such rules are enforceable.¹ But any rule of an association, which can, by any means, be shown to be in

Pittsb. L. J. N. S. 435; *People v. Hughes*, 46 N. Y. St. Rep. 413.

1. See BY-LAWS, vol. 2, p. 705.

Equity Jurisdiction to Compel Admission of Member.—The court of chancery of *New Jersey* has no jurisdiction to compel the admission of a person not elected according to its rules and by-laws to membership in a trade union. *Mayer v. Journeymen Stonecutters' Assoc.*, 47 N. J. Eq. 519; 35 Am. & Eng. Corp. Cas. 356.

Expulsion of Members.—Where a member of a trades union has been expelled for a clear violation of the rules, in working for an employer who did not pay weekly, and employed non-union men, he may not be reinstated, whether a strike is declared or not. *Burns v. Bricklayers' Union*, 27 Abb. N. Cas. (N. Y.) 20.

In *Beesley v. Chicago Journeymen Plumbers', etc., Assoc.*, 44 Ill. App. 278, it was held that to secure membership in a trades union by feigning a qualification which does not exist, and to persist in retaining membership after disqualification, are offenses warranting expulsion.

A by-law of an incorporated association provided that "no expulsion, suspension or fine shall be made, except upon charges preferred, a copy of which shall be served upon the member so charged." A notice to stand and show cause before a meeting of the directors, why a member should not be expelled for a violation of this rule, is not a sufficient compliance with such by-law. *People v. Musical Mut., etc., Union*, 47 Hun (N. Y.) 273. In this case the plaintiff's claim for damages being based upon his loss of employment, on account of his expulsion from the trade union, and it being a rule of the union that no member should accept employment with an expelled member, it was held admissible for the defendant to show that a black list was kept in the office of the union. It was also competent on the part of the plaintiff to show the amount of his earnings prior to his expulsion, to what extent they had been diminished, and his inability to secure other employment, with a view to showing the injury he had sustained.

It is said that a distinction is gener-

ally recognized concerning the power of expulsion belonging to voluntary unincorporated associations, and those which are created by law. *Pitcher v. Board of Trade*, 121 Ill. 412.

Where members of a trade union were expelled for breach of rules in restraint of trade, and the union passed a resolution to wind up their affairs, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules, and an inquiry was directed to be made as to who were so entitled, it was held that, under the Trades Union Act of 1871, 34 & 35 Vict. ch. 31, the expelled members were properly excluded from any share. *Strick v. Swansea Tinplate Co.*, 36 Ch. Div. 558.

Miscellaneous—Action to Annul Fines.—In *Burns v. Bricklayers' Ben. Union*, 24 Abb. N. Cas. (N. Y.) 150, it was held that a party who has been fined for a violation of the rules of a trade union to which he belonged, cannot maintain an action to annul such fines, or for a restoration of his privileges, until he has exhausted all the remedies provided by the by-laws of the association. See SOCIETIES AND CLUBS, vol. 22, p. 803.

Label.—When a label had been adopted by the International Cigarmakers' Union, to be pasted on boxes containing cigars made by the members thereof, the court held that it was not a legal trade-mark, and the right to use it belonged equally to all members of the union, as long as they were members. *Weener v. Brayton*, 152 Mass. 101; *Cigarmakers' Protective Union v. Conhaim*, 40 Minn. 243; *Carson v. Ury*, 39 Fed. Rep. 777. See also TRADE-MARKS, vol. 26, p. 255.

In *State v. Hagen*, 6 Ind. App. 167, it was held that the *Indiana* statute (Acts of 1891, p. 31), providing for the registry of labels which are for the exclusive use of citizens of the state, and making the unauthorized use of such labels a crime, did not protect a label of the Cigarmakers' International Union, which was to be used throughout the union. A right of action to restrain an unauthorized use of such label cannot be maintained by the subordinate branches of the union, but the action,

restraint of trade, is illegal, and, therefore, cannot be enforced; ¹ and in *England*, by statute, it seems that no agreement between members as to the conditions under which they are to work, or as to the payment of subscriptions, or the application of the funds of the association, can be enforced by any court.² Where however, the general objects of a union are legal, the fact that some of its rules are irregular, as in restraint of trade, does not affect the legality of the society.³

TRAFFIC—(See also *INTERSTATE COMMERCE*, vol. 11, p. 544; *INTOXICATING LIQUORS*, vol. 11, p. 567).—See note 4.

TRAFFIC RATES.—(See *BILL OF LADING*, vol. 2, p. 223; *CARRIERS OF GOODS*, vol. 2, p. 770; *CARRIERS OF LIVESTOCK*, vol. 3, p. 1; *INTERSTATE COMMERCE*, vol. 11, p. 539; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1192; *RAILROADS*, vol. 19, p. 775; *SHIPS AND SHIPPING*, vol. 22, p. 710.)

TRAIN.—See note 5.

if any, must be brought by the parent association. *McVey v. Brendel*, 144 Pa. St. 235.

1. *Hornby v. Close*, L. R., 2 Q. B. 153; *Farrer v. Close*, L. R., 4 Q. B. 602.

Thus, a rule of a society, established for the protection of a particular trade, that no member should employ any traveler, carman, or outdoor employé who had left the service of another member without the consent in writing of his late employer, till after the expiration of two years, was held to be unreasonable, in restraint of trade, and void. *Mineral Water, etc., Soc. v. Booth*, 36 Ch. Div. 465.

But when the by-laws of an incorporated association of master workmen, subscribed by the defendant, provided that any member of the association found guilty by its committee of working for less prices than those fixed by the association, should forfeit to it twenty-five per cent. of the price fixed for the same work, the penalty to be collected in the name of the association by process of law, it was held that such a by-law or pledge was not unlawful as made in restraint of trade, and that the by-law being one which the association had the power to make, the association had also the power to attach to its violation a penalty, and an action might be maintained for its recovery. *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.) 1.

A corporation organized for the promotion of good fellowship among its members, and for the relief of those who are unfortunate in a profession, can-

not prohibit others from exercising such profession by their by-laws, and such by-laws, being repugnant to public policy and in restraint of trade, are void. *Thomas v. Mutual Protective Union*, 49 Hun (N. Y.) 171.

2. *Rigby v. Connol*, 14 Ch. Div. 482. But an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits for members, would not be a direct enforcement of the alleged agreement, and therefore the court might entertain the proceeding. *Wolfe v. Matthews*, 21 Ch. Div. 194.

3. *Swann v. Wilson*, 24 Q. B. Div. 252. In this case a member of a union was allowed to recover money payable to him under a rule which was not illegal, although other rules of the organization were void.

4. The word "traffic" has always had a well-understood meaning in a popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money. A trafficker is one who traffics; a trader, a merchant. *Senior v. Ratterman*, 44 Ohio St. 673. See also *Clifford v. State*, 29 Wis. 329.

5. An engine with tender, moving reversely, is a "train of cars," within a statute requiring that whenever any train of cars is moving reversely in any city, town, or village, the locomotive being in the rear, the company shall station on the last car of the train a person who shall warn those standing on or crossing the track of such railway of the approach of such train. *Hollinger*

TRAMP.—(See *HOMICIDE*, vol. 9, p. 553; *POOR AND POOR LAWS*, vol. 18, p. 766; *VAGRANCY*.)

TRANSACTION.—(See also *COUNTER CLAIM*, vol. 4, p. 331; *SET-OFF*, vol. 22, p. 392; *WITNESSES*).—A negotiation or dealing.¹

TRANSCRIPT.—(See also *APPEAL*, vol. 1, p. 616; *AUTHENTICATION*, vol. 1, p. 1020; *DOCKET*, vol. 5, p. 849; *EXEMPLIFICATION*, vol. 7, p. 479; *GARNISHMENT*, vol. 8, p. 1096; *INDICTMENT*, vol. 10, p. 450; *JUDGMENTS*, vol. 12, p. 58; *MEMORANDUM*, vol. 15, p. 262; *NEW TRIAL*, vol. 16, p. 501; *RECORD*, vol. 20, p. 473.)

TRANSFER.—The act by which the owner of a thing delivers it to another person, with intent of passing the right he has in it to the latter.²

TRANSFER COMPANIES.—(See also *CARRIERS OF PASSENGERS*, vol. 2, p. 738; *CARRIERS OF GOODS*, vol. 2, p. 770; *EXPRESS COMPANIES*, vol. 7, p. 539; *FORWARDING MERCHANTS*, vol. 8, p. 573).—The term is applied usually to companies transferring baggage to and from the various railroad depots within a city;³ but it is also used in reference to railroad companies which make it

v. Canadian Pac. R. Co., 21 Ont. 705. In this case it was said that a car is a wheeled vehicle or conveyance, including carriages, chariots, carts, wagons, trucks, etc., and a locomotive is a car carrying the motive power, and a tender is a car carrying the water and fuel for the locomotive, and shackled together they form a train of cars; a train signifying that which is drawn along. If a locomotive and tender cannot be called a train of cars, neither can a locomotive and tender with one box platform or passenger car attached be called a train of cars. See *Cox v. Great Western R. Co.*, 9 Q. B. Div. 106; see also *Casey v. Canadian Pac. R. Co.*, 15 Ont. 574.

1. *Brewin v. Short*, 5 El. & Bl. 226; 85 E. C. L. 226; *Bowman v. Malcolm*, 11 M. & W. 883.

2. *Ex p. Thomason*, 16 Neb. 238; *Robertson v. Wilcox*, 36 Conn. 426.

In *Inerarity v. Mims*, 1 Ala. 669, it is said that, "The term transfer means to convey or pass over the right of one person to another, unless the general meaning is restrained or limited by something accompanying it."

The foreclosure of a mortgage of real estate, the title becoming absolute in the mortgagee by the failure to redeem, constitutes a transfer of the property, within the meaning of the statute providing that real estate of any taxpayer shall be liable for all his taxes

for one year, and afterwards until the transfer thereof. *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243.

Authority to Transfer Does not Authorize Sale.—A general authority in a stock note to use, transfer, or hypothecate the security, does not authorize a sale by the pledgee before maturity of the note. *Ogden v. Lathrop*, 1 Sweeney (N. Y.) 643.

3. **Baggage Transfers.**—A city express company, engaged in carrying parcels between the cities of New York and Brooklyn, and in carrying trunks of travelers to and from the passenger depots of the various railroads, are common carriers, and are responsible as such. *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Da Ponte v. New Orleans Transfer Co.*, 42 La. Ann. 696; *Verner v. Sweitzer*, 32 Pa. St. 208.

In *Aikin v. Westcott*, 123 N. Y. 363, where the baggage of the plaintiff was lost after the delivery of the checks therefor to the agent of the defendant company, the company was not held liable, as the evidence failed to show the delivery of the trunk to them.

A transfer company at the end of the route, which does not receive goods from the preceding carrier under and by virtue of the original contract for through transportation, is not a connecting carrier, but occupies the position of common carrier; and if the bailor's possession was wrongful, the

a business to transfer the cars of one company to the tracks of another, or to elevators, manufactories, etc.;¹ in either case such companies occupy the position of common carriers. Like other carriers of goods, they may limit their liability by special contract.²

transfer company cannot be held liable to the person injured. *Nanson v. Jacobs*, 12 Mo. App. 127.

Municipal Regulation.—In *Reg. v. Verral*, 18 Ont. Rep. 117, it was held that it was no breach of an ordinance prohibiting transfer companies, or their agents, from soliciting passengers or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the city," for an agent to board an arriving passenger train at one of the outlying stations and go through the train calling out, "Baggage transferred to all parts of the city."

1. **Transfer of Cars.**—*Peoria, etc., R. Co. v. Chicago, etc., R. Co.* 109 Ill. 135; 18 Am. & Eng. R. Cas. 506; 50 Am. Dec. 605. See *CARRIERS OF GOODS*, vol. 2, p. 871. But where such a company, having a line of road connecting with the tracks of various other roads, had received loaded cars from another railway company, to be delivered upon the track of a certain manufacturing company, and to be returned after they had been unloaded by the latter, and the cars were burned before being unloaded and re-delivered, it was held that the transfer or connecting line was not liable for the loss of the cars, or for the failure to return them. *East St. Louis Connecting R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594; 32 Am. & Eng. R. Cas. 522, *reversing* 24 Ill. App. 279. In this case the court, by *Mulkey, J.*, said: "When the cars, with their contents, were shoved off the turntable on to the private track of the glucose company, in conformity with their previous course of business, they had reached their destination, and, that consequently the defendant's liability as an insurer of them ceased. Had the glucose company unloaded and returned them, as it was accustomed to do, the defendant's liability as a common carrier would have commenced anew, and continued until they were delivered to the appellee."

Where a corporation voluntarily agrees to switch over its tracks the cars of different railroads, being under no obligation to do so, and only collects a specified switching charge, but

charges no traffic rates on the freight transferred, it is not a common carrier within the provisions of the interstate commerce law. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, *reversing* 2 I. C. C. R. 162; 34 Am. & Eng. R. Cas. 630.

2. In *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64, where a passenger delivered to the agent of a transfer company a check which he had received for his trunk, so that the carrier might obtain and deliver the same at his residence, and received from the agent at the time a paper as a receipt, which contained a printed notice that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding \$100 upon any article, unless specially agreed for in writing on the check receipt, and the extra risk paid therefor," and that the owner thereby agreed that the carrier should be liable only as above, the passenger was held to be charged with actual notice, and the liability of the carrier limited as stated. The words "any article," in the condition, were held not to mean a trunk or piece of baggage and its contents gross, but any article contained in the piece of baggage.

But in *Prentice v. Decker*, 49 Barb. (N. Y.) 30, it was held that the putting into the hands of a passenger a card containing a clause limiting the liability of the transfer company to a specified amount, except by special agreement to be noted on the card, will not, without further proof from which the assent of such passenger to the terms may be implied, establish a contract. In delivering the opinion of the court, *Gilbert, J.*, said: "These principles must be deemed settled; viz., that common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring through the negligence of their agents or servants, or wholly exempt themselves from such liability, and that the acceptance by the bailor from the bailee, in the ordinary course of the business, of a receipt for the goods containing such a stipulation, creates a

TRANSPORT; TRANSPORTATION—(See also **CARRIERS OF GOODS**, vol. 2, p. 783; **CARRIERS OF LIVESTOCK**, vol. 3, p. 1; **INTERSTATE COMMERCE**, vol. 11, p. 560).—See note 1.

TRAVAIL—(See also **BASTARDY**, vol. 2, p. 129; **CONCEPTION**, vol. 3, p. 420; **JUSTICE OF THE PEACE**, vol. 12, p. 423).—The period of pain and danger attending childbirth, before delivery.²

TRAVEL; TRAVELER; TRAVELING.—(See **COMMERCIAL TRAVELER OR DRUMMER**, vol. 3, 315; **CONCEALED WEAPONS**, vol. 3, p. 411; **CONVEYANCE**, vol. 4, p. 138; **DOMICILE**, vol. 5, p. 857; **GUEST**, vol. 9, p. 159; **HIGHWAY**, vol. 9, pp. 400, 401; **INNS AND INNKEEPERS**, vol. 11, pp. 15, 17; **LODGER**, vol. 13, p. 1001; **SUNDAY**, vol. 24, p. 528.)

TRAVELED PLACE—(See also **CROSSINGS**, vol. 4, p. 906).—See note 3.

binding contract; but it is equally clear that the liability of the carrier will continue as established by the common law in respect to all matters not expressly stipulated against." See also *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97. The law stated here as to the power of common carriers to limit their liability for loss occurring through the negligence of their servants, although sustained by the *New York* courts, is contrary to the great weight of authorities. See **CARRIERS OF GOODS**, vol. 2, p. 818.

1. In *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119, it was held that the driving of living fat oxen, etc., on foot was not a transportation thereof within the true intent and meaning of a statute prohibiting the transportation of articles of provision, etc., from the *United States* to *Canada*.

Goods awaiting "transportation," not equivalent to goods awaiting "delivery." *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 319.

The towing of a vessel out to sea by a steamer constitutes transportation of property. *White v. Steam Tug Mary Ann*, 6 Cal. 462.

Transportation Company.—In *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307, it was held that a corporation engaged in the removal of petroleum from place to place by means of pipes, was within the meaning of an act imposing a tax on transportation companies. The court said: "It is contended that this moving of petroleum by means of pipes is not transporting, and, therefore, that this is not a transportation company. The defendant's counsel contend that to transport is to carry, and that this trans-

port company does not carry, but the petroleum flows. We consider this too narrow a construction. If we look into the dictionary for the meaning of the word 'transport,' Webster defines it 'to carry or convey from one place to another.' Again, 'to remove from one place to another,' and throughout all the derivations of the word 'transport' we find in some part of the definition 'to remove.'"

2. *Dennett v. Kneeland*, 6 Me. 460; *Bacon v. Harrington*, 5 Pick. (Mass.) 63; *Drowne v. Stimpson*, 2 Mass. 441.

3. In *Massachusetts*, it is held that an open and traveled street in a city, though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, is a traveled place within the meaning of the statute providing that a railroad corporation shall maintain a signboard and other precautions at railroad crossings over highways and townways. *Whittaker v. Boston, etc., R. Co.*, 7 Gray (Mass.) 98.

But in *New York*, it is held that until a highway which crosses a railroad track has been actually open, or notice of the laying out has been served upon an officer of the corporation, the duty imposed by the general railroad act of giving notice of an approaching train does not attach. *Cordell v. New York, etc., R. Co.*, 64 N. Y. 535.

The road or street must be traveled as well as public. *Byrne v. New York, etc., R. Co.*, 94 N. Y. 12, reversing 28 Hun (N. Y.) 438. And so in *South Carolina*, under such a statute it was held that a traveled place meant a

TRAVERSE—(See also PLEADING, vol. 18, 521).—In pleading, a denial by one side of matters of fact alleged by the other.¹

TREASON.—(See also ALLEGIANCE, vol. 1, p. 490; INSURRECTION, vol. 11, p. 356.)

I. Definition, 532.

II. Essentials ; Prosecution, 533.

III. Penalties, 537.

I. DEFINITION.—The word imports a betraying, treachery, or breach of allegiance. It is the crime of a subject or citizen who attempts to injure the sovereign or overthrow the government.²

"Treason against the *United States* shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."³

place where people had the legal right to cross, and not such a crossing as was not a public one and not recognized as such, although people were accustomed to use it. *Barber v. Richmond*, etc., R. Co., 34 S. Car. 444.

1. *Hall v. Eve*, 4 Ch. Div. 341.

A denial is either by

Common Traverse, a denial in the direct terms of the allegation ; or by

General Traverse, a denial in terms preceded by a general inducement ; or by

Special Traverse, or traverse with an *absque hoc*, a denial commencing with these last words and following the terms of the allegation.

Traverse of Indictment.—Any denial of an allegation in an indictment. 4 Bl. Com. 351; *Stephens on Pl.*, p. 167 *et seq.*

Traverse of Office.—A proceeding whereby the truth and validity of inquests of office were contested or denied.

2. *Bouv. L. Dict.*; *Stormonth's Dict.*

In *England*, there was high treason and petit treason. The distinction is unknown in the *United States*, treason meaning high treason. Petit treason, under Stat. 25, Edward III., was the killing by a wife of a husband, or by a servant of his master, or of a prelate by an ecclesiastic owing obedience to him ; but these kinds of treason were abolished in 1828.

3. U. S. Const., art. 3, § 3.

"Every person owing allegiance to the *United States* who levies war against them, or adheres to their enemies, giving them aid and comfort within the *United States* or elsewhere, is guilty of treason." U. S. Rev. Stat., § 5331.

The constitutional definition cannot

be restricted or extended by Congress. *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; *U. S. v. Hanway*, 2 Wall. Jr. (U. S.) 139.

Misprision of Treason.—Every person owing allegiance to the *United States*, and having knowledge of the commission of any treason against them, who conceals, and does not, as soon as may be, disclose and make known the same to the president or to some judge of the *United States*, or to the governor, or to some judge or justice of a particular state, is guilty of misprision of treason, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars. U. S. Rev. Stat., § 5333.

Treason Against the State.—The constitutions of most of the states contain a similar provision as to treason against the state. Under the *Georgia Code* (1882), § 4314, concealment of treason without assent or participation is treason in the second degree.

See, as to treason against a state, *People v. Lynch*, 11 Johns. (N. Y.) 549; *Charge to Grand Jury*, 1 Story (U. S.) 614.

Homestead Treason Cases ; Organized Strikers.—In the *Homestead Case*, 1 Dist. Rep. (Pa.) 785, *Paxson, C. J.*, in charging the jury, laid down the following points: When a large number of men arm and organize themselves by divisions and companies, appoint officers, and engage in a common purpose to defy the law and resist its officers, and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the constitution and the laws, it is a levying of war against the state, and the offense is treason. Much more so when the functions of the state

II. ESSENTIALS; PROSECUTION.—It has been said that infancy constitutes no defense to a prosecution for the crime of treason;¹ nor coverture.²

In the prosecution, the general rules of procedure govern. The indictment must set forth the place and manner of the overt act.³ Allegations of time need not be proven strictly.⁴

The burden of proving treasonable intent is on the prosecutor.⁵

Under the federal constitution, "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."⁶

Under the federal statute, the indictment must be found within three years.⁷

"If a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."⁸

government are usurped in a particular locality, the process of the commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men, who have assumed the functions of government in that locality. It is a state of war when a business plant has to be surrounded by the army of the state for weeks to protect it from unlawful violence at the hands of men formerly employed in it. Where a body of men have organized for a treasonable purpose, every step taken is an overt act of treason in levying war.

Procuring Provisions for Enemy.—In *U. S. v. Pryor*, 3 Wash. (U. S.) 234, it was held that going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason, as this conduct rested in intention, which is not punishable by our laws.

Private Objects.—A resistance of the execution of a law of the *United States*, accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offense, the object of the resistance must be of a public and general character. *U. S. v. Hoxie*, 1 Paine (U. S.) 265.

1. See *Den v. Banta*, 1 N. J. L. 266.

2. 4 Bl. Com. 29.

3. *In re Burr*, 4 Cranch (U. S.) 469.

A charge that the accused sent intelligence to the enemy, need not set forth the contents of the missive. *Respublica v. Carlisle*, 1 Dall. (U. S.) 35.

Compare U. S. v. Mitchell, 2 Dall. (U. S.) 357.

4. *U. S. v. Vigol*, 2 Dall. (U. S.) 346.

5. The accused is not bound to show what was the object or meaning of the acts done. *Reg. v. Frost*, 9 C. & P. 129. As to proof of knowledge of a treasonable armament, etc., see *U. S. v. Guinet*, 2 Dall. (U. S.) 329.

In a treasonable conspiracy, the overt act of one is that of all; a common design must precede proof of individual acts. *Reg. v. Brittain*, 3 Cox C. C. 77. As to requisites of allegation and proof, in cases under the Treason-Felony Act (11, 12 Vict., ch. 12), see *Reg. v. Davitt*, 11 Cox C. C. 676.

6. U. S. Const., art. 3, § 3.

The constitutional requisite of two witnesses, etc., does not apply to the preliminary examination by magistrate or grand jury. *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 138.

7. U. S. Rev. Stat., § 1043.

8. Marshall, C. J., in *Ex p. Bollman*, 4 Cranch (U. S.) 126. In the *United States*, the early leading cases upon the essentials of the crime, the allegation, proof, etc., came up in connection with an alleged scheme of ex-Vice President Burr to concentrate an armed force at New Orleans, and establish a southwestern confederacy. He was indicted in 1807, on a charge of assembling at Blennerhasset's Island in *Virginia*, a number of armed men, compassing against the *United States*, to descend the Ohio and Mississippi, and traitorously take possession of New

A mere conspiracy to overthrow the government, however atrocious, does not of itself amount to treason.¹

Orleans; "did ordain, prepare and levy war against the said *United States*." (1 Burr's Trial, p. 432.) Aside from this indictment for treason, he was charged with the misdemeanor prohibited by the act of 1794, in preparing a military expedition against *Spain*, a foreign state with whom the *United States* was at peace. He was taken from *Mississippi Territory* to Richmond by military escort under command of General Wilkinson, to whom two alleged accomplices, Bollman and Swartwout, had made confessions (p. 9). On the trial, these, as also certain declarations of another alleged accomplice, Blennerhassett, were offered in evidence, but excluded; the court, by Marshall, C. J., declaring that "Declarations of third persons, not forming a part of the transaction and not made in the presence of the accused, cannot be received in evidence." Nor could "acts of accomplices, except so far as they prove the character and object of the expedition." Nor could "acts of the accused in a different district, which constitute in themselves substantive causes for a prosecution, unless they go directly to prove the charges laid in the indictment." The jury found Burr not guilty. He was then ordered to be committed to *Ohio*, to answer to the charge of setting on foot a military expedition against a foreign prince, etc. 2 Burr's Trial (Robertson's ed.) 539. Upon Burr's trial, Marshall, C. J., said: "It is reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in *England*, and in this country, to have been used in the statute of the 25th of Edward III., from which it was borrowed." Burr's Trial (Coombs' ed.) 308. Bollman and Swartwout were also arrested, but discharged on *habeas corpus* to the marshal of the *District of Columbia*. On the hearing, the court, by Marshall, C. J., quoted with approval the affirmation of Chase, J., in Fries' Trial, that "A combination or conspiracy to levy war against the *United States* is not treason, unless combined with an attempt to carry such conspiracy into execution; some actual force or violence must be used in pursuance of

such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object." A deposition of Gen. Eaton, as to conversation with Burr upon a projected expedition against *Mexico*, was offered; also an affidavit of Gen. Wilkinson setting forth a letter from Burr to meet him at Natchez, and a statement of Swartwout that Burr, with support of a powerful association extending from New York to New Orleans, was levying an armed body of 7,000 men for such expedition. The court construed the word "levying" to import a mere enlisting, hence not to be within the statute; but was divided as to admissibility of the contents of Burr's letter. *Ex p. Bollman*, 4 Cranch (U. S.) 135. For copies of the documents offered in evidence against Bollman and Swartwout, see Appendix, 4 Cranch (U. S.) 455. See Fries' Second Trial, Wharton, State Trials of U. S. 610.

1. Leading *dicta* hereon, and on the distinction between treason against a state and against the *United States*, are those of the court, by Story, J., in a charge to the Grand Jury, U. S. C. Ct. R. I., 1842; 1 Story (U. S.) 615, at the time of Dorr's rebellion: "A conspiracy to levy war, and an actual levy of war, are distinct offenses. To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner, if they are armed and march in a military form, for the express purpose of overawing or intimidating the public, and thus they intend to carry into effect the treasonable design, that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place. . . . In respect to the treasonable design, it is not necessary that it should be a direct and positive intention entirely to subvert or overthrow the government.

What constitutes "force," and what the relation of the overt act to the time of the formation of the design, are immaterial, or dependent on the circumstances of the case.¹

A union of men in arms to commit acts of violence, for the purpose of preventing execution of a law of Congress and suppressing a public office created by it, by compelling resignation of the officer, is treason.² The act of treason may be complete, though the prepared aid and comfort fail to reach the enemy.³

It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Thus, if there is an assembly of persons with force, with intent to prevent the collection of the lawful taxes or duties levied by the government, or to destroy all custom-houses, or to resist the administration of justice in the courts of the *United States*, and they proceed to execute their purpose by force, there can be no doubt, that it would be treason against the *United States*. . . . If the object of an assembly of persons, met with force, is to overturn the government or constitution of a state, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that state with the national government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treasonable purpose is treason against the state only. But treason may be begun against a state, and may be mixed up or merged in treason against the *United States*. Thus, if the treasonable purpose be to overthrow the government of the state, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the state, that would be treason against the *United States*. So, if the troops of the *United States* should be called out by the President, in pursuance of the duty enjoined by the constitution, upon the application of the state legislature, or the state executive, when the legislature cannot be convened, to protect the state against domestic violence, and there should be an assembly of persons with force to resist and oppose the troops so called out by the President,

that would be a levy of war against the *United States*, although the primary intention of the insurgents may have been only the overthrow of the state government or the state laws." To the same effect are *dicta* of the court, by Sprague, J., in a charge to the grand jury, U. S. Dist. Ct. Mass. 1861; 23 Law Rep. 707, at the time of the secession outbreak: "If a convention, legislature, junto, or other assemblage, entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances, or decrees, even with a view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war." See also Judge Smalley's Charge to the Grand Jury, U. S. C. Ct. N. Y. 1861; 4 Blatchf. (U. S.) 518.

1. "The treasonable conspiracy may be formed before the individuals assemble to act, and they may come together to act pursuant to it; or it may be formed when they have assembled, and immediately before they act. The time is not essential. All that is necessary is, that being assembled, they should act in forcible opposition to a law of the *United States*, pursuant to a common design to prevent the execution of that law, in any case within their reach. Actual force must be used. But what amounts to the use of force, depends much upon the nature of the enterprise, and the circumstances of the case. It is not necessary that there should be any military array or weapons, nor that any personal injury should be inflicted on the officers of the law. . . . The presence of numbers who manifest an intent to use force, if found requisite to obtain their demands, may compel submission . . . and effectually prevent execution of the law." Charge to the Grand Jury, U. S. C. Ct. Mass. 1851; 2 Curt. (U. S.) 632.

2. So held as to the insurrection against the act of 1791, imposing a duty on distilled spirits. Wharton St. Tr. 102.

3. In 1862, Confederate President

Treason against the *United States* Government, does not necessarily import treason against any one state in its political capacity.¹

The essence of the crime is unaffected by the government's recognition of the traitors as belligerents.²

Davis gave to Harpending, a Kentuckian, a letter of marque to burn, bond, or take into Confederate ports all vessels sailing under the flag of the *United States*. Greathouse, another Kentuckian, purchased arms and ammunition, which were placed on the schooner Chapman (also purchased by him), in twenty-nine cases marked "machinery," "oil-mill," etc., together with 4,000 feet of lumber for berths, prison deck, etc. Law, who was leagued in the scheme, engaged Libby to go as mate, with full knowledge that the design was to sail from San Francisco to *Guadeloupe Island* and there mount the guns, then capture a downward bound steamer with treasure, then to seize vessels recovering treasure from the wreck of the steamer *Golden Gate*, near *Manzanillo*, and then to burn *United States* vessels at the *Chincha Islands*. When they had partially hoisted the mainsail, the schooner was boarded by government officers from the *United States* war-sloop, *Cyane*, and all seized. On indictment for treason, Law and Libby became witnesses for the prosecution; the others were convicted and sentenced, but finally released on oath and bond under the general amnesty proclamation. On the trial of the case, *U. S. v. Greathouse*, 2 Abb. (U. S.) 364, 379, the court, by Field, J., charged the jury that if Harpending received the letter with intention to use it, then was the conspiracy between him and the chiefs of the rebellion complete, to commit hostilities against the *United States* on the high seas; that the purchase of guns, etc., and employment of men to manage the vessel, if done in furtherance of the common design, were overt acts of treason. "Together these acts complete the essential charge of the indictment. In doing them, the defendants were performing a part in aid of the great rebellion. They were giving it aid and comfort. It is not essential that the enterprise commenced should be successful, and actually render assistance." Thereupon, Foster on Crown Law was quoted: "The bare sending of money or provisions, or sending intelligence to rebels or enemies, which, in most cases, is the most

effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted."

Where one who had been captured by the British in 1813, simply went ashore peaceably to procure provisions for the enemy, it was held not to amount to treason. *U. S. v. Pryor*, 3 Wash. (U. S.) 234.

The seizure, at Charleston, in 1861, of the custom-house, post office, forts, arsenals, vessels and other property of the *United States*, the firing upon vessels bearing the *United States* flag and carrying *United States* troops—either of these acts was treason by levying war. Judge Smalley's Charge to the Grand Jury, 23 Law Rep. 597, 599.

1. In 1814, Lynch and two other citizens of *New York* were indicted for giving aid and comfort to *Great Britain*, then at war with the *United States*, in furnishing provisions on board the *Bulwark*, a British man-of-war, thereby committing treason against the people of the State of *New York*, contrary to the *New York* statute, etc. On motion for his discharge, made upon *certiorari* to the *New York* supreme court (whereof Kent was then C. J.), it was declared, "*per curiam*:" "*Great Britain* cannot be said to be at war with the State of *New York*, in its aggregate and political capacity, as an independent government, and therefore not an enemy of the state, within the meaning of the statute. The people of this state, as citizens of the *United States*, are at war with *Great Britain*, in consequence of the declaration of war by Congress. The state, in its political capacity, is not at war. . . . In our statute, as revised, the words 'or of the *United States*' are omitted." The defendants were discharged, but were remanded until a judge of the *United States* Supreme Court should be informed, etc. *People v. Lynch*, 11 Johns. (N. Y.) 554. Compare *Ex p. Quarrier*, 2 W. Va. 569.

Treason against the *United States* is not cognizable in the state courts. *People v. Lynch*, 11 Johns. (N. Y.) 549.

2. In *Hammond v. State*, 3 Coldw. (Tenn.) 129, the court, by Milligan, J.,

Aiding an enemy's ally, is giving aid and comfort to the enemy.¹ Aliens, while domiciled in the *United States*, owe allegiance, and are subject to prosecution for giving aid and comfort to a rebellion against the government.²

III. PENALTIES.—The penalty for treason is defined by the federal and state statutes.³

TREASURE TROVE—(See also DERELICTION, vol. 5, p. 640; ESTRAYS, vol. 7, p. 34; FINDER OF PROPERTY, vol. 7, p. 977; MINES AND MINING CLAIMS, vol. 15, p. 499; WRECKS).—This name is given to such money or coin, gold, silver plate, or bullion which, having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident.⁴ If the owner is known, the property is not technically treasure trove, and belongs to the owner or his representatives.⁵

said: "The fact that the rebels, pending the war, were recognized as belligerents, by no means concedes to them the right of sovereignty, either absolute or *de facto*; and, after the war terminated, they may be arraigned and tried under the municipal authority for treason, or pardoned and forgiven by the sovereign power."

1. In *Vaughan's Case*, 2 Salk. 634, the court, by Holt, C. J., said: "If an Englishman assist the French, being at war with us, and fight against the king of *Spain*, who is an ally of the king of *England*, this is treason as adhering to the king's enemies against the king; for the king's enemies are hereby strengthened and encouraged."

2. Hereupon, in *Carlisle v. U. S.*, 16 Wall. (U. S.) 147, a cotton-claim case under the captured property act, brought by British subjects who in *Alabama* had sold nitre in aid of the slaveholders' rebellion, the court, by Field, J., quoted *Wildman Inst. Int. Law*, p. 40; *Thrasher's Case*, 6 Webster's Works, p. 526; also 1 Hale Pl. Crown 10; 1 East Crown Law, ch. 2, § 4; *Foster High Treason*, p. 185, § 2; but omitted to cite or to distinguish *U. S. v. Villato*, 2 Dall. (U. S.) 370, a decision apparently conflicting therewith. Compare *Homestead Treason Cases*, 1 Pa. Dist. Rep. 785.

Delivering up prisoners and deserters to the enemy, is adhering to them, giving them aid and comfort, and is treason against the *United States*. Nothing will excuse the act but a well-grounded fear of life. When the act amounts to treason, it involves the in-

tention. *U. S. v. Hodges*, 2 Wheel. Cr. Cas. (N. Y.) 477.

3. See *U. S. Rev. Stat.*, §§ 5332-5336. Under the state statutes the severity of the punishment varies. In some states it is death; in some, imprisonment for life; in others, imprisonment for a term of years. See the statutes of the various states.

4. *Bouv. L. Dict.*

"Treasure trove is properly supposed to have been hidden by some owner since deceased—the secret of the deposit having perished, therefore, it belongs to the crown." *Reg. v. Thurborn*, 1 Den. C. C. 396.

"Treasure trove, though commonly defined as gold and silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially where they are found hidden with both of these precious metals." *Huthmacher v. Harris*, 38 Pa. St. 499; 80 Am. Dec. 502.

5. In *Livermore v. White*, 74 Me. 456; 43 Am. Rep. 600, it is said: "Nor can this be deemed treasure trove, which is thus defined in Jacob's dictionary. It is 'where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs.' Nothing is treasure trove but gold or silver. 'It is not treasure trove if the owner can be known. Nor though the owner be dead; for his executor or administrator shall have it.' Com. Dig., art. 'Waif,' G. All elements constituting treasure trove are wanting. Here was no hiding. Here was no secrecy. The

Under the English law, treasure trove belongs to the crown.¹

In the *United States*, it would seem that the law relating to treasure trove has been merged into the law of the finder of lost property. The term is not often used and has perhaps no technical legal meaning in this country. The finder of the thing upon the land is, if the owner be unknown, its lawful custodian, and, if he cannot be found, becomes its owner.²

Viewing the doctrine of treasure trove in this light, its importance is not considered such as to justify an elaboration of the elements constituting it and of the rights and liabilities regarding it. A summary of these, however, will be found in the notes.³

owner was known. The deposit was not for concealment, but in the usual and ordinary mode of business."

1. 22 Vin. Abr. 413 (2d ed.), § 5; 1 Bl. Com. 296; 7 Com. Dig. (1st Am. ed.) 649; *Maguire v. Longford*, 14 Ir. L. T. 103; *Reg. v. Toole*, 16 W. R. 439; *Reg. v. Thomas*, 33 L. J. M. C. 22.

2. Cent. Dict., tit "Treasure Trove;" 2 Kent's Com. *357; *Sovern v. Yoran*, 16 Oregon 269. And see, generally, *FINDER OF PROPERTY*, vol. 7, p. 977.

In *Pennsylvania*, from an expression in the opinion of *Warren v. Ulrich*, 130 Pa. St. 414, it seems safe to assume that the State of *Pennsylvania* does not claim treasure trove. A roll of money was found by an employé of defendant in an old cesspool on the premises of the plaintiff's intestate. The ownership of the money was proved. In delivering the opinion the court said: "Had it (the money) been found while he remained upon the property, the case would have been much clearer; but it was not found till after his death and after the premises had been occupied by other tenants for some years. Neither of them claimed it, however, and in view of Warren's aversion to banks and known way of hiding and secreting his money, we were not surprised that the jury found him to have been the owner of it. It is true the finder of money has title to it against all the world, except the true owner. Yet we cannot say there was not evidence of Warren's title to submit to the jury, and their verdict is in accordance with the probabilities of the case." The circumstances in this case would have been sufficient to make the law of treasure trove applicable had the owner been unknown, and if the common law applied, the above proposition would have been out of place; so that it is not violence to presume that the rules gov-

erning lost property apply likewise to treasure trove, and that the above statement was made for that reason, unless the court overlooked the fact that the case was not one of lost property.

In *Maine*, the case of *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600, likewise suggests that the English rule does not apply in that state. Some hides which were found in an old vat in a tannery were properly held not to constitute treasure trove, not being gold or silver. If the defendant could claim the hides as treasure trove, it must have been under the civil-law rule, for as against the sovereign the finder of treasure trove had no rights at common law. The court, by Appleton, C. J., in its disposition of the question, rejects the treasure-trove theory because "there was neither gold nor silver hidden, and no hiding." If the state had any right to treasure trove, the defendant's claim would have been fruitless on this ground, and the court would have unquestionably so expressed itself.

Louisiana.—As to the doctrine in *Louisiana*, see *Civil Code of Louisiana*, arts. 553, 3423.

There seem to be no American cases in which the question whether the law of treasure trove obtains in any state of the Union has been decided. The doctrine of the text rests rather upon inference than upon authority, and there are not wanting *dicta* of judges and opinions of text-writers to the effect that the law of treasure trove remains in the *United States* practically the same as in *England*. See 2 Schouler's *Pers. Prop.* (2d ed.) 10; *McLaughlin v. Waite*, 5 Wend. (N. Y.) 404; 21 Am. Dec. 232; *Eads v. Brazelton*, 22 Ark. 501; 79 Am. Dec. 88.

3. *Elements Constituting Treasure Trove*.—First. *Concealment of a Chattel of Value*.—The concealment must

TREASURY.—See note 1.

TREATIES.—(See also **ALIEN**, vol. 1, p. 465; **CONSULS AND AMBASSADORS**, vol. 3, p. 764; **EXTRADITION**, vol. 7, pp. 599, 616; **INDIANS**, vol. 10, p. 444; **INTERNATIONAL LAW**, vol. 11, p. 445.)

- I. Definition, 540.
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be in such a place and under such circumstances as to raise the natural presumption that some person deposited the treasure there, to insure for himself its safe-keeping and not to abandon possession of it. *McLaughlin v. Waite*, 5 Wend. (N. Y.) 404; 21 Am. Dec. 232; 7 Com. Dig. 649; 20 Vin. Abr. (2d ed.), § 9, p. 414. The thing concealed must be of intrinsic value; as money, gold, silver plate, bullion, and the like. 22 Vin. Abr. (2d ed.), § 1, p. 413; *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600; *Sovern v. Yoran*, 16 Oregon 269; *Reg. v. Toole*, 16 W. R. 439; *Reg. v. Thomas*, 33 L. J. M. C. 22; *Maguire v. Longford*, 14 Ir. L. T. 103.

Second. *Discovery*.—The discovery of the hidden treasure, it seems, must be by accident, and not the result of a search. See *Sovern v. Yoran*, 16 Oregon 269; *Dalloz. Juris. Gener. Torn.* 38, "Propriete," § 204.

Third. *Undiscovered Owner*.—If the owner of the treasure be or can be known at the time of its discovery, the title passes neither to the king, state, nor private individual. If, after the discovery of the treasure, the owner thereof, or his legal representatives are found out, the king, state, or private individual is divested of the formerly acquired title. 3 Co. Inst. Cap. XVIII., p. 132; *Maguire v. Longford*, 14 Ir. L. T. 103. And see *infra*, this note, *Rights and Liabilities Regarding Treasure Trove*.

Rights and Liabilities Regarding Treasure Trove.—First. As between the

sovereign and the discoverer, the right of the crown to the treasure trove at common law is absolute. He who discovers it has no claim to any part of it, and must give notice of the discovery to the proper officer. The concealment of it after its discovery is an offense punishable by fine and imprisonment. 1 Bl. Com. 295; 7 Com. Dig. 649; 2 Co. Insts. Cap. XVIII., p. 132; 4 Bl. Com. 121; 21 Alb. L. J. 260; *Maguire v. Longford*, 14 Ir. L. T. 103; *Reg. v. Toole*, 2 Ir. C. L. 36; 2 Bishop's Crim. Law, §§ 875, 876.

Second. As between the sovereign and the discovered owner of the treasure the sovereign has no right; the owner's right is absolute. If the owner is dead, his legal representative stands in his place. *Sovern v. Yoran*, 16 Oregon 269; 7 Com. Dig. 649; *Maguire v. Longford*, 14 Ir. L. T. 103. See also *McKiernan v. Kernan*, 4 Ir. Eq. 269.

Third. As the right of the sovereign is absolute, the owner of the soil upon which another finds treasure trove has no claim thereto; nor has an assignee, as his assignor could pass no title. *Reg. v. Thomas*, 23 L. J. M. C. 22.

1. In *People v. McKinney*, 10 Mich. 86, the word "treasury," as used in a statute, was held not to be understood in a sense of locality, as descriptive of a particular building within which the treasurer kept his office or place of business; but whenever and wherever moneys were in the official custody of the treasurer or subject to his direction, they were to be considered as in the state treasury.

I. DEFINITION.—A treaty is an agreement or contract between two or more sovereign states, entered into, usually, by authorized agents, and duly ratified by the sovereign power of the respective parties.¹

Although primarily a contract between nations, yet a treaty may confer rights and duties upon individual citizens, as in regulating the mutual rights of the citizens of the respective parties with regard to property.²

II. THE TREATY-MAKING POWER—1. **Who May Make Treaties.**—This power exists in all sovereign states whose powers have not been limited or modified by compacts with other states, and is exercised by the constituted authorities of nations, or by persons especially deputed by them for that purpose.³ The treaty-making power in the *United States* is vested in the President and Senate, by the constitution, which provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur.⁴ The general power to make treaties, such as treaties of alliance and confederation, is denied to the states,⁵ but they may, with the consent of Congress, enter into an agreement or compact with another state or foreign power.⁶

1. See *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Cunard Steamship Co. v. Robertson*, 112 U. S. 580; *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Welch v. Trotter*, 8 Jones (N. Car.) 197.

Woolsey says: "Treaties allowed under the law of nations are unconstrained acts of independent powers placing them under an obligation to do something which is not wrong." Woolsey International Law, § 102.

Vattel defines a treaty as "a compact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time." Vattel, p. 192.

Preamble.—The preamble does not form a part of the treaty, but, being duly authenticated by the signatures of the contracting parties, its averments are to be regarded as truths admitted. *Little v. Watson*, 32 Me. 224.

The Several Kinds of Treaties.—Woolsey says of the kinds of treaties: "They may define private relations, like commercial treaties, or political relations that may be temporary or of unlimited duration. And among the latter, some, or some provisions which they contain, may be dissolved by war, and others, intended to regulate intercourse during war, may be perpetual. They may secure coöperation merely, as treaties of alliance, or a closer union, as confederations, or the uniting of two or more

states into one. All the intercourse of nations may come under the operation of treaties, and they may reach to an explanation or alteration, as far as the parties are concerned, of international law." Woolsey International Law, § 106.

2. *Edye v. Robinson*, 112 U. S. 580.

3. Woolsey International Law, § 159; Vattel, p. 193.

4. U. S. Const., art. 2, § 2.

5. No state shall enter into any treaty, alliance, or confederation. U. S. Const., art. 1, § 10; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *People v. Curtis*, 50 N. Y. 321; 10 Am. Rep. 483.

Treaties Between the States, Prior to the Constitution.—Compacts in the nature of treaties exist between several of the older states, which were made prior to the federal constitution, and so far as they are not inconsistent therewith, remain in full force and effect. Such a compact exists between *Virginia* and *Maryland*, of date March 28th, 1785, relating to the rights of the citizens of each state in respect to fishing and navigation in the Potomac river, and has recently received judicial exposition in *Ex p. Marsh*, 57 Fed. Rep. 719. See also *South Carolina v. Georgia*, 93 U. S. 4; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518. See *STATES*, vol. 23, p. 103.

6. U. S. Const., art. 1, § 10. Mr.

2. Extent of Treaty Making Power.—In general, all the intercourse of nations may come within the operation of treaties.¹

The treaty-making power is conferred by the constitution of the *United States* in general terms, and extends to all matters which in the ordinary intercourse of nations have been made the subject of negotiation and treaty, and which are consistent with other provisions of the constitution.² This power is frequently exercised in establishing commercial relations.³

The political department of the government may, by treaty, regulate the property disabilities of aliens in the several states;⁴ as in determining the distribution of the property of deceased aliens.⁵ It may provide for the exercise of judicial authority in

Story says that the agreements or compacts which a state may make with the consent of Congress, relate to "mere private rights of sovereignty, such as questions of boundary, interests in lands situated in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other." Story on Const., § 1403.

1. Vattel, p. 183; Woolsey International Law, § 106.

The fundamental laws of a nation may withhold the power of alienation by treaty. Vat., bk. 1, ch. 20, § 244. See 1 Kent's Com. 167. See *infra*, this title, *Treaties of Peace*.

2. Holmes v. Jennison, 14 Pet. (U. S.) 540.

As to this general power, an eminent author says: "The power to make treaties is, by the constitution, general, and of course it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succor, for indemnity for injuries suffered or payment of debts, for the recognition and enforcement of principles of public law, and for any other purpose which the policy or interest of the independent sovereigns may fix in their intercourse with each other." Story on the Constitution, § 1508.

Constitutional Limitations.—In *People v. Gerke*, 5 Cal. 383, the court said: "The language which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the federal government would be ineffectual, and the reserved rights of the

states would be subverted. This principle of construction as applied, not only in reference to the constitution of the *United States*, but particularly in the relation of all the rest of it to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, vol. 3, p. 135, and vol. 6, p. 560. It may, therefore, be assumed that, aside from the limitations and prohibitions of the constitution upon the powers of the federal government, 'the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society.'"

3. Story on Const., § 1508; Taylor v. Morton, 2 Curt. (U. S.) 454. In *U. S. v. Forty-Three Gallons*, 93 U. S. 196, it is said that "the treaty-making power covers all the usual subjects of diplomacy."

4. *Droit D'Aubine*, 8 Opin. Atty. Gen'l 411.

Article 9, of the treaty of 1794, between the *United States* and *Great Britain*, which provides that the subjects of either power may hold lands within the territories of the other, applies to vested remainders as well as to estates in possession. *Fox v. Southack*, 12 Mass. 143.

5. See *infra*, this title, *When in Conflict with State Laws*; *Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259; *Jost v. Jost*, 1 Mackey (D. C.) 487; *Kull v. Kull*, 37 Hun (N. Y.) 476.

In *People v. Gerke*, 5 Cal. 386, Bryan, J., said: "The treaty-making power of the federal government must, from necessity, be sufficiently ample, so as to cover all the usual subjects of treaties between different powers. If we were

other countries, by the officers of the *United States* appointed to reside therein.¹

By the terms of a treaty, the *United States* may take private property for public use.²

III. WHEN TREATIES TAKE EFFECT.—Treaties as contracts are

to deny to the treaty-making power of our government the exercise of jurisdiction over the property of deceased aliens, upon the ground of interference with the course of descents, or the laws of distribution of a state where property may exist, by parity of reasoning we should not make commercial treaties with foreign nations, because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the states of the Union. If the treaty-making power which resides in the federal government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, since it is denied to the states, and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands, that protection which is most common amongst a majority of modern civilized nations." See also *Geofroy v. Riggs*, 133 U. S. 258.

1. See *CONSULS AND AMBASSADORS*, vol. 3, p. 764; *In re Ross*, 140 U. S. 453.

By the terms of the treaty between the *United States* and *Prussia*, it is provided that the consuls, vice-consuls, and commercial agents (which each of the parties to the treaty is declared entitled to have in the country of the other), shall have the right, as such, to sit as judges and arbiters in such differences as may arise between the captains and the crews of the vessels belonging to the nation whose interests are committed to their charge, without interference of local authority. A *United States* district court was held to have no jurisdiction over claims which have been already adjudicated by the Prussian consul. *The Elwine Kreplin*, 9 Blatchf. (U. S.) 438.

Under a treaty between the *United States* and *Belgium*, providing that consuls "shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise either at sea or in port between the captains, officers, and crews,

without exception, particularly with reference to the adjustment of wages and the execution of contracts, and that local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in port," it was held that the local authorities were not deprived of jurisdiction of a homicide committed on board a *Belgium* steamship moored to the dock in a port of the *United States*, arising out of an affray between two Belgians, both belonging to the crew of a vessel, although it occurred below deck, and was witnessed only by other members of the crew. *Wildenbus' Case*, 120 U. S. 1.

Under a similar treaty between the *United States* and the kingdom of *Italy*, it was held that a justice of the peace had no power to compel a clerk of the *United States* district court, upon a rule of court, to issue admiralty process against a vessel, although sections 4546, 4547 Rev. Sts. U. S., empowered justices to certify to such clerk, whenever facts existed justifying the issue of such processes, who, thereupon, is required to issue such writ. *The Salomoni*, 29 Fed. Rep. 534.

The treaties between the *United States* and *Turkey*, and the act of Congress of July 22d, 1860, authorize American ministers and consuls in *Egypt* to exercise judicial powers over American citizens in that country, in civil, as well as in criminal matters. *Dainese v. Hale*, 1 McArthur (D. C.) 86. But see *Dainese v. Allen*, 3 Abb. Pr. N. S. (N. Y.) 212.

Under the provision of the treaty of 1871, with *Germany*, giving consuls exclusive cognizance of differences between officers and crews, where the captain of a German ship caused the arrest of a Dutch seaman who had shipped at Liverpool, it was held that the seaman, having been handed over to the German consul at Philadelphia, could not maintain an action in the court of common pleas against the captain, for causing the arrest. *Meyer v. Basson*, 10 Phila. (Pa.) 414.

2. *Mede v. U. S.*, 2 Ct. of Cl. 224. See *infra*, this title, *Treaties of Peace*.

binding upon the parties from the day they are signed, unless a different period is fixed by the contracting parties; and the ratification, although subsequent, relates back to that time.¹ But in the *United States*, in so far as they affect individual rights, they are not considered as concluded until there has been an exchange of ratifications. The principle of relation does not apply to rights of individuals which were vested before the treaty was ratified.²

1. Wheat. Int. Law 366; Vattel, bk. 2, ch. 12, §§ 156, 157; *Alcinous v. Nigreu*, 4 El. & Bl. 217; 1 Kent's Com. 170; *Davis v. Police Jury*, 9 How. (U. S.) 280; *In re Metzger*, 5 N. Y. Leg. Obs. 367; *Hylton v. Brown*, 1 Wash. (U. S.) 312; *U. S. v. Reynes*, 9 How. (U. S.) 127; *Yeaker v. Yeaker*, 4 Metc. (Ky.) 33; 81 Am. Dec. 530; *U. S. v. Arrendondo*, 6 Pet. (U. S.) 691; *Haver v. Yaker*, 9 Wall. (U. S.) 32.

A treaty, executed by plenipotentiaries, takes effect from the time of signing, as well in cessions of territory as in other respects, unless otherwise provided, and its ratification relates back to that time. *U. S. v. Reynes*, 9 How. (U. S.) 127.

So, after the signing of a treaty of cession, the ceding power has no authority to make a grant of land or franchises within the territory ceded. *Davis v. Police Jury*, 9 How. (U. S.) 280; *U. S. v. Gusman*, 14 How. (U. S.) 193; *U. S. v. Ducros*, 15 How. (U. S.) 38.

By the terms of the treaty between the *United States* and *Great Britain*, it was to take effect from the time that terms of peace should be agreed upon between *Great Britain* and *France*, and *Great Britain* should be ready to conclude the same. It was held that the terms of a treaty are "agreed upon," when the ministers come to an understanding as to the terms, and reduce them to writing, and that a treaty is concluded, when the agreement thus understood has received its last form by being signed and duly executed by the ministers, and that, therefore, that treaty went into effect from the time when, the terms having been thus agreed upon, *Great Britain* manifested her readiness to conclude the treaty with *France*, by the signatures of her ministers to the same. *Hylton v. Brown*, 1 Wash. (U. S.) 343.

The treaty between the *United States* and *France*, the effect of which was to suspend the state law imposing a tax of

ten per cent. on successions falling to foreign heirs, stipulates: "It shall remain in force for the space of ten years from the day of the exchange of the ratifications, which shall be made in conformity with the respective constitutions of the two countries, and exchanged at Washington within the period of six months, or sooner if possible." Under such a stipulation, it was held that the ratifications did not relate back to the date when the treaty was signed. The treaty did not become operative until the exchange of ratifications on August 11th, 1853. *Schaffer's Succession*, 13 La. Ann. 113.

Where an Indian treaty provided that it should be obligatory as soon as the same should be ratified by the president and Senate, it did not take effect until signed by the president, although it had been previously ratified by the Senate, and accepted by the Indians. *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 347.

2. *U. S. v. Arrendondo*, 6 Pet. (U. S.) 691; *Haver v. Yaker*, 9 Wall. (U. S.) 32; *Yeaker v. Yeaker*, 4 Metc. (Ky.) 33; 81 Am. Dec. 530. See *U. S. v. Sibbald*, 10 Pet. (U. S.) 313.

Mr. Chief Justice Marshall, stating the principle of the text, said: "That it may and does relate to its date as between the two governments, so far as respects the rights of either, it may be undoubted; but as respects individual rights in any way affected by it, a very different rule ought to prevail." *U. S. v. Arrendondo*, 6 Pet. (U. S.) 748.

In such cases, the ratification is deemed its date. *Heidekoper v. Douglass*, 4 Dall. (U. S.) 392.

In computing the time allowed to the owners of land granted under authority of *Spain*, to fulfill the conditions of their grants, after the date of the treaty between *Spain* and the *United States*, the treaty is to be considered as dated at its ratification. *U. S. v. Sibbald*, 10 Pet. (U. S.) 313.

California did not become a part of

IV. EFFECT AND OPERATION—1. In General.—Treaties are, in their nature, contracts, and, as such, are obligatory upon nations as private contracts are upon individuals.¹

In the *United States*, treaties are not merely contracts by which the sovereign power agrees to regulate its conduct, but are, by the constitution, made a part of the municipal law of the land of which all the courts must take notice.² But a distinction is to be observed between a treaty which becomes the law of the land when ratified and confirmed, and one which imports a contract, and, which, not operating of itself, requires the legislature to execute the contract before it can become a rule for the court.³

the *United States* until the ratifications of the treaty were exchanged. *Holbrook v. U. S.*, 22 Law Rep. 226.

How Published.—By an act 31st July, 1876, par. 2; 1 Sup. R. S. U. S. 234; 1 Sup. R. S. U. S. 589, it is provided that new treaties are to be published in a newspaper of the *District of Columbia*.

1. See Vattel, bk. 1, ch. 15; 1 Kent's Com. 174.

The treaties made by the crown of *Great Britain* with other nations, are not, in the courts of that country, considered as a part of the law of the land; but the rights and duties growing out of those treaties are looked upon in that country as matters confided wholly, for their execution and enforcement, to the executive branch of the government. See *U. S. v. Rauscher*, 119 U. S. 407.

2. *Martin v. Hunter*, 1 Wheat. (U. S.) 304.

3. *Foster v. Neilson*, 2 Pet. (U. S.) 253, *per* Marshall, C. J.; *Turner v. American Baptist, etc., Union*, 5 McLean (U. S.) 344; *Garcia v. Lee*, 12 Pet. (U. S.) 519; *Taylor v. Morton*, 2 Curt. (U. S.) 454.

In *Turner v. American Baptist, etc., Union*, 5 McLean (U. S.) 347, McLean, J., said: "A treaty, under the federal constitution, is declared to be the supreme law of the land. This unquestionably applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as when the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limita-

tion of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of Congress, without the signature of the president, was a law, as that a treaty which engages to pay a sum of money, is in itself a law."

A provision in a treaty to be executed *in futuro*, does not become a rule of court until legislative action is had. So the treaty of 1843 with *France*, providing for the surrender of fugitives from justice, could not be executed without an act of Congress. *In re Nutzger*, 1 Park. Cr. Rep. (N. Y.) 108.

The treaty of February, 1819, between the *United States* and *Spain*, stipulated that "all grants of land made, etc., by his Catholic Majesty, shall be ratified and confirmed to the person in possession of the lands." The question arose whether the treaty of itself operated on the titles to the lands. Marshall, C. J., commenting on the language of the provision, said: "This seems to be the language of contracts, and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject." *Foster v. Neilson*, 2 Pet. (U. S.) 253. See also *Choutran v. Eckhart*, 2 How. (U. S.) 344, declaring that the obligation, under this treaty, should be carried out by the legislative department of the government.

The case of *U. S. v. Percheman*, 7 Pet. (U. S.) 86, is apparently in conflict with the doctrine stated in regard to the provision of the treaty cited. But the doctrine stated in this case was intended to be applied to grants made in territory which undoubtedly be-

2. **When in Conflict with State Laws.**—The constitution provides that all treaties made,¹ or which shall be made, under the authority of the *United States*, shall be the supreme law of the land,² and as such, they are paramount to the constitution,³ or the laws of a particular state.⁴

longed to *Spain* at the time of the grant, and not to grants made by *Spain* within the limits of *Louisiana*, in the territory which belonged to the *United States*, according to its true boundary, and where *Spain* had no right to grant lands after the cession to *France*, by the treaty of Ildefonso in 1800. See *Garcia v. Lee*, 12 Pet. (U. S.) 519.

The treaty of Washington provided that grants of land "shall be held valid, ratified, and confirmed." This language was held to be addressed more appropriately to the judicial than to the legislative department, and that, therefore, it was the duty of the courts to consider that treaty to be a law operating upon a grant made under the authority of the British government, without legislative confirmation. *Little v. Watson*, 32 Me. 224.

And in *Great Britain*, the performance of treaties may depend upon legislative action. An eminent author says that "Parliament has the right to give or withhold its sanction to those parts of a treaty that require legislative enactment to give it force; as, for example, when it provides for alterations in the criminal or municipal law, or proposes to change existing tariffs or commercial regulations. If a treaty requires legislative action in order to carry it out, it should be subjected to the fullest discussion in Parliament, and especially in the House of Commons." Todd Parl. Govt. in *England*, vol. 1, p. 610.

1. See *Worcester v. Georgia*, 6 Pet. (U. S.) 515.

In *Ware v. Hylton*, 3 Dall. (U. S.) 199, this provision was given the retrospective effect designed, and under it the treaty of 1783 with *Great Britain* was held to nullify a law of the State of *Virginia*, passed in 1777.

2. Art. 6, § 3 of the constitution provides that "All treaties made, or which shall be made, under the authority of the *United States*, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Art. 3, providing that the judicial power of

the *United States* shall extend to all cases in law and equity arising under the treaties made, or which shall be made, under their authority, places the interpretation and enforcement of treaties within the scope of the judicial power of the *United States*. See Judiciary Act of 1789, § 25.

3. *Hauenstein v. Lynham*, 100 U. S. 483; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Gordon v. Kerr*, 1 Wash. (U. S.) 322; *Owings v. Norwood*, 5 Cranch (U. S.) 344; *In re Parrott*, 1 Fed. Rep. 502. Marshall, C. J., said: "In every such case (where the federal government has acted), the act of Congress, or the treaty, is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 211.

4. *Fisher v. Harnden*, 1 Paine (U. S.) 55; *Hamilton v. Eaton*, Martin (N. Car.) 84; *Kull v. Kull*, 37 Hun (N. Y.) 476.

In *Ware v. Hylton*, 3 Dall. (U. S.) 236, Chase, J., said: "A treaty cannot be the supreme law of the land, that is, of all the *United States*, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature), must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the *United States*, that every treaty made by the authority of the *United States*, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but avoidable only by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the *United States* may control or defeat the will of the whole. The people of *America* have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded."

A legislative act of the State of *Oregon*, prohibiting the employment of

3. When in Conflict with Acts of Congress.—No distinction is made between treaties made under authority of the *United States* and the laws of Congress, but both are declared to be the supreme law of the land; consequently, being of equal dignity, when in conflict, effect is to be given to the later as the last expression of the law-making power; so a treaty may supersede a prior act of Congress,¹ and an act of Congress may supersede a prior

Chinese upon street improvements or public works, but permitting it to other aliens, was declared void as in conflict with the treaty with *China*, which, until abrogated by law of Congress, is the supreme law of the land, the constitution or laws of any state to the contrary notwithstanding. *Baker v. Portland*, 5 Sawy. (U. S.) 566.

Treaties Removing Property Disabilities of Aliens.—A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat, by the laws of the state. See *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Hauenstein v. Lynham*, 100 U. S. 483; *In re Parrott*, 1 Fed. Rep. 502; *Kull v. Kull*, 37 Hun (N. Y.) 476. In this last case, by a treaty, non-resident aliens were allowed privileges in respect to property, which were denied them under a law of the State of *New York*. The treaty was held controlling.

In *Hauenstein v. Lynham*, 100 U. S. 483, which was an action by citizens and residents of *Switzerland*, heirs of an alien who died in *Virginia*, leaving property which had been adjudged to have escheated to the state, to recover the proceeds of said property, the courts of *Virginia* held that, by the laws of *Virginia*, the proceeds of the property sought to be recovered, belonged to the state; but the judgment was reversed by the Supreme Court of the *United States*, on the ground that the laws of *Virginia* were in conflict with a treaty of the *United States* with the Swiss Confederation.

In *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, the supreme court held that a treaty with *France* gave to the citizens of that country the right to purchase and hold land in the *United States*, and that it removed the incapacity of alienage and placed the parties in precisely the same situation as if they had been citizens of the *United States*. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. *In re Parrott*, 1 Fed. Rep.

502. See also *Carneal v. Banks*, 10 Wheat. (U. S.) 189; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489.

The treaty between the *United States* and *Württemberg* provided that "The citizens or subjects of each of the contracting parties, shall have power to dispose of their personal property within the state of the other by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases." This was held not to regulate the testamentary dispositions of citizens or subjects of the contracting powers in reference to property within the country of their origin or citizenship. *Frederickson v. Louisiana*, 23 How. (U. S.) 445.

1. The *Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Foster v. Neilson*, 2 Pet. (U. S.) 314; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103; *Thingvall Line v. U. S.*, 24 Ct. of Cl. 255; *Scott v. Sanford*, 19 How. (U. S.) 629; *In re Ah Lung*, 18 Fed. Rep. 28; *U. S. v. Tobacco Factory*, 1 Dill. (U. S.) 265; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *U. S. v. Payne*, 8 Fed. Rep. 883.

A treaty, assuming it to be made conformably to the constitution in substance and form, has the effect, under the general doctrine that "*leges posteriores priores contrarias abrogat*," of repealing all preëxisting federal laws in conflict with it, whether unwritten, as laws of nations or admiralty, or written, as legislative statutes. *Copyright Convention with Great Britain*, 6 App. Atty. Gen'l 291.

In *Whitney v. Robertson*, 124 U. S. 195, Field, J., said: "Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When

treaty.¹ But in cases of apparent conflict, courts will endeavor to so construe them as to reconcile any inconsistency, and will not impute to Congress an intent to violate a treaty, unless such

the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."

1. *Taylor v. Morton*, 2 Curt. (U. S.) 454; *The Clinton Bridge*, 1 Woolw. (U. S.) 155; *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. Rep. 17; *Williams v. The Welhaven*, 55 Fed. Rep. 80; *Webster v. Reid*, Morr. (Iowa) 467; *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 417.

The treaty of 1832 between the *United States* and *Russia*, provided that no higher duties should be imposed on the importation into the *United States* of any article of produce or manufacture of *Russia*, than were or should be payable on the like article, if produced or manufactured by any other foreign country. In 1851, Congress passed a law imposing a duty on unmanufactured *Russia* hemp. In declaring this legislation to be a declaration of Congress, that the provision of the treaty should no longer operate as the law of the land in respect to *Russia* hemp, in *Ropes v. Clinch*, 8 Blatchf. (U. S.) 309, Woodruff, J., said: "I understand it to be conceded, and, if it be not, I should be constrained to hold, that the legislative department of this government may pass any law it pleases (if it is otherwise constitutional), notwithstanding it conflicts, and notwithstanding to whatever degree, greater or less, it conflicts, with an existing treaty with a foreign nation. Such legislation is not to be imputed to the government upon any doubtful ground. Every presumption is to be indulged against such legislation, but I speak now of the question of power—that it is in the power of the legislative department of this government to enact such laws as they please (otherwise consistent with the constitution itself), and to give to those laws efficiency and force. . . . If, then, Congress, by legislation inconsistent with a treaty, creates a rule of conduct for its citizens, a rule for the guidance of its courts, the only question is—has it enacted a law

which operates to annul, or operates in disregard of, the provisions of a treaty? If it does either or both, then it seems to me within the constitutional power of Congress, and to be binding and conclusive."

In the *Head Money Cases*, 112 U. S. 580, where it was objected that an act of Congress violated the provision contained in a treaty with a foreign nation, the court held that the provisions of the act must prevail in all the courts of the country, and said: "So far as a treaty made by the *United States* with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

Chinese Exclusion Acts.—In *Fong Yue Ting v. U. S.*, 149 U. S. 698, declaring the validity of the Geary law, approved May 5th, 1892, Mr. Justice Gray said: "In our jurisprudence it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of expressed stipulations in an earlier treaty."

In *Chae Chan Ping v. U. S.*, 130 U. S. 600, the Supreme Court of the *United States* held that the validity of the Chinese Exclusion Act of 1883 was not affected by the fact that the act was a violation of existing treaties with *China*. Commenting upon the previous decisions of the treaties, Field, J., said: "The treaties were of no greater legal obligation than the act of Congress. By the constitution, laws made in pursuance thereof, and treaties made under the authority of the *United States*, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at

intent is unmistakable.¹ So an act of Congress will not be given a retrospective effect when to do so would violate any treaty obligation, if such a construction can be avoided.²

V. TREATIES WITH INDIAN TRIBES.—(See INDIANS, vol. 10, p. 444.)

VI. EXTRADITION TREATIES.—(See EXTRADITION, vol. 7, pp. 599, 616.)

VII. COMMERCIAL TREATIES.—Every nation may make such commercial treaties as it thinks proper, provided they do not interfere with the perfect rights of others. A state may enter into a treaty by which it grants special or exclusive privileges to others.³ When such privileges have been granted by a state, it may not afterward allow like privileges to others contrary to the purpose of the engagement.⁴

A stipulation in a treaty, that in the imposition of duties upon goods imported into one of the countries, which are the produce or manufacture of the other, no discrimination shall be made against them in favor of goods of like character imported from any other country, does not prevent special arrangements with other countries, founded upon concessions of special privileges.⁵

the pleasure of Congress. In either case, the last expression of the sovereign will must control. See also *Foster v. Neilson*, 2 Pet. (U. S.) 314; *Edye v. Robertson*, 112 U. S. 599; *Whitney v. Robertson*, 124 U. S. 190."

1. *Chew Heong v. U. S.*, 112 U. S. 536; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Taylor v. Morton*, 2 Curt. (U. S.) 454; *Ropes v. Clinch*, 8 Blatchf. (U. S.) 309; *In re Ah Lung*, 18 Fed. Rep. 28; *In re Chin A On*, 18 Fed. Rep. 507; *In re Tung Yeong*, 19 Fed. Rep. 185; *In re Low Yam Chow*, 13 Fed. Rep. 605; *In re Ho King*, 14 Fed. Rep. 726.

2. *Chew Heong v. U. S.*, 112 U. S. 536. In this case the provision of the Chinese Exclusion Act of 1882, prescribing the certificate which should be produced by a Chinese laborer as the only evidence permissible to establish his right to re-entry, is held not to be applicable to Chinese laborers who resided in the *United States* at the date of the treaty of 1880, but departed before May 6th, 1882, the date of the passage of the act. See also *STATUTES*, vol. 23, p. 448.

3. *Vattel*, bk. 2, ch. 2, § 27; 1 *Kent's Com.* 35.

4. *Vattel*, bk. 2, ch. 2, § 31.

5. In *Bartram v. Robinson*, 122 U. S. 116, it was contended, under such a provision in a treaty between the *United States* and *Denmark*, that the former was required to extend to the latter, without compensation, privileges

which it had conceded to the *Hawaiian Islands* in exchange for valuable concessions. The first article of the treaty with *Denmark* provided that the contracting parties should not grant any particular favor to other nations, in respect to commerce and navigation, which should not immediately become common to the other party, who should enjoy the same freely if the concession were freely made, or on allowing the same compensation if the concession were conditional. The fourth article provided that no higher or other duties should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. Field, J., said: "Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the *Hawaiian Islands* for a valuable consideration. They were pledges of the two contracting parties, the *United States* and the King of *Denmark*, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation

But a provision of this kind in a treaty promissory in its nature, is addressed to the political and not the judicial department of the government, and the courts cannot try the question whether it has been observed or not.¹

VIII. TREATIES OF PEACE.—The principles applicable to treaties in general, are applicable to treaties of peace. Like other treaties,

upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. 'No higher or other duties' were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation, if the concession were conditional. . . . If the exemption is deemed a 'particular favor' in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by *Denmark* upon like compensation to the *United States*."

In *Whitney v. Robertson*, 124 U. S. 190, a similar claim was made under a treaty of the *United States* with *San Domingo*; certain merchants doing business in the city of New York imported a large quantity of sugars, the produce and manufacture of the island of *San Domingo*. These goods were similar in kind to the sugars produced in the *Hawaiian Islands*, which are admitted free of duty under the treaty with the king of those islands, and the act of Congress passed to carry the treaty into effect. They were duly entered at the custom-house at the port of New York, the plaintiffs claiming, that by a treaty with the Republic of *San Domingo*, the goods should be admitted on the same terms; that is, free of duty as similar articles, the produce and manufacture of the *Hawaiian Islands*. The defendant, who was at the time collector of the port, refused to allow this claim, treated the goods as dutiable articles, under the act of Congress, and exacted duties on them. Plaintiff paid under protest the duties exacted, and brought an action to recover the amount. Field, J., affirming the doctrine as stated in

Bartram v. Robinson, 122 U. S. 116, said with regard to the special favor clause of the treaty, that "It was never designed to prevent special concessions upon sufficient considerations touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which in future might be of the highest importance to its interests."

1. *Taylor v. Morton*, 2 Curt. (U. S.) 454; *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. Rep. 17.

When it is claimed that unjust discrimination is made by an act of Congress, no question can arise, for the act of Congress supersedes any provision of the treaty. So in *Whitney v. Robertson*, 124 U. S. 190, though it is stated in the above note that a special exemption allowed to the Hawaiian government for valuable and special concessions did not justify the claims under the treaty with *Denmark*, Field, J., said: "Independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected, authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the *Dominican Republic*, and if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control."

And in *Taylor v. Morton*, 2 Curt. (U. S.) 454, though the treaty with *Russia* stipulated that no higher rate of duties should be imposed on goods imported from *Russia* than on like articles imported from other places, the question whether certain species of hemp, on which the duty of \$25 per ton was imposed by an act of Congress, was like Russian hemp within the meaning of the treaty, was not for the courts to decide. This was a question for Congress, not for the courts.

they are to be made by the power authorized by the fundamental law of the nation.¹

It is a settled principle of international law, that the sovereign in whose name a war has been prosecuted, cannot justly make peace without including his ally; and when the treaty is concluded by the principal, it is not further obligatory on the allies than they are willing to accede to, unless they have given him full power to treat for them.² A treaty of peace becomes obligatory upon the contracting parties from the moment of its conclusion, which is from the day it is signed, unless a particular time is specified,³ but not upon the subjects until they are duly notified. When subjects of the contracting parties, in ignorance of the conclusion of the treaty, have continued acts of hostility, it is the duty of their government to make prompt restitution of things captured.⁴ But it is held that the individuals are not liable civilly or criminally for injuries caused by their acts of hostility, continued after the date of peace, when in ignorance of it.⁵ A capture before the time fixed for cessation of hostilities, but with knowledge of the conclusion of the treaty of peace, is void.⁶

In order to effect a treaty of peace, the public domain and property may be alienated.⁷ So, also, individual rights acquired by war and the vested rights of citizens may be sacrificed, making, of course, just compensation therefor.⁸

When a cession of territory is made by a treaty of peace, the national character of the territory ceded remains as before until actually transferred;⁹ and until changed by the new sovereign, the laws and customs in force at the time of the cession continue.¹⁰ A change of law may be effected by a mere declara-

1. Woolsey International Law, §§ 103, 159.

2. Vattel, p. 437; 1 Kent's Com., p. 166.

Allies may make each his own peace and obtain special concessions, but they are bound in good faith to act together, and to secure one another, as far as possible, against a power which may be stronger than any of them separately. Woolsey International Law, § 159.

3. See *supra*, this title, *When Treaties Take Effect*; Vattel, bk. 4, ch. 3; U. S. v. *Reynes*, 9 How. (U. S.) 127.

4. Vattel, bk. 4, ch. 3, § 24.

5. Grot., bk. 3, ch. 21, § 5.

In the case of *The Mentor*, 1 C. Rob. 179, where a vessel was taken by British ships in 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties, an American owner was denied redress in the British admiralty against the immediate author of the injury. And subsequently, relief was also denied against the admiral in charge of the fleet.

But it is also held by some writers that the person who has caused the injury may be held liable in damages immediately, and that it is the duty of his government to indemnify him. See 1 Kent's Com., p. 170; Woolsey International Law, § 162.

6. Woolsey International Law, § 162; 1 Kent's Com., p. 173; *Schooner Sophie*, 6 C. Rob. 138.

7. 1 Kent's Com., p. 166; Vattel, bk. 1, ch. 20, § 244.

8. Grotius, bk. 3, ch. 20, § 7; *Ware v. Hylton*, 3 Dall. (U. S.) 245; U. S. v. *Schooner Peggy*, 1 Cranch (U. S.) 103; *Meade v. U. S.*, 2 Ct. of Cl. 224.

9. 1 Kent's Com., p. 178; *The Fama*, 5 C. Rob. 106.

10. *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Mitchel v. U. S.*, 9 Pet. (U. S.) 734; *Campbell v. Hall*, Cowp. 209; *Lofft* 655; *Blankard v. Galdy*, Salk. 411.

The laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, continue in force until altered by the new sov-

tion of the sovereign power, without formal act of the legislature.¹ The inhabitants of the ceded territory change their allegiance, and their relation to their foreign sovereign is dissolved; but their relation to each other and their rights of property, not taken from them by the conqueror by right of conquest, cession, or by new laws, remain undisturbed.²

IX. VALIDITY OF TREATIES—HOW DETERMINED.—It is not within the province of courts of law to declare that a particular treaty is not binding on one party because violated by the other, but this question is to be decided by the political department of the government, in its discretion.³ But whether a treaty is inconsistent with the fundamental law, as whether the treaty made under the authority of the *United States* is in conflict with the

ereign. *Strother v. Lucas*, 12 Pet. (U. S.) 436.

1. *Jephson v. Riera*, 3 Knapp 151; *Canal Appraisers v. People*, 17 Wend. (N. Y.) 587; *Mitchel v. U. S.*, 9 Pet. (U. S.) 748.

The sovereign power has the legislative power over the ceded territory; but he may preclude himself from the exercise of that authority by a proclamation that he has commissioned the governor to call an assembly of the people for the purpose of enacting laws. *Campbell v. Hall*, Cowp. 204.

2. *The Fama*, 5 C. Rob. 106, *per* Sir Wm. Scott; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 589; *New Orleans v. U. S.*, 10 Pet. (U. S.) 720; *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *Wilcox v. Wilcox*, 2 Low. Can. Jur. 1.

In *U. S. v. Percheman*, 7 Pet. (U. S.) 87, in reference to the treaty between the *United States* and *Spain*, which stipulated that "His Catholic Majesty cedes to the *United States*, in full property and sovereignty, all the territories which belonged to him situated eastward of the Mississippi, by the name of *East* and *West Florida*," Marshall, C. J., said: "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belongs to him. Lands he had previously granted are not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another conveying the compound idea of surrendering at the same time the lands and the people who in-

habit them, would be necessarily understood to pass the sovereignty only and not to interfere with private property."

By virtue of the grant of lands in *Florida*, by the Spanish governor, to Indians, the lands were separated from the royal dominion, and became private property, which was not ceded to the *United States* by the treaty with *Spain*. *Delassus v. U. S.*, 9 Pet. (U. S.) 117; *U. S. v. Fernandez*, 10 Pet. (U. S.) 304.

The sovereign power acquiring territorial land by cession, may make such provision with reference to the title to lands therein, as it may think proper. So, by an act of 3d of March, 1803, Congress modified the validity of grants made therein prior to the treaty of cession, by imposing a positive necessity upon the proprietors to record such grants, and made expressly void all rights claimed, if the duty so imposed was not complied with. *Harcourt v. Gaillard*, 12 Wheat. (U. S.) 528.

3. *Taylor v. Morton*, 2 Curt. (U. S.) 454.

By an Act of July 7th, 1798, Congress declared that the treaties with *France* were no longer obligatory on the *United States*, as they had been repeatedly violated by the French government.

In *Jones v. Walker*, 2 Paine (U. S.) 696, Jay, C. J., construes validity as applied to treaties as admitting of two descriptions, necessary and voluntary. He says: "By necessary validity, I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with, the constitution. To this kind of validity all such questions as these relate, viz.: Has the treaty been made and ratified by the president, by the advice and consent of three-fourths of the

constitution, is a question for judicial cognizance; and when the conflict is unavoidable, courts must declare the treaty, so far as concerns its effect as a municipal law, null and void.¹

The courts of the *United States* cannot inquire into the competency of the parties, contracting for any foreign nation or power, to make the treaty. This question addresses itself to the political department of the government whose action is conclusive upon such inquiry.²

X. EXTINCTION OF TREATY OBLIGATION—1. **Violations; Abrogation.**—A treaty is violated by proceedings on the part of one of the contracting parties, which are inconsistent with its purpose, or by an intentional breach of one or more of its articles. When so violated by one of the parties, it is not void, but voidable only at the option of the injured party, who alone may deem it annulled and demand redress, or require its observance.³ As between the

senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved by mutual agreement? Has it been annulled and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty? etc., etc. By voluntary validity, I mean that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. I call it, voluntary, because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it."

1. *Doe v. Braden*, 16 How. (U. S.) 635; *Whitney v. Robertson*, 124 U. S. 195.

In *Ware v. Hylton*, 3 Dall. (U. S.) 237, Chase, J., said: "It is the declared duty of the state judges, to determine any constitution, or laws of any state, contrary to that treaty, or any other, made under the authority of the *United States*, null and void. National or federal judges are bound by duty and oath to the same conduct."

In *Cherokee Tobacco v. U. S.*, 11 Wall. (U. S.) 616, Swayne, J., said: "A treaty cannot change the constitution, or be held valid, if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

If the validity or construction of a treaty of the *United States* is drawn in question in a state court, and the decision is against its validity, or against

the title specially set up by either party under the treaty, the supreme court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the abstract construction of the treaty itself. *Martin v. Hunter*, 1 Wheat. (U. S.) 358.

2. *Maiden v. Ingersoll*, 6 Mich. 376.

In *Fellows v. Blacksmith*, 19 How. (U. S.) 366, Nelson, J., said: "A treaty, after being executed and ratified by the proper authorities of the government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect in operation than they can behind an act of Congress."

In *Doe v. Braden*, 16 How. (U. S.) 635, Taney, C. J., said that a treaty made by the president with the approval of the Senate is the supreme law of the land, and courts have no right to annul or disregard any of its provisions, unless they violate the constitution of the *United States*. It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and to fulfill the duties which the constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty in behalf of the foreign nation had power by its constitution and laws to make the engagement into which it entered.

3. Grotius, lib. 3, ch. 19, § 14; Vattel 450; Woolsey Int. Law, § 112; 1 Kent's Com. 175; *Cushing v. U. S.*, 22 Ct. of Cl. 1; *In re Thomas*, 12 Blatchf. (U. S.) 370.

contracting parties, questions as to the violation of treaties are not cognizable by the courts of law.¹

The power to abrogate or modify a treaty does not rest exclusively in the hands of the President and Senate of the *United States*, but Congress, in the exercise of the law-making and law-repealing power, may render a treaty of no effect.² And the courts have no right to inquire into the wisdom of such action of the legislative department of the government.³ So, whether a particular law violates a treaty obligation is not a question for judicial cognizance, and the courts cannot declare it void on that ground. This question addresses itself to the political department of the government, and must be settled by international negotiation.⁴

1. *The Nabob of Arcot's Case*, 4 Bro. Ch. 180; 2 Ves. Jr. 56.

In *Taylor v. Morton*, 2 Curt. (U. S.) 454, this subject was elaborately considered by Mr. Justice Curtis, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation in a treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government, and that they belonged to diplomacy and legislation and not to the administration of the laws. See *Whitney v. Robertson*, 124 U. S. 195.

The supreme court cannot set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation, which the government of the *United States* as a sovereign power chooses to disregard. *Bottler v. Domingues*, 130 U. S. 238, *reversing* (Cal. 1887) 13 Pac. Rep. 685.

2. See *supra*, this title, *Effect and Operation*.

With regard to this power of Congress, it has been said that there are three modes in which Congress may practicably, yet efficiently, annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given be-

fore it shall be abrogated, when such a notice was provided for; or if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once by express terms; and even where there is a provision for the notice, the government of the *United States* may disregard even that and declare that the treaty shall be from and after its date at an end, and meet the consequences of the responsibility for a breach of faith with a foreign government. *Ropes v. Clinch*, 8 Blatchf. (U. S.) 304.

Congress may abrogate a treaty in the exercise of the power to declare war, conferred on it by the constitution. U. S. Const., art. 1, § 8, par. 11.

In *Taylor v. Morton*, 2 Curt. (U. S.) 454, Curtis, J., said: "I think it is impossible to maintain that, under our constitution, the President and Senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the *United States* could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible."

3. *Chae Chan Ping v. U. S.*, 130 U. S. 581.

4. *Edye v. Robertson*, 112 U. S. 580; *Georgia v. Stanton*, 6 Wall. (U. S.) 50; *In re Ah Lung*, 18 Fed. Rep. 28; *The Cherokee Tobacco*, 11 Wall. (U. S.)

2. *Dissolution.*—In general, treaties are dissolved in like manner as other contracts, as by the expiration of the time for which they were made, or by the mutual consent of the parties.¹ There may be such a change of circumstances as to justify the dissolution of a treaty.² But treaties are not, as a rule, extinguished *ipso facto* by war between the contracting parties. Where they contemplate a permanent arrangement of territorial and other national rights, the event of the war does not extinguish them, but they are at most only suspended while it lasts, and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.³

616; *The Amiable Isabella*, 6 Wheat. (U. S.) 1; *Cushing v. U. S.*, 22 Ct. of Cl. 11. See also *dissenting* opinions in *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1. In the *Clinton Bridge*, 1 Woolw. (U. S.) 155, Miller, J., referring to prior treaties, said: "We are of opinion that whatever obligation they may have imposed upon our government, the courts possess no power to declare a statute passed by Congress and approved by the President, void, because it may violate such obligations. Questions of this class are international questions, and are to be settled between the foreign nations interested in the treaties and the political department of our government. When those departments declare a treaty abrogated, annulled, or modified, it is not for the judicial branch of the government to set it up, and assert its continued obligation. If the court could do this, it could annul declarations of war, suspend the levy of armies, and become a great international arbiter, instead of a court of justice for the administration of the laws of the *United States*."

In *Re Ah Lung*, 18 Fed. Rep. 29, where it was contended that the Chinese Exclusion Act of 1882 was a violation of the treaty with *China*, Field, J., sustaining the validity of the act, said: "An act of Congress, then, upon a subject within its legislative power, is as binding upon the courts as a treaty on the same subject. Both are binding, except as the latter one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its claim to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects requires. The courts cannot heed such complaint, nor refuse to give effect to a law of Congress, however

much it may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our legislation, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply the case of conflicting laws, the last modifying or superseding the earlier."

1. Vattel, p. 125. See *CONTRACTS*, vol. 3, p. 889.

2. *Hooper v. U. S.*, 22 Ct. of Cl. 408.

So a "treaty may be extinguished when a state of things, which was the basis of the treaty and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus* by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect, it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation. "The maxim '*Conventio omnis intelligitur rebus sic stantibus*' is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice." Whart. Com. Am. Law, § 161.

3. See Woolsey *International Law*, § 160; Wheat. *Int. Law*, § 275; *Society, etc. v. New Haven*, 8 Wheat. (U. S.) 464.

The treaty of 1794, between *Great Britain* and the *United States*, is of this character, and under it all American citizens who held lands in *Great Britain* on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens, but as native subjects of *Great Britain*. *Sutton v. Sutton*, 1 Russ. & M. 663.

XI. CONSTRUCTION OF TREATIES.—It is not the province of courts of law to expound treaties with respect to the rights and obligations of the sovereign states parties thereto,¹ but so far as they concern the rights of individuals, it is frequently necessary for the courts to ascertain by construction, the meaning intended to be conveyed by the terms used.² And when this duty arises, the courts adopt those general rules applied in the construction of statutes, contracts, and written instruments generally, in order to effect the purpose and intention of the makers.³

Woolsey says that there are certain stipulations which are in their nature lasting: "Such as, first, those which contemplate a state of war, and therefore have no effect if rendered null by a war; second, those which are declared to be perpetual, like the liberty, under our treaty of 1818 with *Great Britain*, 'forever to cure and dry fish' in certain places; war can only suspend such a provision; third, those which imply some state or relation in itself permanent; of this kind is a past recognition of a state within certain boundaries, for an organized community upon a specific territory is an admitted fact to which only conquest, the destruction of a condition otherwise permanent, can put an end; fourth, the same perpetual nature belongs to a compact to regard certain rules or interpretations as a part of the law of nations, since the state of peace or war between two parties cannot affect general principles of justice." Woolsey *International Law*, § 160. See also Kluber, § 165; Vattel, bk. 4, § 42; Philm., vol. 3, 792.

1. *Effingstone v. Bedreecumb*, Knapp 340; *Lindo v. Rodney*, 2 Dougl. 613, n.; *Hill v. Reardon*, 2 Sim. & S. 437; *Maiden v. Ingersoll*, 6 Mich. 373.
2. *Wilson v. Wall*, 6 Wall. (U. S.) 83; *U. S. v. Rauscher*, 119 U. S. 407.

When a treaty contains provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which are capable of enforcement as between private parties in the courts of the country, such courts must resort to the treaty for a rule of decision for the case before it as to a statute. *Head Money Cases*, 112 U. S. 580.

3. *U. S. v. Payne*, 8 Fed. Rep. 892; *The Amiable Isabella*, 6 Wheat. (U. S.) 1; *U. S. v. Percheman*, 7 Pet. (U. S.) 83; *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. Rep. 20; *Anderson v. Lewis*, *Freem. Ch. (Miss.)* 178.

In *Marryatt v. Wilson*, 1 B. & P. 436, where the construction of a treaty between *Great Britain* and the *United States* was in question, Eyre, C. J., after observing that a treaty should be construed liberally and consistent with the good faith which always distinguishes a great nation, said: "That courts of law, although not the expounders of a treaty, yet when it is brought under their consideration incidentally, they must say how the treaty is to be understood between the parties to the action, and in doing which they have but one rule by which to govern themselves. We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states."

Compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptance of the terms in which they are expressed. *U. S. v. D'Anterive*, 10 How. (U. S.) 609.

Where a treaty between *Spain* and the *United States* was drawn up in the Spanish as well as in the English language, that construction which established a conformity between them, prevailed. *U. S. v. Percheman*, 7 Pet. (U. S.) 89.

Maxims for the Interpretation of Treaties.—Vattel states, as general maxims to be observed in the interpretation of treaties, the following: It is not allowable to interpret what has no need of interpretation; if he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed; neither the one nor the other of the parties interested

If the terms of a treaty are ambiguous or indefinite, courts may look to the nature of the things to which they relate,¹ and construe them in the light of the circumstances existing at the time the treaty was made, in order to ascertain the purpose of the contracting parties.² But a court cannot add to, alter, or amend, a treaty, for any purpose, by inserting words or clauses.³

Treaties may be construed on the principle of instruments *in pari materia*.⁴

in the contract has a right to interpret the deed or treaty according to his own fancy; on every occasion when a person could and ought to have made known his intention, we assume for true against him what he has sufficiently declared; every deed, and every treaty, must be interpreted by certain fixed rules calculated to determine its meaning, as naturally understood by the parties concerned at the time when the deed was drawn up and accepted. Vattel, bk. 2, ch. 16.

Grant.—The term "grant" in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. *Strother v. Lucas*, 12 Pet. (U. S.) 436; *U. S. v. Clarke*, 8 Pet. (U. S.) 466; *New Orleans v. U. S.*, 10 Pet. (U. S.) 718.

Laws.—In the term "laws" is included custom and usage when once settled; though it may be comparatively of recent date, and not one of those, to the contrary of which the memory of man runneth not. *Strother v. Lucas*, 12 Pet. (U. S.) 436.

Subjects.—The term "subjects," used in the Spanish treaty of 1795, is to be construed as including all those who owe allegiance, even temporary, to *Spain*. *The Pizarro*, 2 Wheat. (U. S.) 227.

Additions, Alterations.—Where one of the contracting parties annexes to a treaty, at the time of ratifying it, a written declaration explaining ambiguous language, or adding new and distinct stipulations, and the treaty with the declaration attached is afterwards ratified by the other party and ratifications exchanged, the declaration annexed is a part of the treaty, and as binding as if inserted in the body of the instrument. *Doe v. Braden*, 16 How. (U. S.) 635.

1. Vattel, p. 263; *Howard v. Ingersoll*, 17 Ala. 780. In this case the

chancellor states this rule of construction as follows: "In all compacts or treaties between states or nations, the intention of the parties must be our guide in determining any questions in reference to them. If that intention is clear and plain, there is no room for comment, nor necessity for construction, for the intention of the parties being clear, the rule by which the court is to judge is clear. But if the terms or expressions used by the contracting parties are vague or indefinite, or if they are susceptible of a more or less extended signification, we must then look to the nature of the things to which these terms relate, and presume the intention of the parties to be in accordance with reason."

2. *Strother v. Lucas*, 12 Pet. (U. S.) 438; *U. S. v. Payne*, 8 Fed. Rep. 892; *U. S. v. Clarke*, 8 Pet. (U. S.) 462.

3. *Chew Heong v. U. S.*, 112 U. S. 536; *Lattimer v. Poteet*, 14 Pet. (U. S.) 4.

So in the treaty between the *United States* and *Spain*, the section which intended to provide passports for the ships of the respective nations, which were to be "granted according to form annexed" to the treaty, was of no effect in consequence of the failure to annex the form of the passports to the treaty. *The Amiable Isabella*, 6 Wheat. (U. S.) 1.

A treaty stipulation that "free ships shall make free goods" does not imply the converse proposition that "enemies' ships shall make enemy goods." For although together they constitute a well-recognized rule of law of nations, by express compact nations may stipulate for either, and courts will not imply one from the assertion of the other. *The Nereide*, 9 Cranch (U. S.) 419.

4. *Shanks v. Dupont*, 3 Pet. (U. S.) 255. In this case, the question as to who was to be held a "British subject," under the treaty of 1794, was explained by reference to the meaning of the term in the treaty of 1783.

That construction which tends to put the parties in a position of equality should be preferred.¹

When a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.²

The courts should admit that construction which has been adopted by the parties to the treaty, unless the terms of the instrument compel a different one.³ So, that construction which has been placed by the executive upon the terms of the treaty, though not binding upon the judiciary, should be admitted when not inconsistent with their obvious intent.⁴

The provisions of a treaty are to be construed, as intended to be applied to *bona fide* transactions.⁵

TREBLE COSTS.—(See COSTS, vol. 4, p. 324.)

TREES.—(See LOGS AND LUMBER, vol. 13, p. 1018; PUBLIC LANDS, vol. 19, p. 305; TIMBER, vol. 26, p. 2; TRESPASS, vol. 26; WASTE.)

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I. DEFINITION.—A tree is a woody plant whose branches spring from and are supported upon a trunk or body.⁶ When used in a

1. *Jones v. Walker*, 2 Paine (U. S.) 688 according to the maxim that "everything that tends to the common advantage and convenience or has a tendency to place the contracting party on an equality, is favorable. And in such cases it is safest and most consistent with equity to extend the signification of the terms than to limit them."

2. *Sharks v. Dupont*, 3 Pet. (U. S.) 242; *Hauenstein v. Lynham*, 100 U. S. 483. See also *Marryatt v. Wilson*, 1 B. & P. 436.

Treaties, generally, are to receive a fair and liberal interpretation, according to the intention of the contracting parties. 1 Kent's Com., p. 174.

3. *Patterson v. Jenks*, 2 Pet. (U. S.) 216.

In a case where the mutual construction is in the face of the language used, and the rights of third parties have intervened, the language will be taken as governing. *U. S. v. Payne*, 8 Fed. Rep. 892.

4. *Castro v. De Uriarte*, 16 Fed. Rep. 93.

If the legislative and executive branches of the government have given and asserted a construction to a treaty with a foreign power, under which it claims dominion over a territory in its possession, courts will not set up or sustain a different construction. *Foster v. Neilson*, 2 Pet. (U. S.) 253.

5. *U. S. v. Schooner Amistad*, 15 Pet. (U. S.) 595.

6. *Clay v. Postal Tel. Co.*, 70 Miss. 411. In this case a shrub was said to be a low, small plant whose branches grow directly from the earth without any supporting trunk or stem, and it was held that young trees of varying heights and thicknesses were not "shrubs, undergrowth, or bushes," and that a recovery for cutting them down could be had in an action of trespass for cutting down trees.

The word "tree," without explanation, *ex vi termini*, means a standing tree. *Idol v. Jones*, 2 Dev. (N. Car.) 162. And see *Thompson v. Bernard*, 1 Camp. 48; *Minors v. Leeford*, Cro. Jac. 114.

lease, to reserve the "trees" from the operation of the grant, the term has been held not to include fruit trees.¹

II. TREES ON OR NEAR BOUNDARY LINE—1. Ownership.—A tree is wholly the property of him upon whose land it stands, notwithstanding the roots extend into, or the branches overhang, the land of an adjoining owner.² If the tree stands directly on the boundary line, however, and grows partly on the soil of each, it is the property of both as tenants in common,³ and if one of them

Ornamental Trees.—Shade trees are ornamental trees within the meaning of a statute punishing the destruction of ornamental trees. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136.

Not a subject of Larceny.—A standing tree is not a subject of larceny, and it is not actionable slander to charge a person with stealing a tree. *Idol v. Jones*, 2 Dev. (N. Car.) 162. See also *LARCENY*, vol. 12, p. 781.

1. Fruit trees are not included within an exception in a lease of "all trees, woods, coppice, wood-grounds of what kind or growth soever." *Wyndham v. Way*, 4 Taunt. 316; 13 Rev. Rep. 607.

Where a lessor demised certain lands "except and always reserving out of the demise and grant, unto the lessor, all timber trees, and other trees, but not the annual fruit thereof," it was held that apple trees were not within the exception. *Bullen v. Denning*, 5 B. & C. 842; 12 E. C. L. 383. In this case Littledale, J., said that the word "trees," generally speaking, means wood applicable to buildings and does not include orchard trees. If a man grant all his trees, fruit trees will not pass. *Lord Zouch v. Moore*, 2 Roll. 280.

By a grant of a manor, except the wood and underwood, all the trees, great and small, are excepted which are known by the name of wood; but apple trees and other such like are not excepted, because they are not comprehended under the term wood. A sale of the trees in the manor of D. would not pass apple trees. *Whitton & Weston's Case*, Godb. 398.

2. *Hoffman v. Armstrong*, 48 N. Y. 201; 8 Am. Rep. 537, *aff'd* 46 Barb. (N. Y.) 337; *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326, *aff'd sub nom Relyea v. Beaver*, 34 Barb. (N. Y.) 547; *Lyman v. Hale*, 11 Conn. 177; 27 Am. Rep. 728, *reviewing and explaining* *Waterman v. Soper*, 1 Ld. Raym. 737; *Millen v. Fandrye*, Pop. Rep. 161; *Norris v. Baker*, 3 Bulst. 178.

In *Holder v. Coates*, 1 M. & M. 112;

22 E. C. L. 264, it is said that if the roots extend into the soil of both parties, the tree belongs to the owner of the land in which it was first planted. See *Masters v. Pollie*, 2 Roll. 141, where it is said that a proprietor "cannot limit the roots of his tree, how far they shall grow and go."

In *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645, it was held that the location and property in the tree should be determined by the position of the trunk or body above the soil, rather than by the roots within or branches above it. But in *Waterman v. Soper*, 1 Ld. Raym. 737, it was held that where the tree is wholly upon the land of one, but the roots extend into that of another, the tree, by reason of nourishment derived from both estates, becomes the joint property of the owners of such estates; but that if the roots are entirely in the land on which the tree was planted, the fact that the branches extend over that of an adjoining owner, does not affect the ownership, for the branches follow the root and the property of the whole is in the owner of the land on which the tree was planted. See also *Anonymous*, 2 Roll. 255; 2 *Bouvier's Inst.* 158.

By the Civil Code of *France*, the difficulty is avoided, arts. 670 and 673 declaring boundary hedges and the trees in them to be the common property, save in certain cases; the planting of other trees within certain distances of the hedge is, by art. 671, forbidden, and if any are planted within these distances, the occupier of the adjoining land has, by art. 672, the right to have them removed, and to cut the roots growing into his land.

3. *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326, *aff'd sub nom Relyea v. Beaver*, 34 Barb. (N. Y.) 547; *Griffin v. Bixby*, 12 N. H. 454; 37 Am. Dec. 225; *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645; *Bancroft's Case*, 2 Rolle 255; *Musch v. Burkhardt*, 83 Iowa 301.

cuts it down or uses it, the other may maintain trespass therefor,¹ or enjoin the cutting.²

2. Fruit and Clippings.—An adjoining owner has no title to the fruit growing upon the branches of trees which overhang his land, and will be liable in trespass for gathering it,³ or for an assault and battery for using violence to prevent the owner of the trees from gathering it, provided the latter can do so without committing a trespass.⁴ Even though fruit falls from the overhanging branches upon his land, the owner of the trees may go upon the land and take it away without being liable for trespass;⁵ but if, when pruning the trees, the loppings fall upon the adjoining land, the owner cannot enter and take them away, if by using due caution their falling there might have been prevented.⁶

3. Overhanging Branches a Nuisance.—Permitting the branches of trees to extend beyond the soil of the owner, is said to be an unequivocal act of negligence, warranting the party injured in

1. *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326, *aff'd* 34 Barb. (N. Y.) 547; *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby*, 12 N. H. 454; 37 Am. Dec. 225.

One tenant in common is not authorized to exclude another from the possession of land owned in common, or to destroy a chattel, or to sell the whole of it. *Odiorne v. Lyford*, 9 N. H. 511. If he ousts his co-tenant, the latter may maintain trespass. *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Bracket v. Norcross*, 1 Mc. 89. If he destroys personal property owned in common, or sells the entire property, trover lies. *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Farr v. Smith*, 9 Wend. (N. Y.) 338; 24 Am. Dec. 162.

2. And this though the party seeking the injunction had himself cut similar trees before. *Musch v. Burkhart*, 83 Iowa 301; *Relyea v. Beaver*, 34 Barb. (N. Y.) 547. See also *Proudfoot v. Bush*, 7 Grants Ch. (Up. Can.) 518; *INJUNCTIONS*, vol. 10, p. 883.

The destruction of forest trees along a disputed boundary line may be enjoined pending a suit to establish such line. *De La Croix v. Villere*, 11 La. Ann. 39.

In *Hihn v. Peck*, 18 Cal. 640, the court refused to restrain one tenant in common from cutting and disposing of timber, in the absence of an averment of insolvency or that he was exceeding his share. And see *Arthur v. Lamb*, 2 D. & S. 430; *Obert v. Obert*, 5 N. J. Eq. 397.

3. *Lyman v. Hale*, 11 Conn. 177; 27 Am. Dec. 728; *Hoffman v. Arm-*

strong, 48 N. Y. 201; 8 Am. Rep. 587, *aff'd* 46 Barb. (N. Y.) 337; *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645.

4. *Hoffman v. Armstrong*, 48 N. Y. 201; 8 Am. Rep. 587, *aff'd* 46 Barb. (N. Y.) 337.

5. *Miller v. Fawdry*, Latch. 120.

If a tree standing near the boundary line is blown down and falls upon the land of an adjoining owner, the owner of the tree may enter and remove it. *Bac. Abr.*, "Trespass" (F.)

In *Newkirk v. Sabler*, 9 Barb. (N. Y.) 655, which was an action for assault which occurred while trying to get a team out of another's field where the pasture had been fenced in, the court said: "If my tree be blown down and fall on the land of my neighbor, I may go on and take it away, and the same rule prevails where fruit falls on the land of another; but if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it."

6. *Bac. Abr.*, "Trespass" (F.)

In *Miller v. Fandrye*, Pop. Rep. 161, which was an action for a trespass by a dog in chasing sheep across a boundary line, *Crew, C. J.*, said: "A man cut thorns and they fell on another's land, and in trespass he justified for it, and the opinion was, that, notwithstanding this justification, trespass lies because he did not plead that he did his best endeavor to hinder them from falling; yet this was a hard case." And see *Lambert v. Dessey*, Ld. Raym. 422, 467.

abating the nuisance by clipping the branches.¹ An adjoining owner may also sue for damages, but unless the tree is poisonous or noxious in its nature, there must be proof of some real sensible damage to authorize him to maintain such action.²

4. Right to Enjoin Planting.—(See INJUNCTIONS, vol. 10, p. 977.)

III. TREES IN HIGHWAYS AND STREETS—1. Ownership.—As a general rule, the fee in the soil remains in the original owner where a public road is established over it, and while it is used as a highway, he is entitled to the timber which may grow upon the surface.³ He may plant shade trees in the highway, if the public use

1. An adjoining owner may cut off the branches or sue for damages, but he cannot cut down the tree, and can only clip the branches to the extent that they overhang his land. *Grandona v. Lovdal*, 70 Cal. 161. In this case it was also said that it would seem that he may also abate the roots projecting into his soil, at least if he has suffered actual damage. See also *Lonsdale v. Nelson*, 2 B. & C. 302; 9 E. C. L. 96; *NUISANCES*, vol. 16, p. 943; *HIGHWAY*, vol. 9, p. 413.

But after clipping the branches he cannot carry them, and the fruit they contain, away and convert them to his own use. *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645.

There is no authority in anyone to treat as a nuisance that which is not so, and anyone assuming to abate as a nuisance that which is not so, acts at his peril. *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996. In this case, it was held that a company undertaking, under a contract with a municipal corporation, to do a work of public improvement, such as laying a fire-alarm telegraph, had no right to invade the premises of an abutting proprietor and cut off limbs of trees overhanging the sidewalk, which did not obstruct the use of the sidewalk, or when the posts and wires could have been, with less or no inconvenience, located elsewhere. And, to the same effect, see *Hodgins v. Toronto*, 19 Ont. App. 537.

2. *Countryman v. Lighthill*, 24 Hun (N. Y.) 405. The complaint in this case alleged that in consequence of the overhanging limbs, the plaintiff's garden was damaged. The only proof on the subject was that plaintiff had berry bushes on his side of the line, and thought there was a difference between those in the shade and those which were not. What the difference was—whether the shaded bushes were in-

jured or benefited by the shade—did not appear, and it was held that the action was misconceived and that the justice erred in rendering judgment for the plaintiff. It also said that the plaintiff's remedy was by clipping the branches, especially if the owner of the tree refused to do so when requested.

In *Crowhurst v. Amersham Burial Board*, 4 Exch. Div. 5; 39 L. T. 355; 18 Alb. L. J. 515, the defendant, having planted on his own ground yew trees, noxious and poisonous to horses, so near to a neighbor's lot that his horse, while feeding therein, cropped the overhanging branches and died with the poison contained in what he ate, was held liable, solely on the ground that the trees were poisonous.

Poisonous Clippings.—A declaration that the defendant was possessed of yew trees, the clippings of which he knew to be poisonous, and that it was his duty to prevent the clippings from being placed on land not occupied by him; that he took so little care of the same that they were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned, was held on demurrer to disclose no fact from which a duty could be inferred in the defendant to take care of the clippings. *Wilson v. Newberry*, L. R., 7 Q. B. 31.

3. *Barclay v. Howell*, 6 Pet. (U. S.) 513; *Overman v. May*, 35 Iowa 89; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; 8 Am. Dec. 263; *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136; *Robert v. Sadler*, 104 N. Y. 229; 58 Am. Rep. 498; *Shawnee County v. Beckwith*, 10 Kan. 608; *Weller v. McCormick*, 52 N. J. L. 470; *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678; *Brainard v. Clapp*, 10 Cush. (Mass.) 6; 57 Am. Dec. 74; *Chambers v. Furry*, 1 Yeates (Pa.) 167; *Phifer v. Cox*, 21 Ohio St. 248; 8 Am. Rep. 58; *Andrews v. Youmans*, 78 Wis. 56;

is not thereby endangered or obstructed,¹ and anyone who unnecessarily or without authority interferes with or destroys them, will be liable in trespass to the owner,² or may, at his instance, be

Goodtitle v. Alker, 1 Burr. 133. And see *HIGHWAY*, vol. 9, p. 375; *STREETS*, vol. 24, p. 35.

In *Lyman v. Arnold*, 5 Mason (U. S.) 198, Story, J., said: "Where a highway is made over another's land, the soil remains in the owner, subject to the easement. If there are trees on it, they are his. If it be necessary to cut them down and remove them in order to make the highway safe, still the property in the trees so cut down is unchanged. The reason is that nothing is deemed included to pass as an incident to the easement but what is necessary to its reasonable enjoyment. The change of property in such trees is not necessary to such enjoyment."

The owner of the soil retains all his rights not incompatible with the public right of way, and may maintain trespass for cutting timber. *Babcock v. Lamb*, 1 Cow. (N. Y.) 238.

But where road allowances are made to a municipality from government lands, the municipality may maintain an action against anyone cutting timber thereon. *Barrie Tp. v. Gillies*, 20 U. C. C. P. 369.

Trover for Timber Cut from Highway.—The owner of the soil may maintain trover for timber cut from the highway in front of his land, where defendant's passage was not obstructed by the trees. *Sanderson v. Haverstick*, 8 Pa. St. 294.

Use of Trees for Repairing Highway.—When land is taken for a highway, the public acquire the right to take the trees standing within the limits of the right of way for the purpose of making and repairing the road and bridges. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 140. But see *contra*, *Baker v. Shephard*, 24 N. H. 208.

1. *Wellman v. Dickey*, 78 Me. 29; *Quinton v. Burton*, 61 Iowa 471; *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136. And see *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 233; 38 Am. Rep. 246. The policy of our laws favors the planting and preservation of shade trees in the public streets, where they do not constitute actual obstructions. *Clark v. Dasso*, 34 Mich. 86.

The owners of the soil may lawfully use the dividing space between the carriage path and sidewalks for the growth

of trees for ornament or use, and trees thus situated are in no sense nuisances, but specially protected from injury by *New Hampshire Comp. Stats.*, ch. 560, § 19. *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536.

Where shade trees have been allowed to stand where they were planted in a public way for more than twenty years, the presumption is thereby raised that they were planted under lawful authority. *Bliss v. Ball*, 99 Mass. 597. But in *Gaylord v. King*, 142 Mass. 495, it was held that the fact that trees had remained in the highway, the fee of which was in the public, for sixteen or seventeen years without objection, did not raise a presumption that license had been granted the lot owner to plant them which would give him the ownership thereof under *Massachusetts Pub. Stats.* (1882), ch. 54, § 6.

Responsibility of Owner.—The abutting owner must use reasonable care to prevent such trees from becoming dangerous to the passing public, and will be liable in damages to anyone injured through his negligence in this respect. Thus, he will be held liable to a passerby injured by the falling of a decayed limb. *Weller v. McCormick*, 52 N. J. L. 470.

2. *Phifer v. Cox*, 21 Ohio St. 248; 8 Am. Rep. 58; *Beauchamp v. Montreal*, 7 Mont. Super. Ct. 382.

Trees so planted are a public benefit and cannot be destroyed without the call of public necessity; and highway commissioners who destroy them without reason or necessity are trespassers, and if the act is wanton, are liable for exemplary damages. *Wellman v. Dickey*, 78 Me. 29; *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678.

If the trees encroach upon the highway and must be removed, the adjacent owner has a right, and must be afforded reasonable opportunity, to take them as living trees and transplant them elsewhere, and a highway commissioner who acts upon his own judgment in removing them, instead of instituting a prosecution, must take the risk of a jury differing with him in opinion in case he is prosecuted. *Clark v. Dasso*, 34 Mich. 86. See also *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 233; 38 Am. Rep. 246.

restrained from removing them.¹ Laws passed for the protection of such trees, and prohibiting their mutilation or removal, have been held not to apply to the owner.²

In *Bliss v. Ball*, 99 Mass. 597, it was held that only the mayor and aldermen or selectmen have authority to cause shade trees lawfully standing in the public way to be removed against the will of the owner, and anyone assuming to destroy them, on the ground that they are a public nuisance, is liable in damages. It was also held to be no ground of defense or mitigation of damages that the trees rendered the defendant's house damp and unwholesome.

Such trees are presumptively the private property of the adjacent landowner, and whoever injures them is presumptively a trespasser against such owner, who may forcibly protect them from an impending injury. *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536.

Whether or not a tree cut down by an overseer of highways obstructed the public in the use of the road, or whether it was cut down maliciously, are questions for the jury. *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678.

In *Castleberry v. Atlanta*, 74 Ga. 164, it was said that "shade-trees on the city's sidewalks and streets belong to the city, and in grading the streets and sidewalks they may be removed, if necessary to the grading. The court certainly went to the extreme of the law when it authorized damage for negligently and carelessly killing them." And in *Hodgins v. Toronto*, 19 Ont. App. 537, it was held that where the Ontario Tree-Planting Act (R. S. Ont., ch. 201) is not in force, the abutting owner has no interest in trees growing in the street sufficient to enable him to complain of the clipping of the branches by a telephone company with the assent of the city.

Telephone Company Clipping Branches.—Where a telephone company, without permission, but thinking it had it, cut off the top of a handsome elm standing in front of a centrally located lot available for high-class buildings, damages to the amount of \$150 were awarded. *Hoyt v. Southern New England Teleph. Co.*, 60 Conn. 385.

In *Mississippi*, boards of supervisors cannot grant to a telegraph or tele-

phone company a right of way along the margin of a highway, and such company will be liable for cutting trees or branches on adjoining land. *Clay v. Postal Tel. Co.*, 70 Miss. 406. But see *Hodgins v. Toronto*, 19 Ont. App. 537.

Where Fee of the Street Is in City.—But where the fee of a street is owned by the municipality, it is a good defense to an action against the municipal authorities for removing trees from the front of plaintiff's lot. *Gaylord v. King*, 142 Mass. 495.

Trees on Railroad Right of Way.—A railroad company may remove ornamental or other trees from its right of way to fit their track for safe and convenient use, either when originally constructing the road or afterwards. The company is the sole judge of the necessity of such removal, and the burden of proof to justify does not rest upon them. *Brainard v. Clapp*, 10 Cush. (Mass.) 6; 57 Am. Dec. 74.

1. A road supervisor will, at the instance of a landowner, be restrained from removing trees standing in the highway adjacent to, and in front of, his land, unless such removal is demanded by the wants of the public travel and convenience, and the determination of the supervisor does not so far partake of a judicial character as that it cannot be reviewed and controlled. *Bills v. Belknap*, 36 Iowa 583.

The fact that it would cost more to build a bridge in the middle than at the east side of a highway, is not a sufficient reason why a road supervisor should not be enjoined from building it at the east side, when it appears that by so doing plaintiff's hedge and shade trees would be destroyed. *Quinton v. Burton*, 61 Iowa 471. See also *Crimson v. Deck*, 84 Iowa 344.

2. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136. But in *Baker v. Normal*, 81 Ill. 108, an ordinance prohibiting the hitching of horses to shade trees in the streets, was held to apply to the owner of the adjoining property, notwithstanding he had set out the trees with the permission of the town. In this case it was said that the town has the control of the streets, and if it permits its citizens to improve and adorn that part in front of their lots, the improve-

2. Municipal Control.—It is the duty of the municipal authorities to have trees or their branches which have become dangerous to, or obstruct public travel in streets and highways removed,¹ and the municipality will be liable for any injury resulting from their negligence in this respect.² Where the proper officers fail to have such obstructions removed, *mandamus* lies to compel them.³

IV. DAMAGES FOR DESTRUCTION.—The owner may recover for damage done by the destruction of trees, and the measure of damages, in the case of full-grown timber trees, is usually the value of the trees.⁴ When fruit or ornamental trees are de-

ment and adornment does not thereby become the property of the citizen.

1. It is not necessary that a highway be rendered impassable in order to constitute an obstruction, and trees standing therein in such positions as to interfere with travel should be removed by the road supervisor. *Patterson v. Vail*, 43 Iowa 142. But unless they obstruct travel, they do not constitute a nuisance, and a city council has no right to declare them such and order them removed. *Everett v. Council Bluffs*, 46 Iowa 66. In this case it was held that a city council, even under a charter giving it a general power "to declare what shall be a nuisance and to prevent, remove, or abate the same," has no power to declare a thing a nuisance which is not such at common law and which has not been declared to be such by statute.

But in *Chase v. Oshkosh*, 81 Wis. 313, it was held that the decision of the city council that trees growing within the limits of a sidewalk are obstructions which should be removed, is not reviewable by the courts, in the absence of evidence to show an abuse of discretion.

Under § 6 Wm. IV., ch. 50, § 65, giving a justice of the peace power to order and direct that all trees growing near a highway which prejudice the highway by excluding the sun and wind therefrom, be "pruned or lopped," it was held that the term "lop" meant to cut off the branches laterally, and that the section did not give any power or any authority to the justices or the surveyor to cut off the tops of any tree. *Unwin v. Hanson* (1891), 2 Q. B. 115. The order of the justices for lopping trees served on the occupying tenant is sufficient. *Woodard v. Billerica Highway Board*, 11 Ch. Div. 214.

2. In *Chase v. Lowell*, 151 Mass. 422, it was held that where the superintendent of streets of a city had been

notified that a shade tree standing in the highway was unsound and dangerous, and did not proceed to obtain authority to have it cut down and removed, nor take due precaution against the danger, the city was liable to a traveler who, while in the exercise of due care, was injured by its fall.

Where a municipality has authority to plant, rear, trim, and preserve ornamental shade trees in its streets, proof that a party owns and occupies the lot in front of which a tree stands is not sufficient evidence that he planted or maintains the tree for his own use, so as to charge him with responsibility for an injury received by a party upon whom a neglected rotten limb had fallen. *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175.

Where the servants of the municipality, in getting materials on land adjoining the road for its repair, felled a tree which in falling lodged against another tree near the road, and being left there afterwards fell and killed plaintiff's wife while passing along the road, the municipality was held liable. *Gilchrist v. Carden Tp.*, 26 U. C. C. P. 1.

Where plaintiff, while riding on the top of a load of hay along a highway, was pushed off by coming in contact with a branch of a tree, and severely injured, and it appeared that the branches hung over the traveled portion of the road so low as to leave an insufficient space thereunder for the passage of a load of hay, and that this condition had existed for more than ten years, it was held to present a case of inexcusable negligence on the part of the town, and the plaintiff was allowed to recover damages resulting from the injury. *Embler v. Wallkill*, 57 Hun (N. Y.) 384. See also *HIGHWAY*, vol. 9, p. 384.

3. *Patterson v. Vail*, 43 Iowa 142.

4. Where timber forming part of a forest, is fully grown, the value of the trees taken or destroyed can be recov-

stroyed, however, as they are of little or no value when severed from the realty, the measure of damages is the diminished value of the

ered. In nearly all jurisdictions this is all that may be recovered, and the reason assigned is that the realty has not been damaged, because the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. *Wooden Ware Co. v. U. S.*, 106 U. S. 432; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Bennett v. Thompson*, 13 Ired. (N. Car.) 146; *Foot v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; *Beede v. Lamprey*, 64 N. H. 510; *Coxe v. England*, 65 Pa. St. 212; *Ross v. Scott*, 15 Lea (Tenn.) 479; *Tuttle v. Wilson*, 52 Wis. 643; *Cotter v. Plumer*, 72 Wis. 476; *Cushing v. Longfellow*, 26 Me. 306; *Smith v. Gonder*, 22 Ga. 353; *Graessle v. Carpenter*, 70 Iowa 166; *Striegel v. Moore*, 55 Iowa 88; *White v. Chicago, etc., R. Co.*, 1 S. Dak. 326; 3 Sedgw. on Dam. (8th ed.), § 933. See also DAMAGES, vol. 5, p. 36. But in *New York*, even where full-grown timber is cut or destroyed, the damage to the land may also be regarded, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. *Dwight v. Elmira, etc., R. Co.*, 132 N. Y. 202; *Bevier v. Delaware, etc., Canal Co.*, 13 Hun (N. Y.) 260; *Morehouse v. Mathews*, 2 N. Y. 514. And see cases cited *infra*, next note.

This rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal and their market value necessarily furnishes the true rule of damages. *Birket v. Williams*, 30 Ill. App. 451; *Dwight v. Elmira, etc., R. Co.*, 132 N. Y. 202; 3 Sedgw. on Dam. (8th ed.), p. 48.

Where forest trees were destroyed by fire from a railroad locomotive, the measure of damages was held to be the difference in the value of the trees before and after the fire. *Atkinson v. Atlantic, etc., R. Co.*, 63 Mo. 367; *Greenfield v. Chicago, etc., R. Co.*, 83 Iowa 270.

The invariable rule of damages in all actions for such unlawful cutting, as fixed by the *Wisconsin* statute, is the highest market value of the logs or timber between the cutting and the trial, unless the defendant, within the

time limited, serve upon plaintiff an affidavit that the cutting was done by mistake, and tender judgment as prescribed in the act. *Webber v. Quaw*, 46 Wis. 118; *Haseltine v. Mosher*, 51 Wis. 443. See also *Befay v. Wheeler*, 84 Wis. 135.

Where timber had been cut and piled, but before it was entirely removed a portion was destroyed by fire, it was held that an instruction that plaintiff could recover the value of the timber cut down, except the portion destroyed by fire, was correct. *Skinner v. Wheeler*, 2 Hun (N. Y.) 598.

In *Fremont, etc., R. Co. v. Crum*, 30 Neb. 70, it was held, where young trees and timber were destroyed by fire from the railroad, that the measure of damages was the amount of damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with the standing trees and timber before the fire and afterwards; and, in determining the amount of damages, that the inquiry should be as to the value of the trees burned as standing timber, and not the market price for transplantation as shade or ornamental trees.

The plaintiff may recover the value of the trees as they lay upon the land, and is not restricted to the value of the trees as they stood. *Firmin v. Firmin*, 9 Hun (N. Y.) 571. Where the trespass is the result of mere inadvertence, the value of the timber when first cut is the measure of damages. *Gardere v. Blanton*, 35 La. Ann. 811. See also *Yarborough v. Nettles*, 7 La. Ann. 116.

Punitive Damages.—Where the cutting is done under a *bona fide* belief that the land belongs to him, the damages should be restricted to the injury shown by the proof to have been inflicted. *Yahoola River Min. Co. v. Irby*, 40 Ga. 479. See also LOGS AND LUMBER, vol. 13, p. 1048.

Time of Estimating Value.—The value of the trees cut should be estimated by the price of timber of that quality at the time it was cut. *Schlater v. Gay*, 28 La. Ann. 340.

Effect of Payment of Damages.—In *Betts v. Lee*, 5 Johns. (N. Y.) 348; 4 Am. Dec. 368, it was held that the settlement of a suit for trespass in cutting timber, and recovering compensation, did not transfer to the trespasser

land.¹ This rule is also applied to shade trees and growing timber trees.² When the land is injured by the destruction or cutting of trees, such injury may also be taken into consideration in determining the question of damages.³

a right to the timber cut down and remaining on the land. And, to the same effect, see *Curtis v. Groat*, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204.

1. The measure of damages for the destruction of fruit trees is the difference in the value of the realty before and after such destruction. *Dwight v. Elmira*, etc., R. Co., 132 N. Y. 199, *criticising* *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644; *Mitchell v. Billingsley*, 17 Ala. 391. See also *Bennett v. Thompson*, 13 Ired. (N. Car.) 149.

In either case the measure of recovery is the value of the trees, the difference being in the mode of ascertaining it; thus, in the case of forest trees having no value except as timber, the means by which to determine the damage occasioned by their removal must be quite different from that pursued in determining the value of fruit trees, which may have no value whatever when removed from the soil. *Montgomery v. Locke*, 72 Cal. 77.

The measure of damages for the destruction of an orchard is not the cost of replacing the trees, and the care and labor bestowed on the destroyed trees before the burning, but the value of the destroyed trees at the date of the destruction. *Stoner v. Texas*, etc., R. Co., 45 La. Ann. 115; *Norfolk*, etc., R. Co. v. *Bohannon*, 85 Va. 293. See also *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644.

The value of an orchard is to be estimated with reference to what, in its growing state, it is worth to the premises. *Mitchell v. Billingsley*, 17 Ala. 391.

In *U. S. v. Taylor*, 35 Fed. Rep. 484, it was held that, in an action for cutting growing trees, if they had a value which could be accurately measured without reference to the soil, the recovery should be of their value, and not for the difference in the value of the land before and after such injury. See also *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644.

In *McDougall v. Moulezun*, 39 La. Ann. 1005, which was an action for clipping the branches of ornamental trees, it was held that in estimating the damages, allowance should be made for

the fact that time would soon replace them.

2. The value of young timber, like the value of a growing crop, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees, considered as timber, may, from their youth, be valueless, and so the injury done will be imperfectly compensated, unless the plaintiff should receive such a sum as would be equal to their value to him while standing upon the soil. *Wallace v. Goodall*, 18 N. H. 456; *Longfellow v. Quimby*, 33 Me. 457; *Chipman v. Hibberd*, 6 Cal. 162; *Hayes v. Chicago*, etc., R. Co., 45 Minn. 17; *Carner v. Chicago*, etc., R. Co., 43 Minn. 375.

The same rule prevails as to shade trees which, though fully developed, may add a further value to the freehold for ornamental purposes or in furnishing shade for stock. *Nixon v. Stillwell*, 52 Hun (N. Y.) 353; *Dwight v. Elmira*, etc., R. Co., 132 N. Y. 203; *Hoyt v. Southern New England Teleph. Co.*, 60 Conn. 385. The market value of the lumber would be a poor recompense, and the measure of damages, in such a case, is not necessarily the value of the wood and timber moved, but the solid and permanent injury to the inheritance. *White v. Stoner*, 18 Mo. App. 540.

3. *Ensley v. Nashville*, 2 Baxt. (Tenn.) 144; *Knisely v. Hire*, 2 Ind. App. 86; *Chipman v. Hibbard*, 6 Cal. 162. It is not difficult to see that serious injury may result from the cutting of timber on a wood-lot to the whole farm, by which it is used to supply fuel, fencing, and timber, and no sound reason exists why damages should not be recovered by reason of such destruction. *Argotsinger v. Vines*, 82 N. Y. 314. In this case, it was held that evidence was properly received as to the value of the farm with its timber and its value after it was cut, and that the difference furnished a proper measure of damages. And see, to the same effect, *Van Duesen v. Young*, 29 N. Y. 9; *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94; *Harder v. Harder*, 26 Barb. (N. Y.) 409.

In trespass *quare clausum*, with an averment for taking and carrying away

The action should be in trespass *quære clausum*; for if trover is brought, the plaintiff is limited in his recovery to the loss of the trees, and can recover nothing for the injury to the realty.¹

trees, the plaintiff may recover for the whole injury to the land, including the damage for prematurely cutting the trees, and for the loss of the trees themselves. *Beede v. Lamprey*, 64 N. H. 511; *Wallace v. Goodall*, 18 N. H. 456; *Footte v. Merrill*, 54 N. H. 490.

The injury done the possession is the gist of the action, and the value of the timber is admissible in proof of the damage sustained. *Kolb v. Bankhead*, 18 Tex. 228.

The defendant should pay the value of the timber used or destroyed, and for any injury the destruction has caused. *Watterston v. Jetcher*, 7 Rob. (La.) 20.

The *Michigan* statute allowing damages for cutting and taking away timber, fairly construed, includes not merely the value of the timber or wood cut, but such damages as accrue to the freehold by their destruction. When the action is merely for carrying away timber already cut, the damages could not go well beyond its value; but when standing trees are cut down, the rule of damages would fairly be the amount which the value of the estate is diminished by their destruction. *Skeels v. Starrett*, 57 Mich. 354; *Miller v. Wellman*, 75 Mich. 359; *Achey v. Hull*, 7 Mich. 430.

If the value of the timber cut covers the damage done the land, that should be the basis of the verdict; but if not, it should be the damage done the land by the cutting and removal of the timber. *Thompson v. Moiles*, 46 Mich. 42.

1. *Beede v. Lamprey*, 64 N. H. 510; *Longfellow v. Quimby*, 33 Me. 457; *Miller v. Wellman*, 75 Mich. 353; *Skeels v. Starrett*, 57 Mich. 354; *Achey v. Hull*, 7 Mich. 423; *Thompson v. Moiles*, 46 Mich. 42.

In *Bailey v. Chicago, etc., R. Co.* (S. Dak. 1893), 54 N. W. Rep. 596, it was held that the owner may bring his action, either for the value of the trees destroyed or for the injury to the real estate, and that in the former action the measure of damages is the market value of the trees, in the latter, the diminished value of the real estate. *Kellan, J.*, delivering the opinion of the court in this case, said: "A single tree, a grove of growing trees, or a forest of mature timber, has an intrinsic estima-

ble value for the material it contains. That value may be more or it may be less than what it adds to the value of the real estate upon which it stands. If the tree, or the grove, or the forest is destroyed, the owner ought to be allowed to exercise his own judgment, whether he will seek to recover the value of his property destroyed, or the diminished value of his land. When he does this, he determines the rule of damages by which his injury will be measured." This case was followed in *Uhe v. Chicago, etc., R. Co.* (S. Dak. 1893), 54 N. W. Rep. 601.

Where the action is brought solely for the value of the timber cut, and not for damages to the land, it is not error to reject evidence as to how much the land has been damaged. *Coody v. Gress Lumber Co.*, 82 Ga. 793.

As to the measure of damages in an action of trover, and when plaintiff can recover the enhanced value, and also as to the proper form of action, see LOGS AND LUMBER, vol. 13, pp. 1047, 1048, n. See also TROVER, vol. 26.

Replevin.—Replevin may be maintained for trees severed from the land, and the plaintiff's right to pursue his property, wherever it can be identified, is unaffected by any change made in the shape or form. If the trees were cut in good faith upon some supposed right, the defendant may deduct the value of his time, labor or skill; but if the trespass were wanton or willful, no allowance will be made for the increased value bestowed. *Heard v. James*, 49 Miss. 236; *Single v. Schneider*, 24 Wis. 299; *Hungerford v. Redford*, 29 Wis. 345; *Herdic v. Young*, 35 Pa. St. 176. And see REPLEVIN, vol. 20, p. 1061.

In *Single v. Schneider*, 30 Wis. 570, it was held that even though the timber were cut knowingly and willfully, without color or claim of right, the measure of damages would be the stumpage, unless the taking was accompanied by special circumstances, as of malice or insult, justifying exemplary damages. But this case is strongly disapproved in *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491, and *Skinner v. Pinney*, 19 Fla. 50; 45 Am. Dec. 1.

Where timber is cut upon public

In many of the states, statutes have been enacted allowing the owner of land to recover treble damages, or a specified penalty for each tree cut, from anyone who enters upon his property and cuts and carries away trees or timber without his consent; but the courts, in construing such statutes, have usually held that if the trees are cut by one under the mistaken belief that the land is his own, and not wantonly or willfully, only single damages can be recovered.¹ The word "owner," as used in such statutes, is usually held to mean the owner of the fee.²

lands willfully, fraudulently, or negligently, or without authority, and made into saw-logs, the government may replevy such logs or sue in trover for their value, and in either case may recover, without deduction, for their enhanced value, after severance from the freehold, arising from the labor of the wrongdoer. *Bly v. U. S.*, 4 Dill. (U. S.) 464.

1. *Clarke v. Field*, 42 Mich. 342; *Russell v. Myers*, 32 Mich. 522; *Wallace v. Finch*, 24 Mich. 255; *Osborn v. Lovell*, 36 Mich. 246; *Van Deusen v. Young*, 29 N. Y. 9; *Wagstaff v. Shippeil*, 27 Kan. 450; *Batchelder v. Kelly*, 10 N. H. 436; 34 Am. Dec. 174; *Morrison v. Bedell*, 22 N. H. 237; *Russell v. Irby*, 13 Ala. 131; *Watkins v. Gale*, 13 Ill. 152; *Whitecraft v. Vanderver*, 12 Ill. 235; *Cushing v. Dill*, 3 Ill. 460; *Cushman v. Oliver*, 81 Ill. 444; *Barnes v. Jones*, 51 Cal. 303; *Thurn v. Alta Tel. Co.*, 15 Cal. 474; *Soulard v. St. Louis*, 36 Mo. 546; *Schmidt v. Densmore*, 42 Mo. 225; *Perkins v. Hackleman*, 26 Miss. 41; *Cohn v. Neeves*, 40 Wis. 401.

The trespass must be willful or the neglect inexcusable. *McCleary v. Anthony*, 54 Miss. 708; *Barnes v. Jones*, 51 Cal. 303; *Keirn v. Warfield*, 60 Miss. 799.

There need be no malicious motive; hence, where the title to the land was in litigation and had been decided adversely to defendant, if pending an appeal he enters and cuts timber, he will be liable to treble damages. During the litigation he should let the timber alone. *Wright v. Brown*, 5 Kan. 600.

It is immaterial that the defendant supposed he was cutting on public land. Unless he has a reasonable cause to believe the land was his own, he is liable to treble damages. *Emerson v. Beavaus*, 12 Mo. 511; *Givens v. Kendrick*, 15 Ala. 648; *Perkins v. Hackleman*, 26 Kan. 41.

A railroad company, acting in good faith under a supposed authority conferred by its charter, is not liable to

treble damages. *Lindell v. Hannibal*, etc., R. Co., 25 Mo. 550.

A penalty is sometimes prescribed of so much for each tree cut, *Mhoon v. Greenfield*, 52 Miss. 434; and where different penalties are annexed to the felling of different trees, the declaration should set out and distinguish the different classes to which the trees felled belong. *Whitecraft v. Vanderver*, 12 Ill. 235. Where the statute provides for the recovery of a certain sum per tree, the judgment must be for some multiple thereof. *Behymer v. Odell*, 31 Ill. App. 350.

The *United States* is held to be a "person," within the meaning of a statute making it an offense for any one to cut down trees growing upon the land of any "person." *State v. Herold*, 9 Kan. 194.

2. *Missouri*, etc., R. Co. *v. Arnold*, 10 Kan. 473; *Wright v. Bennett*, 4 Ill. 258; *Achey v. Hull*, 7 Mich. 423; *Behymer v. Odell*, 31 Ill. App. 350; *Jarrot v. Vaughn*, 7 Ill. 132.

The one suing as owner must aver and prove an estate in fee. *Clay v. Boyer*, 10 Ill. 506; *Mason v. Park*, 4 Ill. 532; *Whiteside v. Divers*, 5 Ill. 336; *Edwards v. Hill*, 11 Ill. 22. But objection that the declaration does not contain a sufficient averment of ownership must be raised on demurrer. *Clark v. Field*, 42 Mich. 342. Possession under claim and color of title is presumptive evidence of title in the plaintiff, and casts the burden of contesting the title upon the defendant. *Abney v. Austin*, 6 Ill. App. 49; *Mason v. Park*, 4 Ill. 532; *Douglass v. Dickson*, 31 Kan. 310; *Nelson v. Mather*, 5 Kan. 151. There must be a claim of ownership, however, possession alone being insufficient. *McCleary v. Anthony*, 54 Miss. 708.

But he need not be in actual possession. *Sullivan v. Davis*, 29 Kan. 28; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *State v. Herold*, 9 Kan. 199. Nonjoinder of co-owner goes to apportionment of damages. *Achey v. Hull*, 7 Mich. 423.

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I. IN GENERAL: DEFINITION; CONSTITUENTS—1. Definition.—Trespass, in its usual legal acceptation, is a wrong done with force, to the person, property, or rights of another.¹ It is also the

1. Bouv. Law Dict. Any interference, however slight, which unlawfully disturbs another in the enjoyment of his property, is a trespass. *Rand v. Sargent*, 23 Me. 326; 39 Am. Dec. 625.

Forcible disturbance of peaceable possession is trespass; and an action therefor involves no question of title. *Newcombe v. Irwin*, 55 Mich. 620.

An entry on the land of another without license, and without express or implied permission from the owner, is a trespass. *Hatch v. Donnell*, 74 Me. 163.

Trespass is the proper remedy where there is no right to distrain, and the seizure is illegal. *Dickson v. Parker*, 3 How. (Miss.) 219; 34 Am. Dec. 78.

Injury is immediate and therefore trespass, only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of. *Holly v. Boston Gaslight Co.*, 8 Gray (Mass.) 123; 69 Am. Dec. 233.

Constructive possession of goods, by one having the general property in them and a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin. There is a tortious taking, whenever there is an unlawful meddling with the property, or an exercise or claim of dominion over it, without any pretense of authority or right. This, without a manual seizing of the property, is sufficient, and an action of trespass or replevin will lie. *Haythorn v. Rushforth*, 19 N. J. L. 160; 38 Am. Dec. 540.

Trespass lies whether the injury is willful or not, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; thus, where the defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass. *Neuson v. Anderson*, 2 Ired. (N. Car.) 42; 37 Am. Dec. 406.

Yet it is held that trespass will not lie for an injury which is caused by an unavoidable accident. So, in *Gibbons v. Pepper*, 4 Mod. 405, it was held that where a horse runs away with his rider against his will, and he could not have avoided it, and runs against another, there is no injury in the rider. And

in *Wakeman v. Robinson*, 2 Bing. 213, which was an action of trespass for driving against the plaintiff's horse and injuring him with the shafts of a gig, it was held to be a good defense, that the horse was frightened by the noisy and rapid approach of a butcher's cart, and became ungovernable, so that the injury was occasioned by an unavoidable accident. And in *Goodman v. Taylor*, 5 Car. & P. 410, which was an action for an injury done to a horse by a pony and chaise running into it, evidence was given on the part of the defendant, that his wife was holding the pony by the bridle when it became frightened by a passing show. It was held that this was a good defense under a plea of not guilty.

In *Vincent v. Steiner*, 7 Vt. 62, *Williams, C. J.*, after an examination of the authorities, said: "The result of our examination is that we think there must be some blame, or want of care and prudence, to make a man answerable in trespass; and that where a horse takes a sudden fright, and there is no imprudence in the rider, either in managing the horse or in driving an unsafe horse, and the horse runs against another and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained; and although a man is held responsible for injuries occasioned by his cattle, as was urged in the argument, it is on the ground that blame is attached to him in not restraining them, and that it is his duty to keep them from mischief and to make use of care and prudence in proportion to the necessity of the case. It is on the ground that no blame is attached to him that he is not responsible for damages arising from the vicious propensities of domestic animals, unless he knew of such propensity and neglects to take the proper precaution to prevent their injuring others."

An action of trespass may be maintained against idiots or lunatics, who are presumed to have no will, for the mind need not concur in the act occasioning the injury. *Ogle v. Barnes*, 8 Tr. 191; *Gates v. Miles*, 3 Conn. 70.

The act of uncocking a gun is voluntary and not unavoidable. *Underwood v. Hewson*, 1 Str. 596.

name of an action in tort; the remedy which is used when it is desired to recover damages for violent or forcible injury either to the person or property.¹ Force is the gist or criterion

An action of trespass is an appropriate remedy where one's property, or the property of a person of whom he has become administrator, has been tortiously taken. *Osborn v. Bell*, 5 Den. (N. Y.) 370; 49 Am. Dec. 275.

Parties engaged in the prosecution of a lawful act are not liable for an accidental injury occurring during the performance of the act, when due care and precaution have been exercised. *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259; 55 Am. Dec. 59.

1. Bouv. Law Dict.

Illustrations—As to Personalty.—The defendant's gig, in which he was driving at a "brisk trot" through a "narrow street," came in contact with the plaintiff's horse, which was loose in the street, and was walking obliquely across the defendant's course, and killed him. It was held that the accident was owing to the defendant's carelessness, or to his imprudent driving, and that he was liable for the value of the horse. *Payne v. Smith*, 4 Dana (Ky.) 497.

The owner of a cow which is accustomed to hook, the vicious propensity being known to her owner, is liable for damage done by her, although it is done in the highway against the land of her owner, and while going to her usual watering place. *Cogswell v. Baldwin*, 15 Vt. 404.

The defendant applied to the bailee of goods for them, saying that he had authority from the owner to sell them, and took the goods, sold them, and paid part of the proceeds of the sale to the bailee, requesting him to pay it to the owner. The owner received the same without objection, and requested the bailee to call on the defendant for the remainder. It was held that trespass *de bonis asportatis*, could not be maintained by the owner against the defendant, although he did not show any authority from the owner to make the sale. *Wellington v. Drew*, 16 Me. 51.

The defendants untied plaintiff's horse, and removed him from the post to which the owner had fastened him, and which the plaintiff's right to use, if not exclusive, was at least as good as the defendants'. It was held that this constituted a technical trespass for

which the plaintiff would be entitled to recover nominal damages, if nothing more. *Bruch v. Carter*, 32 N. J. L. 554; *Harrison v. Wisdom*, 7 Heisk. (Tenn.) 99; *Nelson v. Bondurant*, 26 Ala. 341; *Furlong v. Bartlett*, 21 Pick. (Mass.) 401; *Imlay v. Sage*, 5 Conn. 489; *Coxe v. England*, 65 Pa. St. 212; *Mills v. Wooters*, 59 Ill. 234.

Trespass will not lie for bare neglect by an infant or adult to use a hired animal with ordinary care, to protect him from injury, and return him as agreed upon. *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; 19 Am. Dec. 561.

After a delivery of goods sold, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring an action of trespass against the person taking them away. *M'Carty v. Vickery*, 12 Johns. (N. Y.) 348.

Trespass will not lie against a person, coming to the possession of goods lawfully, for any subsequent unlawful conversion of them. *Bradley v. Davis*, 14 Me. 44; 30 Am. Dec. 729.

The owner of a bull is liable in trespass if the bull breaks into an inclosure and gores a horse of his neighbor so that he dies; and the measure of damages is the value of the horse. *Dolph v. Ferris*, 7 W. & S. (Pa.) 367; 42 Am. Dec. 246.

Taking a bill of sale as security for a contract which the taker then intended not to carry out is a fraud, and taking possession of the goods under it is as much a trespass as if the bill had never passed. *Butler v. Collins*, 12 Cal. 457.

Trespass lies for an injury sustained by frightening the plaintiff's horse by firing a gun, if there was reasonable ground to think that the firing might frighten him. *Cole v. Fisher*, 11 Mass. 137.

The offense of "fraudulently opening certain packages or casks," being in care of the defendant and belonging to the plaintiff, "and taking therefrom a part of their contents," is a trespass only. *Cook v. Darby*, 4 Munf. (Va.) 444; 6 Am. Dec. 529.

Trespass lies against the owner of a dog which has killed the plaintiff's sheep. *Paff v. Slack*, 7 Pa. St. 254; *Campbell v. Brown*, 19 Pa. St. 359.

In trespass *de bonis asportatis*, if the original taking be not a trespass as against the plaintiff, the subsequent conversion of the property will not render the defendant liable. *Henderson v. Marx*, 57 Ala. 169.

Any unlawful exercise of authority over the goods of another will support trespass, even though no force may be exerted. Thus, trespass will lie against the purchaser, with notice, of the goods of a third person at a sale under execution. *Hardy v. Clendening*, 25 Ark. 436.

The defendants entered the store of the plaintiff, and carried off a quantity of goods. They first put up a quantity in one package, which one of the defendants carried away, while the other remained and selected goods for another package, which, on the return of the first defendant, they together carried away. It was held that the whole might properly be regarded as one trespass. *Harris v. Rosenberg*, 43 Conn. 227; *Hurd v. Darling*, 16 Vt. 377; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Rich v. Johnson*, 61 Ind. 246; *Pope v. Cordell*, 47 Mo. 251.

As to Person.—Where the trespass is forcible, an owner may resist entry; but he is not justified in killing the trespasser, unless it is necessary to prevent a felonious destruction of the property, or to defend himself against loss of life or great bodily harm. *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282. See ASSAULT AND BATTERY, vol. 1, p. 778; FALSE IMPRISONMENT, vol. 7, p. 661.

As to Realty.—The wanton and unnecessary destruction of the property of another, in removing an obstruction from the highway, is a trespass. *Beardslee v. French*, 7 Conn. 125; 18 Am. Dec. 86.

The purchaser of a crop of growing grass is entitled to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal, and may maintain trespass *quare clausum fregit* against a stranger who, during that time, wrongfully enters, and cuts and carries away the grass. *Dolloff v. Danforth*, 43 N. H. 219.

One who enters into the possession of unoccupied lands without any claim of right or title, and for the purpose of keeping the true owner out of possession, is a trespasser. *McCall v. Capehart*, 20 Ala. 521.

In trespass *quare clausum fregit*, the plaintiff complained of an injury to his

house situated on the land, as well as to the land itself. The trial was had on the question of title, and a verdict was found for the plaintiff. It was held that the plaintiff in error could not insist that his house was personal property, and that trespass would lie for its destruction. *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.) 379.

The sale of timber standing upon another's land, and the subsequent cutting and removal of it by the purchaser, make the vendor a trespasser. *Dreyer v. Ming*, 23 Mo. 434.

Plaintiff, in an action of trespass for cutting and removing timber, claimed to have constructive possession under certain probate proceedings, and defendant asked a charge that, to entitle him to recover, he must show title. It was held that a charge that "plaintiff's title, or color of title and possession and occupation, were sufficient to entitle him to maintain the action," did not take from the jury the question whether the title was valid or not. *Hoffman v. Harrington*, 44 Mich. 183.

Where A brought an action of trespass against B, for breaking and entering his close, and cutting and carrying away certain pine timber, and the evidence tended to show that the timber was not cut on the plaintiff's land, but was drawn across it, it was held that the action could be maintained even if the cutting were not upon the plaintiff's land. *Brown v. Manter*, 22 N. H. 468.

The *Maine* resolve of Jan. 24th, 1839, authorizing and requiring the land agent to prevent "all persons found trespassing on the territory of this state, as bounded and established by the treaty of 1783," and with force, if necessary, from committing such trespasses, is equally applicable to such as may commit them on the land of private persons, and to such as trespass upon the public lands of the state. *Plummer v. Jarvis*, 23 Me. 297.

Trespass lies against A for cutting down a tree upon B's land, which had a swarm of bees in it, and taking the honey, unless the bees went from A's hive. *Merrills v. Goodwin*, 1 Root (Conn.) 209.

Trespass does not lie for taking shell-fish on the land of an individual between high and low water mark. *Peck v. Lockwood*, 5 Day (Conn.) 22.

A right granted by one man to another to convey water through land of the grantor, by means of a race, to the mill of the grantee, is an incorporeal

of the action, and distinguishes it from Trespass on the Case.¹

2. Acts of Trespass.—A trespass, that is to say, a direct physical interference with the person, land, or goods of another, is, as a rule, actionable.² For mere words, without more, the action does

hereditament; and for an injury to such right an action of trespass will not lie. *Baer v. Martin*, 8 Blackf. (Ind.) 317.

A person has no right to enter on the land of another and remove a house therefrom, although the greater part of it is on his own land. *Bolling v. Whittle*, 37 Ala. 35; *Small v. Ball*, 47 Vt. 486; *Corcoran v. Webster*, 50 Wis. 125.

Possession of a meeting-house horse shed, without actual or constructive notice of parol conveyances to others, entitles one to maintain trespass, and, after judgment in his favor, it was held in *Kelley v. Seward*, 51 Vt. 436, that, as the facts found were consistent with the theory that the shed was so attached to the realty as to become part of it, it would be regarded as so attached.

Four persons owned in common a water-ditch, and while in the joint use of the water, three of said tenants agreed with A that if he would enlarge and improve the ditch, he should have an interest therein, and right to use water therefrom. A did work on the ditch to the value of \$50, and began to use the water, and was completing his contract when he was stopped by the owners, including the persons with whom he had contracted, and who declared the contract rescinded, whereby A was prevented from completing his work. No reason was assigned, and no offer to pay for the work done. A continued to use water from the ditch. Thereupon the owners, including the contracting persons, sued in trespass for wrongful use of the water from the time he entered. It was held that the defendant's acts did not constitute trespass and plaintiffs could not recover. *Bowman v. Ayers* (Idaho, 1889), 21 Pac. Rep. 405.

1. Force is the Gist of the Action.—*Walker Am. Law* (8th ed.), p. 596; *Dale Mfg. Co. v. Grant*, 34 N. J. L. 142. See cases cited in illustrations in preceding note.

It Is Not Always Necessary That Actual Force Be Used.—In an action of trespass for entering plaintiff's house and removing a piano, it appeared that the plaintiff had hired it from the defendant, who claimed to remove it for non-

payment of the rent; but plaintiff's house, where the piano was, was kept locked against the defendant, and he could not enter. In order to effect an entrance, this subterfuge was employed: An insurance agent, in the employ of the defendant, went to the house, and obtained admission upon pretense of examining the flues. Immediately afterwards, defendant, with assistants, came to the house. Plaintiff's wife locked the front door against them, and requested the insurance agent to retire by the back door; but, instead of doing so and against her objection, he threw open the front door, and the defendant and his aids entered, and removed the piano. On this evidence, defendant conceded that the insurance agent obtained entrance by deceit; but claimed that he, being once peaceably in the house, could admit his confederates, and, their entry being peaceable, their subsequent acts were not a trespass. It was held that the defendant and his assistants were trespassers. The house was kept fastened against them, which they knew. Had they broken down the door to gain an entrance, it is not denied that it would have constituted a trespass. The mere fact, however, that one of their number effected an entrance without force, by fraudulent means, and, upon the approach of the others, contrary to the will and command of the inmates of the house, unbolted the door, and allowed them to rush in, can place the act in no more favorable attitude than if the door had been broken. *Kimball v. Custer*, 73 Ill. 389.

2. Clerk & Lindsell on Torts, p. 6. A person is a trespasser, who, instead of passing along on the sidewalk of a street, stops on it in front of a man's house, and remains there, using towards him abusive and insulting language. *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

The public have only an easement in a highway to pass and repass along the same, and when one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating; and, in case the trespasser is armed with a

not lie;¹ though this rule is qualified somewhat where the words accompany acts tending to cause a breach of the peace.² The action will not lie for trespass committed by one against another where both are engaged in an unlawful act.³

pistol and acting in a belligerent manner, the principle of *molliter manus* does not apply. *State v. Davis*, 80 N. Car. 351; 30 Am. Rep. 86.

For an unavoidable accident, trespass, ordinarily, does not lie. *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Davis v. Saunders*, 2 Chit. 639; *Goodman v. Taylor*, 5 C. & P. 410; 24 E. C. L. 385; *Roche v. Milwaukee Gas Light Co.*, 5 Wis. 55.

If there be any want of ordinary care and skill, the defendant is liable. *Dy-gert v. Bradley*, 8 Wend. (N. Y.) 469; *Vincent v. Stinehour*, 7 Vt. 62; 29 Am. Dec. 145.

The clandestine entry of a claimant upon premises of which another has been given possession by legal process, makes him an intruder, whom the lawful possessor may forcibly expel, if need be; and if the intruder is accidentally injured in the process of expulsion, his own contributory negligence should be considered in fixing responsibility therefor. *Taylor v. Adams*, 58 Mich. 187.

Where rubbish was laid near a neighbor's wall and accidentally fell against and injured the wall, the master of the servant placing it there was held liable. *Gregory v. Piper*, 9 B. & C. 591; 17 E. C. L. 454; *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55; *Jordan v. Wyatt*, 4 Gratt. (Va.) 151; 47 Am. Dec. 720.

1. *Mere Words*.—*Wheeler v. Moore*, *Wright (Ohio)* 408; *Keyes v. Devlen*, 3 E. D. Smith (N. Y.) 518.

2. *Abusive Words*.—*Shorter v. People*, 2 N. Y. 193; 51 Am. Dec. 286; *Merest v. Harvey*, 5 Taunt. 442; *Stephen v. Myers*, 4 C. & P. 349; 19 E. C. L. 414.

3. *Lord v. Chadbourne*, 42 Me. 429; 66 Am. Dec. 290; *Gregg v. Wyman*, 4 Cush. (Mass.) 322.

Illustrations—Acts That May or May Not Be Trespass.—An act lawful at the time it was committed, cannot subsequently, by a legal fiction, be converted into and treated as a trespass. *Pratt v. Potter*, 21 Barb. (N. Y.) 589.

A peaceable entry into the house of another, for illegal purposes, is a trespass. *Gilmore v. Wale*, Anth. (N. Y.) 64.

In *Connecticut*, the commanding officers of companies of militia marching

through the country, will be held liable in trespass for disorders, committed by the soldiers under their command, which they knew of, and did nothing to prevent, or to detect and punish. *Avery v. Bulkly*, 1 Root (Conn.) 275.

Where any public way is unlawfully obstructed, an individual who wants to use it in a lawful way may remove the obstruction. *Arundel v. McCulloch*, 10 Mass. 70.

The fact that land granted to a railway company for the location of its tracks and buildings is also used by another company, does not render the former liable in damages to the grantor. *Wrightsville, etc., R. Co. v. Holmes*, 85 Ga. 668.

A director in a railway company who participates in the location of the road, and afterwards buys land through which it runs, is estopped from recovering damages of the company for trespass in locating its road on the land. *Wrightsville, etc., R. Co. v. Holmes*, 85 Ga. 668.

A person who has made a parol contract to purchase uninclosed land from another, and has entered into possession, cannot sue his vendor for trespass in going on the land and taking water from the well. *Bick v. Hill*, 27 Mo. App. 554.

An agreement to sell the defendant half of the plaintiff's growing crop of corn, or so much thereof as he may have to spare, does not carry with it an irrevocable license to enter and remove the corn; and where plaintiff has notified defendant that he cannot let him have any corn, such entry constitutes defendant a trespasser. *Green v. Evans*, 38 Mo. App. 517.

In an action of trespass, where there is evidence of title to the land in controversy in a stranger to the suit; that he was in possession, and authorized defendant to cut timber, etc., it is proper for the court to charge that, if plaintiff was not the owner of the *locus in quo*, but it belonged to another, and the owner was in the actual possession of the same, and authorized the defendant to enter and cut timber, then the plaintiff, though in possession, cannot maintain his action of trespass against the defendant. *Roberts v. Pres-*

3. Liabilities.—For the consequences of one's wrongful act liability follows,¹ even though the consequences might have been avoided by the exercise of care on the part of the injured person;² nor is liability lessened by the contribution of extraneous causes.³

4. Aiding, Abetting, and Inciting.—One who aids, abets, or incites in the perpetration of a trespass is liable as well as the direct perpetrator.⁴ So one who has delegated authority to be used for his benefit may be liable for the acts of the ministerial agent.⁵

ton, 106 N. Car. 411; *Brown v. Perkins*, 1 Allen (Mass.) 89; *Norvell v. Gray*, 1 Swan (Tenn.) 96; *Cutler v. Smith*, 57 Ill. 252; *Chouteau v. Boughton*, 100 Mo. 406; *Dexter v. Cole*, 6 Wis. 319; 70 Am. Dec. 465; *Butterfield v. Haskins*, 33 Me. 392.

1. *Burton v. McClellan*, 3 Ill. 434. Trespass *quare clausum fregit* may be committed by one who stands on his own ground or in the street, and with missiles breaks the house of another. *Prewitt v. Clayton*, 5 T. B. Mon. (Ky.) 4.

A person can recover for the temporary interruption of his business, and loss of time of his workmen, occasioned by the blasting of rock by a contractor on a public work in the immediate vicinity of the plaintiff's buildings, in such a negligent manner as to throw pieces of rock against the buildings, and cause the plaintiff's workmen to leave them under a reasonable apprehension of danger; and a payment of the damage to the building is no bar to the action, it being understood by the parties that the damage by interruption of the plaintiff's business was not included in the settlement. *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423.

2. As where A swung B around violently and suddenly turned him loose; B struck C, who pushed him off, whereby B was injured. It was held that B could recover of A. *Richer v. Freeman*, 50 N. H. 420. So defendant was held liable for injury to plaintiff's carriage in *Burdick v. Worrell*, 4 Barb. (N. Y.) 596. In *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464; 47 Am. Dec. 268, defendant was held liable where he willfully drove a boy back of a counter, whereby the boy knocked a faucet off a barrel and certain wine was destroyed. See also *Scott v. Shepherd*, 2 W. Bl. 892.

3. *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146; *Barnes v. Hurd*, 11 Mass. 59.

4. **Inciting or Aiding Trespass Makes One Liable.**—*Clark v. Bales*, 15 Ark.

452; *Mallory v. Merritt*, 17 Conn. 178; *Hall v. Howd*, 10 Conn. 514; 27 Am. Dec. 696; *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96; *Judson v. Cook*, 11 Barb. (N. Y.) 642; *Horton v. Hensley*, 1 Ired. (N. Car.) 163; *McMurtrie v. Stewart*, 21 Pa. St. 322; *Welsh v. Cooper*, 8 Pa. St. 217; *Vosburgh v. Moak*, 1 Cush. (Mass.) 453; 48 Am. Dec. 613; *Smith v. Felt*, 50 Barb. (N. Y.) 612; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Lewis v. Johns*, 34 Cal. 629; *Brown v. Perkins*, 1 Allen (Mass.) 89; *McMannus v. Lee*, 43 Mo. 206; 97 Am. Dec. 386.

5. **Responsible for Acts of Agent.**—One who encourages a constable to make a levy under a void writ of execution, and gives him a bond of indemnity in order to induce him to make such levy, is liable as a co-trespasser with the officer. *Kamerick v. Castleman*, 29 Mo. App. 658.

A person cannot be held liable as a trespasser for employing an officer to execute legal process, and no one who lawfully employs an officer is liable for the officer's abuse of his functions. *Sutherland v. Ingalls*, 63 Mich. 620.

Where there is a common intent among several to beat an adversary, or where the parties are all present, aiding, abetting or encouraging, or have become principals by previously counselling the violence, a joint verdict against all is proper. *Smithwick v. Ward*, 7 Jones (N. Car.) 64.

Where a contractor, under orders from his employer, attempted to excavate for a building to a greater width than his employer's lot, so that the excavation encroached upon his neighbor's land, it was held that the employer was a co-trespasser with the contractor. *Williamson v. Fischer*, 50 Mo. 108.

All who investigate, promote, encourage, co-operate in, aid, or abet the commission of a trespass, are guilty; but persons will not be deemed trespassers simply because present at the commission of a trespass which they

Those who are liable for the same trespass may be sued either jointly or severally.¹

5. Ratification.—One ratifying a wrongful act becomes responsible for that act, even though the act were done without authority.²

did not aid or abet, and in which they neither participated nor had an interest. *Berry v. Fletcher*, 1 Dill. (U. S.) 67.

In trespass, all are liable who participate in the wrongful act, either by aiding in, or advising, or assenting to it. *Ross v. Fuller*, 12 Vt. 265; 36 Am. Dec. 342.

1. Those Responsible Sued Jointly or Severally.—An injured party may sue several joint trespassers separately and prosecute each suit to final judgment; but then he must elect against whom he will take execution. *Fleming v. McDonald*, 50 Ind. 278; 19 Am. Rep. 711.

In case of a joint trespass there may be separate actions, and satisfaction of separate costs, but only one satisfaction of damages. *Lord v. Tiffany*, 98 N. Y. 412; 50 Am. Rep. 689.

Where execution on a void judgment has been levied by the sheriff by direction of the judgment creditors, they are all joint trespassers and liable for the property seized. *Shaw v. Rowland*, 32 Kan. 154.

Where an action is for joint trespass, one defendant may be convicted for acts done alone as well as for those done in concert with others. *Blanchard v. Burbank*, 16 Ill. App. 375.

Plaintiff brought separate actions for a joint trespass. Defendants in one of these actions paid the amount of the judgment into court, pending the other action. The clerk entered a satisfaction of record, but plaintiff refused to receive the money. It was held that he could not be deprived, without his consent, of the right to make his election. *Power v. Baker*, 27 Fed. Rep. 396.

2. Pardridge v. Brady, 7 Ill. App. 639; *McNeeley v. Hunton*, 30 Mo. 332; *Bell v. Miller*, 5 Ohio 250; *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96; *Grund v. Van Vleck*, 69 Ill. 478; *Fox v. Jackson*, 8 Barb. (N. Y.) 355; *Barrett v. Warren*, 3 Hill (N. Y.) 348; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74.

Ratification and Adoption of the Wrongful Act.—If a slave commits a trespass for his master's benefit, but not at his command or request, and the master afterwards assents to it, the master is liable in trespass. *Caldwell*

v. Sacra, Litt. Sel. Cas. (Ky.) 118; 12 Am. Dec. 285.

If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgages it as a security for his own debt, and the mortgagee takes possession under the mortgage, the bailor may maintain an action of trespass therefor against him, without a previous demand. *Stanley v. Gaylord*, 1 Cush. (Mass.) 536; 48 Am. Dec. 643.

The subsequent approval of a trespass by a third person will not render him liable, unless the act was originally done in his name or for his use. *Grund v. Van Vleck*, 69 Ill. 478.

If one without an antecedent authority, enters on land in behalf of the owner, his entry will enure to the benefit of the owner, if he afterwards ratifies it; and his bringing an action for trespasses committed on the land before the entry, will be a sufficient ratification, in case an entry was necessary to maintain the action. *Dexter v. Sullivan*, 34 N. H. 478.

Where several persons are engaged in the accomplishment of a lawful object, as in assisting one of their number to abate a nuisance on his land, and one or more of them commits a trespass in aid of their common purpose, the others, not directing or countenancing such unlawful act, are not liable therefor. *Richardson v. Emerson*, 3 Wis. 319; 62 Am. Dec. 694.

One who receives possession of property known to him to have been wrongfully taken from another, does not thereby become a party to the wrong, and cannot be held liable as a trespasser by relation. Agreeing to a trespass committed for one's use makes him guilty of trespass, and liable as a trespasser. *Harper v. Baker*, 3 T. B. Mon. (Ky.) 422; 16 Am. Dec. 112.

If one agrees to a trespass which has been committed by another for his benefit, trespass will lie against him, although the act was not done in obedience to his command, or at his request. *Caldwell v. Sacra*, Litt. Sel. Cas. (Ky.) 118; 12 Am. Dec. 285.

In trespass for disturbing plaintiff's rights, to maintain a water pipe across defendant's lot, it appeared that defend-

6. *Damnum Absque Injuria*.—There may be an infringement of a right without specific injury.¹

7. *Intent*.—To make one liable it is not necessary that he intended to do the particular injury which follows; if it was a mischievous act, or an act done in a careless manner, and injury results, he is liable.² Even if done with the best intention, if injury results, he is liable, the law looking rather at the damage done than the intent.³ Mere mistake will not ex-

ant had contracted with a third person, for the grading of the lot; that the grade, as fixed by the defendant, was two feet below the pipe; that he inserted no provision in the contract for its protection; and that he was present the most of the time while the work was in progress, and when the pipe was cut. He testified that he frequently warned the contractor not to get too close to the pipe. Plaintiff's evidence, however, was undisputed that, after the contractor had cut the pipe, defendant plugged it up; that he told plaintiff's wife the water was stopped, and going to be stopped, and that the pipe should not go down on his land again; and that subsequently, when plaintiff expressed a desire to relay the pipe, defendant declared that if the attempt was made he would prevent it by force. It was held that, as defendant had kept control of the work, and had adopted the act as his own, he was responsible for the injury. *Reynolds v. Braithwaite*, 131 Pa. St. 416.

1. *Right of Action Without Specific Injury*.—A party putting a fence on, or plowing the land of another, although not materially injuring him, is liable as a trespasser. *Pfeiffer v. Grossman*, 15 Ill. 53.

Trespass, *quare clausum fregit*, will lie for the act of placing a shaft from one building to another, across a passage-way, owned in fee by the plaintiff, although the shaft was placed underneath a bridge or platform, over which was the passage-way, and in no way interfered therewith. *Esty v. Baker*, 48 Me. 495.

An action on the case lies against an intruder, by one having a right of way, without proof of actual damage. *Williams v. Ealing*, 4 Pa. St. 486; 45 Am. Dec. 710; *Embrey v. Owen*, 6 Exch. 353; *Rochdale Canal Co. v. King*, 14 Q. B. 122; *Woodman v. Tufts*, 9 N. H. 88; *Snow v. Cowles*, 22 N. H. 302; *Cadwell v. Farrell*, 28 Ill. 438.

2. In an action for procuring the arrest and imprisonment of the plaintiff,

it was held that the fact that the statements of the defendant which led to the arrest of the plaintiff were made under military compulsion, could afford no defense if the defendant knew such statements to be false, and intended thereby to secure the arrest of the plaintiff. *Huggins v. Toler*, 1 Bush (Ky.) 192.

An accident, to excuse a trespass, must be unintentional, unavoidable, and without the least fault on the part of the trespasser. *Jennings v. Fundeburg*, 4 McCord (S. Car.) 161.

For a forcible, direct injury to the person, which is not the effect of unavoidable accident, he who inflicts it is liable in damages. The liability does not depend on the capacity or intention of the actor. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Brown v. Kendall*, 6 Cush. (Mass.) 292.

In order to constitute an act of trespass *vi et armis*, the injury done need not have been intentional. It is sufficient if it is the direct and immediate consequence of a force exerted by the defendant without the exercise of due care. *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55.

A person committing a willful and malicious trespass upon the property of another, under circumstances involving unavoidable injury to persons and property, is responsible to any person injured by such trespass. It is not necessary that he should intend to do the particular injury which ensues. *Munger v. Baker*, 65 Barb. (N. Y.) 539.

3. *Intent Not Material*.—If a person unlawfully injures another's property, he is liable for the damage, without regard to the intention with which the act was done. *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Cate v. Cate*, 44 N. H. 211; *Bruch v. Carter*, 32 N. J. L. 554; *Dexter v. Cole*, 6 Wis. 319; 70 Am. Dec. 465.

In an action to recover damages for a trespass on land, the fact that the trespass was not willful, is no bar to the

cuse.¹ The spirit in which the wrongful act may have been done

recovery of the damages actually sustained. *Maye v. Yappen*, 23 Cal. 306.

Where the defendant ascended in a balloon, which came down into the plaintiff's garden, and a crowd of people broke the fence into the garden to assist the defendant there in peril from being entangled, and trod down vegetables and flowers, the defendant was held answerable in trespass for all the damage done to the garden. *Guille v. Swan*, 19 Johns. (N. Y.) 381; 10 Am. Dec. 234.

Entering without authority upon land in possession of another, and cutting down and carrying away timber, constitute a trespass, irrespective of the motive or ignorance of the trespasser. *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20.

A party will be liable in damages for an injury inflicted by him on a third person during a fight, though no such injury may have been intended; but if such third person, by his own improper conduct, has brought the injury upon himself, by officiously and improperly intruding himself in the way of danger, it is his own folly and he will be without remedy. *Cogdell v. Yett*, 1 Coldw. (Tenn.) 230.

Trespass is not less wrong that it is done by accident, or without design, or even against the will of the actor. Trespass or wrong done by accident, without design, or against actor's will, is not fault, in the sense of that word as used in connection with actions for negligence. It is a misfortune, and not a fault. *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546.

In trespass for cutting trees on a church lot, it is no defense that defendant cut the tree under instructions of persons who had no authority in the matter, though he believed they had such authority. *Allison v. Little*, 85 Ala. 512.

Pennsylvania Act March 29th, 1824, gives treble damages against "any person who shall cut down or fell, or employ any person or persons to cut down or fell, any timber, tree or trees growing upon the land of another, without the consent of the owner thereof." The agent of S. entered into negotiations with P., for the purchase of certain timber, provided it stood on his land. P. had a survey made, which by mistake showed the timber to be upon his land, and the agent cut it down under a contract of sale by which he was to take it away

within three years. It was held that P. was liable to the real owner of the land on which the timber stood. *McCloskey v. Powell*, 123 Pa. St. 62.

In *Lowenberg v. Rosenthal*, 18 Oregon 178, defendants were held liable for the carrying away of timber standing upon plaintiff's land, without any lawful authority for taking it, although they had probable cause for believing and did believe that they had authority from the plaintiffs for taking the timber.

Whether defendants, acting under authority of the board of health in laying drains to abate a nuisance on plaintiff's land, acted in good faith, was properly left to the jury, where the evidence showed that they placed the drain above the surface, and filled in gravel, and that they injured structures on the premises, and made long delays. *Conway v. Russell*, 151 Mass. 581.

Where A, without B's consent, enters upon B's land, and removes therefrom logs which C has unlawfully cut thereon, and undertaken to sell to A, such entry and removal constitute a trespass to the realty, though made in ignorance of B's rights. *Hazelton v. Week*, 49 Wis. 661; 35 Am. Rep. 796; *Warren v. Putnam*, 68 Wis. 481; *State v. Smith*, 78 Me. 260; 57 Am. Rep. 802; *McClanahan v. Stevens*, 67 Tex. 354; *Gerhardt v. Swaty*, 57 Wis. 24; *Keirn v. Warfield*, 60 Miss. 799; *Sullivan v. Davis*, 29 Kan. 28; *Burton v. McClellan*, 3 Ill. 434; *Roth v. Smith*, 41 Ill. 314.

1. **Mistake Does Not Excuse.**—Trespass cannot be justified on the ground of mistake merely. *Hobart v. Hagget*, 12 Me. 67; 28 Am. Dec. 159.

A, by direction of B, who had purchased of C a lot of timber, cut by him without right on the plaintiff's close, entered on the close and removed the wood without knowledge of the defect in the title. It was held that he was liable in trespass. *Higginson v. York*, 5 Mass. 341.

Where the defendant cut timber on the land of the plaintiff, it is no defense that the plaintiff, by mistake, led him to believe that the timber was on his (the defendant's) land. *Pearson v. Inlow*, 20 Mo. 322; 64 Am. Dec. 189.

A party entering upon land in good faith, under the belief that he has the title thereto, is not a naked trespasser, though the title be in fact in another;

may be shown in mitigation of damages.¹ Bad motives alone cannot be made a ground of action, if the rights of another have not been violated.²

8. Indemnity.—When judgment has been recovered against several defendants in trespass, the defendant, who pays the whole of the judgment, is not entitled to contribution from the co-defendants,³ provided that the person seeking redress knew at the time that he was engaged in an unlawful act; but if such person were innocent of intentional wrong, as a servant or agent, obeying the instructions of the master or principal, he can enforce contribution.⁴

and he is entitled to all legal protection to his improvements and property placed upon the premises, given by the statute to parties in possession under color of title. *Durell v. Hayward*, 9 Gray (Mass.) 248; 69 Am. Dec. 284.

1. Intent as Mitigating Damages.—In an action of trespass, where it is admitted that defendants occupied the premises for a year, and the defense is a contract for a lease for that period, there being no evidence that plaintiff authorized the person from whom defendants took the contract to make it, she was entitled to recover, without regard to the good faith of defendants' entry. *Johnson v. Park* (Ky. 1891), 17 S. W. Rep. 273.

A civil remedy is not taken away by the felonious intent with which a trespass has been committed. *Cannon v. Burris*, 1 Hill (S. Car.) 372.

The word "willfully" in the *Vermont* trespass act, is not synonymous with "voluntary," but implies a tort or wrong. *Savage v. Tullar*, Brayt. (Vt.) 223.

To sustain an action for malicious injury to the plaintiff's fishery, caused by anchoring a vessel therein, it must appear that the defendant knowingly, and without necessity, or reasonable commercial purpose, cast anchor so as to interrupt the same, and remained after the wind and the tide permitted him to depart. *Mason v. Mansfield*, 4 Cranch (C. C.) 580.

To subject a party to the statute penalty for cutting timber, he must have committed the wrong knowingly and willfully, or under such circumstances as show him guilty of criminal negligence. The statute does not extend to a person who fells trees upon the land of another, under a mistaken belief that his boundaries extend far enough to in-

clude the trees in controversy. *Watkins v. Gale*, 13 Ill. 153; *Batchelder v. Kelly*, 10 N. H. 436; 34 Am. Dec. 174.

Where one cuts timber, knowing it not to be upon his own land, or upon land which he had a license to cut from, the law presumes that the trespass was willful. *Watkins v. Gale*, 13 Ill. 152.

It is not trespass for cattle, used by a person in making a road, to stray upon adjoining unfenced land against the will of their owner. *Cool v. Crommett*, 13 Me. 250; *Coats v. Darby*, 2 N. Y. 517; *Leach v. Francis*, 41 Vt. 670; *Hearn v. Camp*, 18 Tex. 545.

One's action for damages sustained from negligence of another, cannot be defeated by showing that the former party is a wrongdoer, a trespasser, or a violator of the law, unless it appears that his own negligence or his fault has directly contributed to his damage. *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546.

2. Pickard v. Collins, 23 Barb. (N. Y.) 444. The mere intent of a defendant in trespass is not material, if his conduct was not actionable. *Estey v. Smith*, 45 Mich. 402.

Although one may remove wood piled without right upon his land, he is bound to do so in a reasonable manner, and may be held liable for damages when he willfully and maliciously removes it so as to obstruct a pathway on the land of the trespasser; and his declarations to the effect that he removed the wood to the pathway in order to be mean, are admissible upon the question of motive. *Burnham v. Jenness*, 54 Vt. 272; *Sparkman v. Swift*, 81 Ala. 231.

3. There is no Contribution Among Wrongdoers.—*Percy v. Clary*, 32 Md. 245; *St. John v. St. John's Church*, 15 Barb. (N. Y.) 346.

4. Contribution Enforced by Innocent

9. **Those Accessory.**—There are no accessories in trespass, but all who are concerned with the trespass in any manner, are principals.¹

10. **Acquiescence.**—Acquiescence in an act of trespass may bar one from suing for damages arising therefrom.²

II. RIGHTS IN REALTY WHICH MAY BE THE SUBJECT OF TRESPASS—

1. **Eminent Domain.**—(See EMINENT DOMAIN, vol. 6, p. 509.)

2. **Possession With and Without Title**—*a.* **WHAT IS POSSESSION.**

—Possession is the detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or

Agent, Servant, or Party.—*Allaire v. Ouland*, 2 Johns Cas. (N. Y.) 52; *Randall v. Rich*, 11 Mass. 494; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Drummond v. Humphreys*, 39 Me. 347.

The rule that no contribution lies between trespassers applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong. Contribution lies between trespassers, where one of several persons, who join in performing an act, which to them appears to be right and lawful, but which proves to be a tort, has paid the amount of the damage. *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663.

Where one goes in aid of a person who commits a trespass, though he takes no further part in it, he will be guilty of trespass. *Clark v. Bales*, 15 Ark. 452.

One tort-feasor, not a party to the suit in which judgment was obtained for the joint tort, cannot be called upon to pay, till his co-trespassers have paid the judgment, and fixed his liability to them by a suit; nor can he be compelled to give them security, till they secure him from all loss beyond his share. *Bell v. Walsh*, 7 Cal. 84.

Where an immediate act is done by the co-operation, or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable, in trespass, for the acts of others, it must appear, either that they acted in concert, or that the act of the party sought to be charged, ordinarily and naturally produced the acts of the others. *Brooks v. Ashburn*, 9 Ga. 297; *Wallace v. Miller*, 15 La. Ann. 449; *Irwin v. Scribner*, 15 La. Ann. 583; *Woodbridge v. Conner*, 49 Me. 353; *Allen v. Craig*, 13 N. J. L. 294; *Judson v. Cook*, 11 Barb. (N. Y.) 642; *Whitaker v. English*, 1 Bay (S. Car.) 15; *Chanet v. Parker*, 1 Mill (S. Car.)

333; *Johnson v. Tompkins*, 1 Baldw. (U. S.) 571.

The guilty knowledge of one trespasser is the knowledge of his co-trespassers. *Ously v. Hardin*, 23 Ill. 403.

Possession alone is sufficient to maintain the action of trespass against mere tort-feasors. In such action, all procurers, aiders and abettors, and even those who are not privy to the commission of a trespass for their use and benefit, but who afterwards assent to it, are, in judgment of law, principals. *Horton v. Hensley*, 1 Ired. (N. Car.) 163.

1. Accessories are liable as principals. *Olsen v. Upsahl*, 69 Ill. 273.

2. **Acquiescence.**—A party, as here, a railroad company, who had been forbidden by the owner of land to enter thereon, acquires no right to do so from his mere acquiescence. *Currie v. Natchez R. Co.*, 61 Miss. 725.

In trespass on the case, for injury caused by the negligence of the defendant, it may be shown, in defense, that the injury was caused by the plaintiff's own negligence. *Bethea v. Taylor*, 3 Stew. (Ala.) 482; *Wynn v. Allard*, 5 W. & S. (Pa.) 524.

Direct and immediate force employed by one person against another without permission, with malice, constitutes trespass, however slight the injury produced; but it is otherwise, if the force is used with permission. *Cadwell v. Farrell*, 28 Ill. 438.

Where a trespass is waived by the plaintiff, at the time it is committed, by referring the matter to a referee, he cannot bring an action of trespass *vi et armis*, though the property is clearly his. *Patterson v. Peironnet*, 7 Watts (Pa.) 337.

Trespass will not lie against a colonel, who, with the implied assent of the owner to the use of an unoccupied field for a muster field, cut down some old pine saplings which interfered with the use of the field as a muster ground.

exercises it in his name.¹ One in possession of realty can generally maintain an action against one trespassing against his rights.²

b. EXCLUSIVE POSSESSION.—Exclusive possession is possession to the exclusion of all others. Such possession, if peaceable, is

Law v. Nettles, 2 Bailey (S. Car.) 447.

The acquiescence in a trespass of one who has been deceived by a pretense of legal authority, is not such consent as to affect his remedy at law. Bagwell v. Jamison, Cheves (S. Car.) 249.

1. See POSSESSION, vol. 18, p. 840.

2. POSSESSION.—An unrecorded deed of wild land is not of itself sufficient evidence of possession by the grantee to enable him to maintain trespass. Estes v. Cook, 22 Pick. (Mass.) 295.

Two persons not the owners in fee of a tract of land, fenced it to get the grass thereon, and, without a partition fence assigned to each other a half respectively. After three years' occupation, one gave a third party permission to enter to cut some hay, but neglecting to designate upon which half, it was taken from the other's, who brought trespass therefor, and it was held that the plaintiff could recover. Morse v. Iman, 42 Ill. 150; 89 Am. Dec. 417.

Possession under a paper title apparently good is actual possession sufficient to maintain trespass. Parker v. Wallis, 60 Ind. 15; 45 Am. Rep. 703.

Cutting wood upon a wood lot up to a well-known line for thirteen years, is such possession as will support trespass *quare clausum fregit*. Chandler v. Walker, 21 N. H. 282; 53 Am. Dec. 202.

Possession of a part under color of title does not give constructive possession of the whole against one in actual possession. Hosford v. Whitcomb, 56 Vt. 651.

One in unlawful possession of land may allow another to commit acts of waste on the land, and the real owner cannot maintain trespass against the other. Hawkins v. Roby, 77 Mo. 140.

Entry on land, under a deed claiming title, and cutting and selling timber is possession. Sawyer v. Newland, 9 Vt. 383.

Possession of an inclosed farm is possession of inclosed woodland attached. Penn v. Preston, 2 Rawle (Pa.) 14.

A delivered to B the key of his house, for the purpose of putting B in possession of goods therein, but not of the house itself. It was held that B had no such possession as would support tres-

pass for breaking and entering. Davis v. Wood, 7 Mo. 162.

Occasional entries, by one claiming title, and cutting and hauling off timber, do not constitute possession. Ozark Land Co. v. Leonard, 20 Fed. Rep. 881.

Nailing up the windows of a house never used, by one claiming title, is not possession without re-entry. Patterson v. Bodenhammer, 11 Ired. (N. Car.) 4.

Possession of a part of a tract of land by the owner of the whole, is possession of the whole. Possession of a trespasser extends only to actual occupancy. Kincaid v. Logue, 7 Mo. 167; Sloan v. Moore, 7 Mo. 170; Hibbard v. Foster, 24 Vt. 542.

Title by possession need not be of such a character as to dislodge the true owner, in order to give the superior right as against one subsequently entering and claiming by no higher title than possession under such an entry. Currier v. Gale, 9 Allen (Mass.) 522.

A plaintiff in an action of trespass, held a deed of certain premises from one who had a bond for title for conveyance upon payment of the purchase-money; but the payment had not been made. The plaintiff never was in possession of the premises himself, but, for a time, was in possession by a tenant, who finally removed therefrom, delivering the key to his landlord, and leaving the premises unoccupied; the defendant, being the owner in fee, claiming under a subsequent conveyance from the same party who had executed the title bond to the plaintiff's grantor, entered peaceably into the possession of the premises, and this entry constituted the alleged trespass. It was held that this possession of the plaintiff was not sufficient to maintain his action against the entry on the owner in fee, although as against a stranger his title might prevail. Dean v. Comstock, 32 Ill. 173.

The entry of an owner upon a trespasser, will enable the former to maintain trespass; but it must be an entry for the purpose of taking possession, which may be evidenced by acts of ownership on the land, as plowing it or the like, or by a formal declaration of the intention accompanying the entry. Bynum v. Carter, 4 Ired. (N. Car.) 310. In an action of trespass *quare clausum*

always sufficient to maintain trespass *quare clausum fregit*.¹ The action may sometimes be maintained where the plaintiff has not been in exclusive and peaceable possession.²

c. ACTUAL POSSESSION.—The possession must be *bona fide* actual possession, either in person or by tenant.³ Such possession is sufficient to support the action of trespass.⁴ Even though

fregit on a tract of land called B, defendant took defense for a tract of land called A, on a part of which the alleged trespass was committed. The lands were located on plats. It was held that the plaintiff was only entitled to recover for a trespass committed within the lines of the tract called B, as the same was located by him on the plats in the cause, although he had been in possession and cultivation of the land on which the trespass was alleged to have been committed, claiming the same as part of B for upwards of fifty years, and it had always been called and reputed to be part of that tract. *Chapman v. Brawner*, 2 Har. & J. (Md.) 366.

1. Exclusive Possession.—Exclusive and peaceable possession of *United States* lands is sufficient against a trespasser. *Keith v. Tilford*, 12 Neb. 271.

Possession, in order to be sufficient to maintain an action for trespass upon land, must be exclusive; otherwise plaintiff is put to proof of his legal title. *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

An open, peaceable, adverse, and exclusive possession of land which has been discontinued as a highway under claim of title, is sufficient. *Bowley v. Walker*, 8 Allen (Mass.) 21.

A corporation in peaceable possession and control of property, with acquiescence of the defendant, is not barred from maintaining an action for trespass against the defendant by the fact that it is liable to the defendant for the value of such interests. *Wausau Boom Co. v. Plumer*, 49 Wis. 112.

Where possession has been mixed and plaintiff shows no title, he cannot object to title of defendant. *Brown v. Pinkham*, 18 Pick. (Mass.) 172.

Actual exclusive possession of land is sufficient; if no such possession exists, plaintiff must show title to maintain action. It may be laid down as a rule, almost without exception, that plaintiff in trespass upon land to sustain his action must prove either actual possession of land or title to it. *Dejarnett v. Haynes*, 23 Miss. 600.

2. Exclusive possession is not neces-

sary to maintain trespass *quare clausum fregit*. *McCormick v. Huse*, 66 Ill. 315. Compare *Ganter v. Atkinson*, 35 Wis. 48.

Open and exclusive possession of lands will enable the disseisor of the true owner to maintain trespass against a mere wrongdoer, even though the possession of the disseisor has continued less than twenty years. *Clancey v. Houdlette*, 39 Me. 451; *Look v. Norton*, 55 Me. 103.

3. Actual Possession.—*Smith v. Wunderlich*, 70 Ill. 426; *Uttendorffer v. Saeger*, 50 Cal. 496; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Zell v. Ream*, 31 Pa. St. 304; *Duncan v. Yordy*, 27 Kan. 348. See also *Carter v. Jackson*, 56 N. H. 364.

Trespass lies by one in possession of land, whether inclosed or not, against another who herds stock thereon after being forbidden. *Bedden v. Clarke*, 76 Ill. 338.

One in possession can maintain trespass against one unable to show a better right. *Stratton v. Lyons*, 53 Vt. 641.

The owner of land cannot maintain trespass for cutting trees down, unless he was actually possessed of them. He may maintain it for carrying away the cord wood. *McClain v. Todd*, 5 J. J. Marsh. (Ky.) 335; 22 Am. Dec. 37.

Must not Be Tortious.—In an action for trespass in tearing down a wall, it was held essential that the plaintiff should at the time of the trespass show that he was in possession of the *locus in quo*, and that proof of a mere tortious occupancy would not suffice. *Townsend v. Bissell*, 5 Thomp. & C. (N. Y.) 583; 3 Hun (N. Y.) 556.

What Actual Title or Possession Must Be Shown to Maintain Trespass.—*Yahoola, etc., Min. Co. v. Irby*, 40 Ga. 479; *Nelson v. Mather*, 5 Kan. 151; *Phillips v. DeGroat*, 2 Lans. (N. Y.) 192; *Oatman v. Fowler*, 43 Vt. 462; *Kidder v. Kennedy*, 43 Vt. 717; *Hughes v. Graves*, 39 Vt. 359; 94 Am. Dec. 331; *Gardner v. Hearrt*, 1 N. Y. 528.

4. Illustrations.—When a tenant for years sues for trespass on land, he must show possession at the time of the tres-

pass; the defendant may show that he was and long had been in adverse possession. *Heilbron v. Heinlen*, 72 Cal. 371.

Where the plaintiff shows possession, the defendant cannot show want of title in plaintiff as a defense, except he shows a better right to the possession. *Reed v. Price*, 30 Mo. 442.

Under the *South Carolina* law, before the adoption of the code, one in actual possession, having title to hold, could maintain trespass against one in possession of the portion where the trespass was committed. Since the adoption of the code, title without possession is sufficient. *Gilmore v. Roberts*, 18 S. Car. 551.

Upon a bill brought by plaintiff to restrain defendant from trespassing upon lands alleged to belong to plaintiff, and for an accounting, and for damages for past trespasses, it appeared that each party was in partial possession; that each derived title by grant from the state; that plaintiff's claim of title from the state's grantee was perfect; that defendant claimed under an earlier grant, but there was a defective sheriff's deed in his claim of title, by which the title was left outstanding in one of his predecessors. It was held that, whether the bill was to be considered as an ejectment bill or a bill to restrain waste, the plaintiff must fail; for, if ejectment, the outstanding title was a perfect defense, and, if a bill to restrain waste, the rule in trespass would apply, and the title of plaintiff was not so far superior to that of defendant as to enable him to maintain trespass without showing exclusive possession. *Walker v. Fox*, 85 Tenn. 154.

While, as a general rule, trespass *quare clausum fregit* can only be maintained by one in actual possession of the premises, yet, in the case of a disseisin, the disseisee, after he has regained possession, may maintain the action against the disseisor, for acts done during the disseisin. *Haley v. Wheeler*, 8 Hun (N. Y.) 569.

A rented the premises in question from the owner, and sold his interests in them to plaintiff, the agent of the owner recognizing plaintiff as their tenant, previous to the time defendant entered upon the premises. It was held that plaintiff was entitled to possession at the time defendant entered, and if defendant, during the time he was in possession, injured said premises so as to render them untenable, then

plaintiff was entitled to recover in an action of trespass what it would cost to repair said injury. *Burt v. Warne*, 31 Mo. 296.

Where A, in possession of land, is wrongfully ousted by B, the latter does not acquire such a possession as it would be a trespass in A to disturb by an entry involving no breach of the peace. *Illinois, etc., R., etc., Co. v. Cobb*, 94 Ill. 55.

One in possession of land under a claim of right may recover of another claimant thereof for entering without license, and carrying off and converting to his own use grains stacked and raised thereon by the former. *Ray v. Gardner*, 82 N. Car. 454.

Where one entered upon an uncultivated and unappropriated lot of land and drove down stakes with his initials upon them, to define the limits of such land taken, and erected buildings thereon, he was entitled to judgment, in an action of trespass *quare clausum fregit* against a person entering upon a part of the land staked out, if the plaintiff entered with the intention to take possession, claiming the land, and if the defendant knew, or might, with ordinary care, have known these facts, and if such mode of inclosing such land had been acquiesced in, by the town in which it lay, as giving a valid possession. *Cook v. Rider*, 16 Pick. (Mass.) 186.

A defendant in trespass, holding by possession only, cannot object to the plaintiff's title under a partition to a proprietor of a common field, that such proprietor had previously received his full share, or that the *locus* had been previously assigned to another proprietor. *Lawrence v. Russell*, 17 Pick. (Mass.) 388.

A disseisee regaining possession can maintain trespass *quare clausum fregit* for acts between disseisin and re-entry. *Emrich v. Ireland*, 55 Miss. 390.

Mere Possession Is Sufficient.—*Russell v. Thorn*, 1 Mo. 390; *Hunt v. Rich*, 38 Me. 195; *Johnson v. McIlwain*, 1 Rice (S. Car.) 368; *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184; *Darling v. Kelley*, 113 Mass. 29; *Masterson v. West End, etc., R. Co.*, 5 Mo. App. 64; *Ruggles v. Sands*, 40 Mich. 559; *Carpenter v. Smith*, 40 Mich. 639.

Possession Unnecessary.—In an action where the petitioner did not charge that the defendants broke the plaintiff's close, nor that they used

this possession may have been illegally acquired, it is sufficient.¹ Possession must have been had at the time the injury sued for was committed, and not at the time the action in trespass is brought.²

d. CONSTRUCTIVE POSSESSION.—Constructive possession is that possession which exists in contemplation of law, without actual personal occupation.³ Where neither of the parties claiming title to land is in actual possession, he who has constructive possession can maintain an action in trespass.⁴ Constructive possession will not prevail against actual possession.⁵ Possession of a part may be constructive possession of an adjoining part.⁶

e. RIGHT OF POSSESSION; TITLE WITHOUT POSSESSION.—It happens frequently that the plaintiff in an action of trespass is not in possession, but has title without possession or right

violence, although averring that they cut and carried away valuable trees growing on the land of the plaintiff of certain value, etc., it was held not to be in the form of an action of trespass, and that the plaintiff need not show title or possession at the time of the taking, as if the action was for trespass. *Kline v. Mann*, 29 Iowa 112.

1. *Evertson v. Sutton*, 5 Wend. (N. Y.) 281; 21 Am. Dec. 217; *Oglesby v. Stodghill*, 23 Ga. 590.

2. *Smith v. Ingram*, 7 Ired. (N. Car.) 175. A prior possession of land, accompanied with acts of ownership by one through whom plaintiff deduces title, will authorize recovery against defendant, who is afterward found in possession without title or claim to the premises.

3. *Bouv. Law Dict.*; *Hubbard v. Austin*, 11 Vt. 129; 2 Bl. Com. 116.

Definition.—The owner of the legal title to unoccupied land has the constructive possession; a stranger to the title, who intended to use the land for grazing purposes without the owner's consent, cannot recover the value of grass from a railroad company which negligently set fire to it. *Texas, etc., R. Co. v. Torrey* (Tex. 1891), 16 S. W. Rep. 547.

A person owning in fee simple a tract of unoccupied land, which had never been in the possession of anyone, is in possession by construction. *Safford v. Basto*, 4 Mich. 406.

4. *Padgett v. Baker*, 1 Tenn. Ch. 222. Only the persons in actual or constructive possession of real property can maintain trespass *quare clausum fregit* in reference thereto; and such constructive possession is only that of the

owner, when no person is in the actual possession. *Gunsolus v. Lormer*, 54 Wis. 630.

5. A plaintiff in actual possession of land under a paper title can maintain trespass *quare clausum fregit* against one who claims a constructive possession. *Earl v. Griffith*, 52 Vt. 415.

Actual Possession Prevails Over Constructive Possession.—*Stean v. Anderson*, 4 Harr. (Del.) 209; *Webb v. Sturtevant*, 2 Ill. 181; *Davis v. White*, 27 Vt. 751.

6. A purchaser of land adjoining that to which he is in actual possession, is constructively in possession to the extent of the boundary of both tracts; and one who enters on that possession, and builds a cabin and locks it up, is not in possession beyond the actual close, and cannot maintain trespass against the former for cutting timber on the land. *Fish v. Branamon*, 2 B. Mon. (Ky.) 379.

What Is Not Constructive Possession.—Possession of a part of a tract of land without title, cannot be extended by construction to the part not in actual possession of the party, so as to enable him to reclaim timber cut thereon. *Aikin v. Buck*, 1 Wend. (N. Y.) 466.

The actual occupancy of one half quarter section of land, does not draw after it the possession of an adjoining unoccupied quarter section upon which the occupant had exercised acts of ownership, by cutting logs for his saw-mill, so that he can maintain trespass *quare clausum fregit* against one who had also cut logs thereon, and was in the actual occupation of adjoining land. *Blackburn v. Baker*, 7 Port. (Ala.) 284.

of possession.¹ Title without possession will support the action,²

1. **What Is Right of Possession.**—One who obtains actual possession of real estate wrongfully, cannot recover of an invader having a right to possession, for any injury done to the real estate; otherwise, as to injuries to his person or personal property, even though the invader forcibly ejecting him be the owner. *Comstock v. Brosseau*, 65 Ill. 39.

Where the plaintiff has the right of property and of immediate possession in real estate, he may maintain an action of trespass for a direct injury thereupon, though not in actual possession. *Mason v. Lewis*, 1 Greene (Iowa) 494; *Poole v. Mitchell*, 1 Hill (S. Car.) 404; *Snider v. Myers*, 3 W. Va. 195.

The city of Milwaukee authorized a gas company to set up and establish lamp posts along the streets of the city. The company erected, managed them, etc. It was held that they had sufficient title and possession to maintain trespass for an injury to them. *Roche v. Milwaukee Gas Light Co.*, 5 Wis. 55.

In an action of trespass *quare clausum fregit* it appeared that the plaintiff let the land on which the trespass was committed, by his agent, by a parol lease, to A, who entered and paid rent. Before the expiration of the lease, A permitted the defendant and B to come upon the premises; and, by the advice of the defendant, who said the land belonged to B, A delivered the possession of the premises to B, who claimed them as his right, and raised ore upon them, etc. The plaintiff, by his agent, afterwards, and before the determination of the lease to A, entered upon the premises, B being then in possession. It was held that the plaintiff had proved sufficient title to maintain the action of trespass. *Tasker v. Ridgely*, 4 Har. & M. (Md.) 497.

To recover for a trespass to real estate, the plaintiff must show that the portion upon which the wrongful act was committed was in his inclosure, or that he had the paramount title, if it was vacant, or that he was in the actual possession of a part under a deed for the whole. *Winkler v. Meister*, 40 Ill. 349.

Under an arrangement between the plaintiff and her daughter and son-in-law, the details of which were disputed, the latter moved on to a farm owned by the plaintiff. In general terms, the arrangement was that the daughter

and son-in-law were to live on the property and take care of and support the plaintiff during her life, and at her death the daughter was to have the land. The plaintiff lived on the farm in pursuance of these terms until some disagreement arose, when she moved away and gave her daughter and son-in-law notice to quit. Upon their refusal, she brought an action of trespass *quare clausum fregit*. The evidence was conflicting as to whether, by the terms of the contract, the defendants were to take and hold exclusive possession during the life of the plaintiff. It was held that as the defendants had control of the farm and used it as their own, and had such lawful possession as authorized them to put in the crops, their right of possession did not, during the growth thereof, at once cease and determine, so as to make them liable in trespass for continuing there, although they failed to fulfill all the terms of their contract thereafter. *Berkey v. Auman*, 91 Pa. St. 481.

2. *Edwards v. Noyes*, 65 N. Y. 125; *Gillespie v. Dew*, 1 Stew. (Ala.) 229; 18 Am. Dec. 42; *Alkin v. Buck*, 1 Wend. (N. Y.) 466; *Goodrich v. Hathaway*, 1 Vt. 485; 18 Am. Dec. 701; *Smith v. Yell*, 8 Ark. 470; *Ledbetter v. Fitzgerald*, 1 Ark. 448; *Wilson v. Bushnell*, 1 Ark. 465; *Moore v. Moore*, 21 Me. 350; *Myrick v. Bishop*, 1 Hawks (N. Car.) 485; *Richardson v. Murrill*, 7 Mo. 333; *Webb v. Sturtevant*, 2 Ill. 181; *Gent v. Lynch*, 23 Md. 58; 87 Am. Dec. 558; *Guion v. Anderson*, 8 Humph. (Tenn.) 298.

Illustrations.—A and B had conveyances covering the same land, of which neither had actual possession. He who had the younger title entered on the land and cut the timber, and with the timber so cut erected houses and fences, by means whereof he became actually possessed of the land. It was held that the other party having the older and better title, might maintain an action of trespass for the injuries done before the actual possession was taken. *Bailey v. Massey*, 2 Swan (Tenn.) 167.

Where the plaintiff in trespass is not in possession, he must show that he or his grantors obtained title from the general government. *Heinrichs v. Terrell*, 65 Iowa 25.

Where the rightful owner of land is dispossessed, he may maintain an action against the wrongdoer for the original

if the title is valid.¹

f. POSSESSION WITHOUT TITLE.—Generally an action of trespass may lie where plaintiff has possession, even though he is without title,² but in some cases it will not, the rule not being an universal one.³

g. POSSESSION OF TENANT THE POSSESSION OF LANDLORD.—The possession of the tenant or agent is the possession of the landlord.⁴

h. POSSESSION UNDER COLOR OF TITLE.—(See *COLOR OF TITLE*, vol. 3, p. 314; *TITLE*, vol. 26, p. 20).—Color of title is an

trespass, but he cannot for any injury afterwards committed by such wrongdoer, until he has regained possession. *Rowland v. Rowland*, 8 Ohio 40; *Graham v. Houston*, 4 Dev. (N. Car.) 232. But see *Carter v. Beals*, 44 N. H. 408.

Where premises are unoccupied, an action of trespass may be maintained by the owner thereof, he being regarded as having constructive possession; but where the tenant was in possession at the time of the alleged entry, the action must be brought by him, unless there is injury to the reversion. *Gould v. Sternburg*, 4 Ill. App. 439.

Per Contra.—A railroad company claiming title to land, of which, however, it had no possession except that its tracks ran across a subdivision of it, tore down and removed without process of law a house held by the occupant under a lease which was adjudged afterwards to be void, the ownership of the land also being adjudged afterwards to be in the railroad company. It was held that the person so ejected was entitled to damages. *Sinclair v. Stanley*, 64 Tex. 67.

1. In trespass *quare clausum fregit*, if plaintiff cannot show actual and exclusive possession of the land, but is obliged to rely upon his legal title, he must show a valid title. *Stephenson v. Wilson*, 37 Wis. 482.

2. *Possession Without Title.*—See *supra*, this title, *Actual and Exclusive Possession*.

An action of tort will lie for breaking and entering a close whereof the plaintiff is in possession, and to which neither party proves title. *Sweetland v. Stetson*, 115 Mass. 49.

A party peaceably in possession of lands may maintain trespass for an injury to his possession, though the trespasser has a better title to the lands. *Larue v. Russell*, 26 Ind. 386.

The plaintiff's possession under claim of title is sufficient evidence of title to

maintain the *Mississippi* statute action for cutting trees; after such proof it is for the defendant to show title, either in himself or another, to defeat the action. *Ware v. Collins*, 35 Miss. 223; 72 Am. Dec. 122.

3. The one who occupies land without title, cannot bring trespass for a forcible entry by one who also has no title. *Muldrow v. Jones*, 1 Rice (S. Car.) 64.

The possession of the owner of a part of a tract of land, is the possession of the whole tract only so long as no other person is in the actual adverse possession of any part. As soon as another takes possession of any part, either with or without title, the former possessor loses the possession of that part, and cannot maintain trespass for any act done on such part while he is thus out of possession of it. *Ring v. King*, 4 Dev. & B. (N. Car.) 164.

In an action for trespass on land, plaintiff testified that he occupied a piece of land, 26 by 107 feet, which he had had surveyed; that defendant used part of the land as a road, and was so using it before the survey; that defendant had made the road by filling; that defendant put a wagon on the roadway so that it stood partly on plaintiff's line as surveyed; that "defendant occupied the land south of mine, where the driveway is, and I occupy 26 feet north, where the board fence was." It was held that plaintiff had neither possession nor title to sustain the action. *Danihee v. Hyatt* (Supreme Ct.), 12 N. Y. Supp. 465.

4. *M'Colman v. Wilkes*, 3 Strobb. (S. Car.) 465; 51 Am. Dec. 637; *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265; *Coburn v. Palmer*, 8 Cush. (Mass.) 124; *Towne v. Butterfield*, 97 Mass. 105.

The defendant in trespass, not claiming title, cannot impugn the title of the plaintiff, who is in possession by a tenant yielding rent. *Willson v. Hinsley*, 13 Md. 64.

apparent title founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like.¹ Possession under color of title will support the action of trespass.²

3. By Conveyance or Writing—*a.* BY DEED.—The title, whether with or without possession, which will support an action in trespass, is most commonly obtained by deed.³

1. Color of Title.—Bouv. Law Dict.; 3 Wait's Act. & Def. 17.

2. Possession under claim and color of title is sufficient evidence of title in an action to recover damages from a mere trespasser. *Douglass v. Dickson*, 31 Kan. 310.

One having color of title to only a portion of a tract of timbered land, cannot, by chopping fire wood and saw logs on the remainder, so take possession thereof as to compel the owner to resort to ejectment, but will be liable as a trespasser. *Ware v. Johnson*, 55 Mo. 500.

Where a party claims a tract of land under a color of title, and puts a servant into a house situated on it, with the privilege of getting firewood from the land, he is considered as in possession of the whole tract as against a mere wrongdoer, and may maintain trespass against him for cutting timber thereon. *Lamb v. Swain*, 3 Jones (N. Car.) 370.

As to what color of title will enable a party to maintain trespass *quare clausum fregit* against a wrongdoer, see *Savage v. Holyoke*, 59 Me. 345.

The use of water in a millpond is no evidence of title to or of possession of the land covered by the water. *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

3. Sheriff's Deed.—Plaintiff must have legal title at commencement of action to try title. Sheriff's deed, dated after the commencement of the action, will not support trespass to try title to land purchased by plaintiff at judicial sale prior to the proceeding. *Bank of State v. South Carolina Mfg. Co.*, 3 Strobb. (S. Car.) 190; 49 Am. Dec. 640.

In a possessory action, plaintiff claimed several parcels of land by purchase at sale on execution and sheriff's deed. The court charged the jury that if they found the defendant was in possession of any one parcel, they should find for the plaintiff for all the parcels described in his declaration and the sheriff's deed. *Carwile v. House*, 6 Ala. 710.

Sheriff's deed is inadmissible as evi-

dence of title without proof of judgment and execution. *Aikin v. Buck*, 1 Wend. (N. Y.) 466.

Tax Deed.—When defendant claims title to land under a tax deed, although it appears that, if plaintiff were holder of the original government title, defendant's right of action against him on the tax deed would be barred by reason of plaintiff's occupancy of the land for a part of the three years next after the recording of such deed, still, as to the acts performed by him under a claim of title, and right of possession by virtue of tax deed, defendant cannot be treated as a mere wrongdoer or intruder; but he may question the sufficiency of plaintiff's title, and require him to make strict proof of it. *Stephenson v. Wilson*, 37 Wis. 482.

Where a purchaser, under a tax sale of a lot of wild and uncultivated land, had become entitled to a deed, and had actual possession under the tax sale, it was held sufficient to support a trespass. *Pierce v. Hall*, 41 Barb. (N. Y.) 142.

A deed *in futuro* will support trespass.

Action Barred.—Where plaintiff had conveyed to another without consideration, he could not recover from a third party for an injury to the freehold. *Wolfe v. Beecher Mfg. Co.*, 47 Conn. 231; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

Illustrations.—In an action for unlawfully removing a house, where plaintiffs have shown that they were in possession of the house and lot under a deed therefor, until shortly before the trespass, the fact that they then left it unoccupied for a time is not sufficient to defeat their possessory title, where they locked it up, and put it in charge of an agent to rent it. *Holman v. Herscher* (Tex. 1891), 16 S. W. Rep. 984.

The grantee of an estate or inheritance in the trees may have trespass *quare clausum fregit* against the general owner for cutting them down, both parties having had possession according to their interests. *Clap v. Draper*, 4

b. BY GRANT, PRESCRIPTION, PRE-EMPTION OR COLONIZATION LAWS.—It frequently happens that rights obtained by grant, or prescription, or under pre-emption or colonization laws, are the subject of trespass.¹

c. UNDER CONTRACT.—Rights may be obtained by contract which will support an action.²

Mass. 266; 3 Am. Dec. 215. See *Rehoboth v. Hurt*, 1 Pick. (Mass.) 224.

The delivery of the deed, and cutting timber on the land by the grantee, is no evidence of his adverse possession of land afterwards claimed by the grantor not to have been included in the deed, so as to support an action for trespass. *Stockton v. Garfrias*, 12 Cal. 315.

A person who has entered land over which there is a way under a deed of warranty, has sufficient seisin and possession to maintain an action for trespass committed on such way by a party who shows no right therein. *Ashley v. Landers*, 9 Allen (Mass.) 250.

A grantor who has in his deed reserved to himself the timber and pine trees on the granted premises, may maintain trespass against the grantee or his assignee who cuts and carries away any of them, although this is done more than twenty years after the date of the deed. *Goodwin v. Hubbard*, 47 Me. 595.

One who has paid the consideration for the land and has exclusive control and possession, is the "owner," within the meaning of the statute, though his deed for it has not been executed. *Wellington v. State*, 52 Ark. 266.

The sale of standing timber is a sale of an interest in real estate; and a subsequent purchaser by warranty deed of the land with notice of such sale, cannot maintain trespass against the prior purchaser of the timber for cutting and removing the timber. *Russell v. Myers*, 32 Mich. 522.

A *bona fide* purchaser, however, without notice, would be protected against a prior unrecorded sale of the timber, the same as against any other unrecorded instrument. *Russell v. Myers*, 32 Mich. 522.

1. By Grant.—In a grant of lands, a reservation was made of a mill-site. It was held that the exception was inoperative until the grantor or his assigns built the mill, and that the whole premises vested in the grantee, who could maintain against a stranger, or the grantor or his assigns, for an entry on the lands for any other purpose than

that specified in the exception. *Dygart v. Matthews*, 11 Wend. (N. Y.) 35.

A purchaser of lands from the *United States* may maintain an action of trespass *quare clausum fregit* to recover damages for injury done to the premises after his purchase and previous to his possession, and this after the abandonment of the land by the squatter. *Blevins v. Cole*, 1 Ala. 210.

An instruction in an action of trespass, "that the plaintiff would have a right to recover for damages done to a bridge built by him under authority of a court having a right to grant such authority, even though such a bridge was not on a public highway," is correct. *Beebe v. Stutsman*, 5 Iowa 271.

Williams v. Michigan Cent. R. Co., 2 Mich. 259; 55 Am. Dec. 59, holds that a railroad company, having acquired its road by purchase and grant from the state, is the legal owner of the road, and has, by the express terms of its act of incorporation, the entire and exclusive right to its possession and control.

By Prescription.—The plaintiff had possession under a grant of land, part of which was covered by the defendant's elder grant, and of which the defendant had possession. The action was in *quare clausum fregit* and, although possession of a part is possession of the whole under such circumstances, the defendant's title to the land in dispute was upheld. *Aikin v. Jones*, Harp. (S. Car.) 69.

By Pre-emption Laws.—A person in possession of swamp land under a pre-emption claim, and who has improved the same, can maintain trespass for its protection. *Barden v. Smith*, 7 Wis. 439.

Under Colonization Laws.—See *Kemper v. Victoria*, 3 Tex. 159.

2. Land Conveyed by Writing.—In *Whitney v. Swett*, 22 N. H. 10; 53 Am. Dec. 228, it was held that no estate in land can be conveyed without writing, except an estate at will.

Under Bond to Convey.—A person in lawful possession of land under a bond to convey to him, may, before he has paid the balance of the purchase-money

4. Under Execution Laws.—By statute in some states, a regular and complete levy under execution will give such a possession as will afford the foundation for an action of trespass against the debtor or other party.¹ If land is conveyed for a valuable consideration with intent to defraud the creditors of the grantor, but without knowledge on the part of the grantee of the fraudulent intent, a levy by a creditor thus defrauded confers

or received his deed, maintain trespass against the obligor for injuries to the freehold. *Smith v. Price*, 42 Ill. 399.

Executory Contract.—Under an executory contract for the sale of timber when it is severed from the land, with a license to enter and cut the trees and remove them, the purchaser has no interest in the land that will enable him to maintain an action of trespass. *Fletcher v. Livingston*, 153 Mass. 388.

A contract between the owner of the fee of the land and A, in which it is agreed that A shall settle, and, within three years, make certain improvements and, on performance of certain conditions, have title in fee, is sufficient to entitle A to maintain trespass to recover possession against a stranger, although he has never been in possession and has only a right of entry and possession; and such stranger cannot resist the recovery of possession on the ground that the plaintiff has not performed, or has forfeited its conditions. *White v. Guirons, Minor* (Ala.) 331.

An old man, whose children support him, working his farm, but without any contract giving them the title or exclusive possession of the farm, is still possessor of his farm, so that he may maintain an action for any injury to it. *Russell v. Scott*, 9 Cow. (N. Y.) 279.

Conveyance as Assignment of Right of Action.—In an action for a trespass to real estate, it is error to admit a conveyance of the property and assignment of the cause of action, to plaintiff from his wife, executed and delivered after suit was commenced. *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

Land Not Incident to Land.—*Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; 32 Am. Dec. 261. Land will not pass as incident or appurtenant to land. Where the owner of a narrow strip of land, and also of the land adjoining on the north and on the south, describing the one as land bounded by an "intended street," and the other as land bounded by street, these words being used to designate the narrow strip, the fee in the latter does not pass by such

conveyance, but the grantee has a right of way therein by implication, or on the principle of estoppel.

1. Under Execution Laws.—*Langdon v. Potter*, 3 Mass. 215; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Blaisdell v. Roberts*, 37 Me. 239; *Cressy v. Sawyer*, 18 N. H. 95; *Chapman v. Gray*, 15 Mass. 439; *Allen v. Thayer*, 17 Mass. 299; *Bartlett v. Perkins*, 13 Me. 87; *Clark v. Brown*, 3 Allen (Mass.) 509. As against a mere stranger, a levy of an execution, under the *Massachusetts Act of 1844*, ch. 107, is *prima facie* sufficient evidence of title, to sustain an action for a trespass, without proof that an action to recover possession of the land was brought within a year from the return of the execution on which the levy was made. *Wellington v. Geary*, 3 Allen (Mass.) 508.

Per Contra.—The plaintiff brought an action of trespass *quare clausum fregit* against A and B, and showed levy of execution as against A and a subsequent demand of possession against B. It appeared that B refused this demand, and was in possession adverse to A prior to the levy and therefore to the purchase of the writ. It was held that the plaintiff had not sufficient possession, by mere force of the levy, to maintain the action. *Bowne v. Graham*, 2 Tyler (Vt.) 411.

Where A recovered judgment, in the case of unlawful detainer, against B, for a tract of land in the possession of B's tenant, C, and the sheriff delivered to A constructive possession on a writ of *habere facias possessionem*, since which A's tenant had farmed the land, but B afterwards obtained a *supersedeas* of the judgment, and C refused to deliver the landlord's share of the crop to A, but delivered it to B, notwithstanding he had, previously to the *supersedeas* and on A's request, promised A to deliver it to him, it was held, that A could not maintain trespass against C therefor, and that the execution of the writ of *habere facias possessionem*, gave A no possession as against C. *Kretzer v. Wysong*, 5 Gratt. (Va.) 9.

no legal title or right of possession sufficient to maintain trespass upon.¹

5. **Equitable Rights.**—The grantee in possession of an equitable estate in land, or his assigns, may maintain an action for trespass thereon.²

6. **Rights in Land Acquired by Custom.**—One may acquire rights by custom also which will support the action.³

III. REALTY WHICH MAY BE THE SUBJECT OF TRESPASS—1. **Private House.**—A man's house cannot be entered forcibly for the execution of civil process; it may be to execute criminal process.⁴ If the defendant flies to or removes goods to another's house, the privilege does not protect him there after demand for entry made;⁵ if he is not there and has no property there, the sheriff

1. Waterman on Trespass, vol. 2, p. 13; Davis v. Tibbette, 39 Me. 279.

2. **Equitable Rights.**—Carney v. Reed, 11 Ind. 417; Miller v. Zufall, 113 Pa. St. 317. One having equitable title and prior possession may maintain trespass. Brown v. Hartzell, 87 Mo. 564. See also Bailey v. Kilburn, 10 Met. (Mass.) 176; 43 Am. Dec. 423; Stearns v. Palmer, 10 Met. (Mass.) 32.

Plaintiff agreed in November to purchase a store of defendant, payment to be made and deed to be passed on May 1st, following, and possession to be given April 1st. It was held that the plaintiff took an equitable right in the land at once; but that he had no right of property, nor any power to pursue the legal rights and remedies of those who hold a title, until payment and conveyance on May 1st; and that the defendant, having entered in March and removed certain fixtures, the plaintiff had neither the possession requisite to maintain an action of trespass, nor personal property essential to a suit in trover for conversion; and that a demand for the article removed, made prior to May 1st, would not give him such rights. Tabor v. Robinson, 36 Barb. (N. Y.) 483.

A person who enters into the possession of land under an equitable title, with the consent of the legal owner of the fee, acquires no estate of any kind or degree in it; and the legal owner may maintain trespass *quare clausum fregit* for an injury to the inheritance. Jones v. Taylor, 1 Dev. (N. Car.) 435.

3. **By Custom.**—In Knowles v. Dow, 22 N. H. 387; 55 Am. Dec. 163, the custom alleged was that the inhabitants of Hampton had been in the habit of hauling seaweed upon plaintiff's property and there depositing it for a while, afterwards carrying it away at their pleasure.

It was decided that the custom was reasonable. So, also, a custom to erect a fence to inclose a house while in process of erection. Bradbee v. Christ's Hospital, 4 M. & G. 714; 43 E. C. L. 368. But a custom to take sand from the plaintiff's close, which had been deposited there blown by wind from the seashore, was unreasonable. Blewett v. Tregonning, 3 A. & E. 554; 30 E. C. L. 151. It has been held that the use of ground for sixty years as a public landing-place, would support a plea that the ground was a landing-place for the inhabitants of the town who had used it during that period. Coolidge v. Learned, 8 Pick. (Mass.) 504.

4. **Private House—Leading Case.**—The leading case on this question is Semayne's Case, 5 Coke 91; Smith's Lead. Cas., vol. 1, p. 238; Hubbard v. Mace, 17 Johns. (N. Y.) 127; Gordon v. Clifford, 28 N. H. 402.

In the Year Book, 18 Edw. IV., fol. 4, pl. 19, a case is reported as follows: "Catesby came to the bar and showed how a *feri facias* was directed to the sheriff of Middlesex, to cause execution to be made for one J. upon a recovery by the said J. against one B.; and afterwards the said B. put all his goods into a closet, closed and locked; and afterwards the sheriff broke the (outer) door of the house and entered into the house, and took the goods (away) with him. And whether the sheriff had done any wrong. Littleton and all his companions held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *feri facias*; for the *feri facias* shall not excuse him of the breaking of the house, but of the taking of the goods only."

5. Allen v. Martin, 10 Wend. (N. Y.)

becomes a trespasser.¹ Once in the house, the sheriff is justified in breaking inner doors to execute civil process.² Each part of a house, occupied in two parts by two families, may be a separate house in the eye of the law, if there be two entrances.³ Lowering windows on pulleys, or raising a latch, has been deemed a breaking.⁴

2. Public House.—It is a question as to whether public houses, such as churches, can or cannot maintain a civil action of trespass.⁵

3. Highways—*a.* IN GENERAL.—In the term highways, in this connection, are included streets, turnpikes, roads, and railroads.⁶ Trespass may be committed on the highway, by one who has the use thereof, against the owner of the property bordering thereon, or by such owner against the public.⁷

301; 25 Am. Dec. 564; *Curtis v. Hubbard*, 1 Hill (N. Y.) 336; 4 Hill (N. Y.) 437; 40 Am. Dec. 292; *Lee v. Gansell*, Cowp. 1; *Foster Crown Law* 320; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145.

1. *Semayne's Case & Notes*, 5 Coke 91; *Smith's Lead. Cas.*, vol. 1, p. 238.

2. *Glover v. Whittenhall*, 6 Hill (N. Y.) 597.

3. *Whalley v. Williamson*, 7 C. & P. 204; *Hammond's N. P.* 152; 32 E. C. L. 512; *Stedman v. Crane*, 11 Met. (Mass.) 295.

4. *Curtis v. Hubbard*, 1 Hill (N. Y.) 336; *Penton v. Browne*, 1 Keb. 698; *Lee v. Gansell*, Comp. 1; *Buckenham v. Francis*, 11 Moore 40.

5. Public House.—A religious society, entitled to the use of a meeting-house for all religious purposes, but who are not the owners of the fee therein, this being a separate society composed of the pew-holders in the meeting-house, cannot maintain an action of trespass *quare clausum fregit* for a breaking and entering into the meeting-house, whereby the exercise of their right was interrupted. *Religious Congregational Soc. v. Baker*, 15 Vt. 119; 40 Am. Dec. 668.

Where a parish erected and occupied a meeting-house, and used the land around it for purposes connected with the meeting-house as a place of public worship, under a vote of the town appropriating the land for that purpose, though the town had subsequently sold some part of the land so appropriated, it was held that the parish might maintain trespass against a person who plowed up a portion of the land so used. *First Parish v. Smith*, 14 Pick. (Mass.) 297.

The use of a church for divine worship by a religious society, and keeping it locked at other times, is a sufficient occupation to enable the trustee of the society, although not a constant attendant at church, to maintain trespass *quare clausum fregit* against a person breaking into it. *Carrine v. Westerfield*, 3 A. K. Marsh. (Ky.) 331.

The minister of a religious society cannot, as such, maintain trespass *quare clausum fregit* for the use of the society. *Cox v. Walker*, 26 Me. 504.

Where land is conveyed to several persons as trustees of the Methodist Episcopal Church, they may maintain trespass *quare clausum fregit* for an injury to the land, although not appointed trustees in the manner pointed out by the statute. *Walker v. Fawcett*, 7 Ired. (N. Car.) 44. The legal title is in them, and that is sufficient to enable them to support the action; and if they sue as trustees, such description of them is mere surplusage, and may be rejected. See, generally, *RELIGIOUS SOCIETIES*, vol. 20, p. 773.

6. See *HIGHWAY*, vol. 9, p. 362.

7. Trespasses on Highways.—One who deposits rails on a highway, commits a trespass against the owner of the soil. *Lewis v. Jones*, 1 Pa. St. 336; 44 Am. Dec. 138.

One who, not being duly authorized by a town, undertakes to alter a highway, is liable to the owner of the land in trespass. *Hunt v. Rich*, 38 Me. 195.

The removal of sidewalks by a village, laid at its expense, renders the village liable. *Rogers v. Randall*, 29 Mich. 41.

Making a bridge over a ditch on the side of a public road and cutting timbers for the same, is not such a

b. WHEN IMPASSABLE.—When the highway is blocked, by reason of some sudden or unexpected obstruction, the public have the right to pass over adjoining property, to get around the obstruction, without being deemed guilty of a trespass.¹

c. OVERHANGING EAVES, WINDOWS, AND DOORS.—Adjoining property owners have a right to a reasonable use of the highway for swinging doors, windows, or overhanging eaves.²

4. Private Ways.—One owning land over which others have a right of way, has such property in the right of way as will support trespass.³

5. Boundaries.—Land need not have marked boundaries to support an action for a trespass upon the land,⁴ so long as it can be

possession as will maintain trespass. *Morris v. Hayes*, 2 Jones (N. Car.) 93.

A party in possession of land under a title liable to be divested upon a future contingency, may maintain trespass against one who has no title; as where the highway over the land of the plaintiff has been discontinued by a vote of the town. *Bigelow v. Hillman*, 37 Me. 52.

A private individual has been held liable to adjoining owners for widening a highway, although the highway surveyor might lawfully have done the same thing. *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473.

A highway inclosed by an individual and used for more than twenty years under claim of right, gives a prescriptive right to the land so occupied against the selectmen of the town, who removed the fence to the original line or highway. *Knight v. Heaton*, 22 Vt. 480.

If the fee of the highway is in the state, a town cannot maintain trespass against a railroad for using the same. *St. Louis, etc., R. Co. v. Summit*, 3 Ill. App. 155.

One who has placed a house upon the highway, under a license from the owner of the adjoining land for a limited time, has no such title as will enable him to maintain an action against the owner of the land, at the expiration of the time, excavating the soil around the house and thereby endangering its safety. *Mason v. Holt*, 1 Allen (Mass.) 45.

1. *Smith v. Savannah, etc., R. Co.*, 84 Ga. 698; *Campbell v. Race*, 7 Cush. (Mass.) 408; 54 Am. Dec. 728; *Morey v. Fitzgerald*, 56 Vt. 487; 48 Am. Rep. 811; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; 32 Am. Dec. 261; *Bureau v. Marshall*, 55 Mich. 234.

2. See EASEMENTS, vol. 6, p. 139.

3. *Robbins v. Borman*, 1 Pick. (Mass.) 122; *Perley v. Chandler*, 6 Mass. 454; 4 Am. Dec. 159; *Adams v. Emerson*, 6 Pick. (Mass.) 57; *Dietrich v. Berk*, 24 Pa. St. 470.

The plaintiff, owning a lot in Portland, constructed at his own expense and from his own materials, a sidewalk in front of the lot, some of which materials the city for certain purposes removed and sold, and the defendant assisted in carrying them away. It was held that the defendant was liable to plaintiff in trespass, for the value of the materials removed. *Muzzey v. Davis*, 54 Me. 361.

By contemporaneous conveyances of lots on an alley, by descriptions bounding thereon, with a right of way over the alley in common with the other owners, the title passes, unless there are express words of exclusion, to the center line of the alley, subject to the private way; and for an injury to the soil and things affixed thereto an action of trespass will lie by an owner in possession of the adjoining lot. *Freeman v. Sayre*, 48 N. J. L. 37.

4. One owner may maintain trespass, under the code, against his neighbor, to recover treble damages for cutting trees standing on the dividing line, because, though each has, abstractedly, a right to cut the half standing on his own land, yet he cannot be allowed so to use his half as to destroy his neighbor's. *Relyea v. Beaver*, 34 Barb. (N. Y.) 547.

A tree whose trunk stands on the land of A, extending some of its branches over, and some of its roots into, the land of B, is, with such overhanging branches and the fruit thereon, the sole property of A; and if B gathers the fruit from such branches, and appropriates it to his own use, he is

identified. Trees on the line and other monuments belong to each of the adjoining owners.¹

6. **Party Walls.**—(See PARTY WALLS, vol. 18, p. 3.)

7. **Fences.**—Fences are part of the freehold, though accidentally detached.² A fence built on the land of another belongs to him;³ if by agreement on the line, to both.⁴ Trespass lies for removing the fence of another, or a party fence.⁵ No action lies for obstructing light, air, or view by either wall or fence.⁶

8. **Easements.**—(See EASEMENTS, vol. 6, p. 139.)

9. **Support of Adjacent Soil.**—The owner has the right to lateral support for his land;⁷ but this right of lateral support for the

liable in trespass to A. Lyman v. Hale, 11 Conn. 177; 27 Am. Dec. 728; Skinner v. Wilder, 38 Vt. 115; 88 Am. Dec. 645.

1. Hunt v. Taylor, 22 Vt. 556; Carroll v. Smith, 4 Har. & J. (Md.) 128.

Line Trees.—Dubois v. Beaver, 25 N. Y. 123; 82 Am. Dec. 326.

The principle of the common law which has treated every entry upon another's land, even by cattle, unless by the owner's lease, as an injury for which an action for trespass will lie, is not applicable to the uncultivated, uninclosed, wild prairie lands of *Nebraska*. Delaney v. Erickson, 10 Neb. 492.

2. **Fences.**—Goodrich v. Jones, 2 Hill (N. Y.) 142; Walker v. Sherman, 20 Wend. (N. Y.) 640; Hannibal, etc., R. Co. v. Crawford, 68 Mo. 80.

3. Dietrich v. Berk, 24 Pa. St. 470.

4. Burrell v. Burrell, 11 Mass. 294. This was an action for entering on the plaintiff's land, and taking away a fence on the dividing line between premises owned by the parties respectively. The part of the fence removed by the defendant was made of rails; and he proved that he built it twenty-three years previous, and had ever since kept it in repair; and that, at the time of the alleged trespass, he took away the rails in order to replace them by a stone wall, which he built the following year, putting it nearer to his own than the place where the rail fence had stood. The court held there was nothing from which an entry on the plaintiff's land could be inferred, unless such entry was necessary for the purpose of taking down the fence in order to rebuild it, which would not be tortious. The part of the fence assigned to the defendant to keep in repair was his property, so far, at least, that the removal of it for lawful purposes could not make him a trespasser; and we do not think there was any joint tenancy or tenancy in common

of the materials of which the fence was composed.

5. Wells v. Rubenacher (Ky. 1891), 15 S. W. Rep. 1063. Owners of adjoining lands with a division fence between them, built one-half by each, and established for more than twenty-one years, have not such an ownership in the materials of which it is made, as will justify a removal by either of the portion built by him, against the consent of the other, and for such a removal an action of trespass will lie. Stoner v. Hunsicker, 47 Pa. St. 514; Rawson v. Ward, 128 Mass. 552; Brake v. Crider, 107 Pa. St. 210.

No action lies against a person for removing, with as little injury as possible, a fence separating a highway from a navigable creek, at a place over which he has a right to pass, although he does so for the purpose of filling up the creek, and thus committing a nuisance. Harvard College v. Stearns, 15 Gray (Mass.) 1.

6. Guest v. Reynolds, 68 Ill. 478; 18 Am. Rep. 570, holds that an owner of land who erects thereon a fence or wall which obstructs the access of light and air to a house on adjacent land, and also obstructs the view from such house, is not liable in damages for the obstruction to the owner of such adjoining premises, if the latter has no adverse right by prescription or otherwise, as no positive right is invaded; light and air being not subjects of property beyond the moment of actual occupancy.

7. In Humphries v. Brogden, 1 L. & Eq. R. 241. Lord Campbell, C. J., said that the right to lateral support "stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the principle, *sic utere tuo ut alienum non ledas*." And again he

adjacent land does not extend to the support of buildings placed on such adjacent land.¹

10. **Church Pews.**—(See PEWS, vol. 18, p. 413.)

11. **Cemeteries.**—(See Cemeteries, vol. 3, p. 49.)

12. **Rivers and Streams.**—(See NAVIGABLE WATERS, vol. 16, p. 236.)

13. **Oyster Beds.**—(See OYSTERS, vol. 17, p. 306.)

14. **Fisheries.**—(See FISH AND FISHERIES, vol. 8, p. 23.)

15. **Game.**—(See GAME AND GAME LAWS, vol. 8, p. 1023.)

16. **Land Covered by Water.**—Land covered by water may be trespassed upon.²

IV. ENTRY ON ANOTHER'S LAND—1. **Under Protection of Process.**—Persons or officers acting under and within the authority of process regularly issued by a court of competent jurisdiction, will be protected thereby from trespass.³ This is true, if the process or

says: "The right to lateral support from the adjoining soil, is not like the support of one building upon another supposed to be gained by grant, but is a right of property passing with the soil."

1. *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; 25 Am. Dec. 524; *Farrand v. Marshall*, 21 Barb. (N. Y.) 409.

In the absence of a prescriptive right, a party, by erecting a house near the boundary line of his lot, does not acquire any right of support over the adjoining land, and the owner of the adjacent premises may lawfully excavate the same for the purpose of erecting a building thereon; and in such event, even though he should be guilty of negligence in failing to give notice thereof to the other party, or in making the excavation in an unskillful manner, he cannot be made liable in an action of trespass. *Mamer v. Lussem*, 65 Ill. 484.

In *Wyatt v. Harrison*, 3 B. & Ad. 871, *Tenterson, C. J.*, said: "It may be true, that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it."

See, generally, **LATERAL AND SUBJACENT SUPPORT**, vol. 12, p. 933.

2. *Trespass quare clausum fregit* lies for trespass on lands covered with water, if the subject of grant. *Smith v. Ingram*, 7 Ired. (N. Car.) 175.

Fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes, or for use in the arts, and the cutting and taking of ice, are lawful and free upon the great ponds, of *Massachusetts* to all persons who own land adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed. *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158.

3. **Protection of Process.**—*Wall v. Farnham*, 46 Me. 525; *Hill v. Figley*, 25 Ill. 156; *Bogert v. Phelps*, 14 Wis. 88; *Young v. Wise*, 7 Wis. 128.

If a rate bill and warrant issued by a board of school trustees, under the *Missouri* act, providing for the organization of schools, is regular and valid upon its face, the constable will be protected in executing it, although there may have been errors in the previous proceedings. *Turner v. Franklin*, 29 Mo. 285.

An execution issued by a court of competent jurisdiction is a legal justification to an officer for taking and selling the judgment debtor's property thereon, and he is not bound to investigate the genuineness or sufficiency of a receipt shown to him by the debtor in settlement of the judgment. *Twitchell v. Shaw*, 10 Cush. (Mass.) 46; 57 Am. Dec. 80.

The theater of the plaintiff was assessed, but erroneously, as a dwelling

warrant is regular on its face, even though there was some irregularity in issuing it.¹ The protection extends to those whom the officer may lawfully call on for assistance.² If the process shall

house; a tax collector executed a warrant of distress under such assessment. It was held that an action of trespass did not lie against him as a ministerial officer for executing such warrant. *Henderson v. Brown*, 1 Cai. (N. Y.) 92; 2 Am. Dec. 164.

Where the court has jurisdiction and the proceedings are regular on their face, trespass will not lie. *Putnam v. Man*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686.

1. **Even if Irregularly Issued.**—*Yeager v. Carpenter*, 8 Leigh. (Va.) 454; 31 Am. Dec. 665; *Horton v. Hendershot*, 1 Hill (N. Y.) 118; *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Averett v. Thompson*, 15 Ala. 678; *Mower v. Stickney*, 5 Minn. 397; *Billings v. Russell*, 23 Pa. St. 189; 62 Am. Dec. 330; *Lovier v. Gilpin*, 6 Dana (Ky.) 321; *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 406; *Donahoe v. Shed*, 8 Met. (Mass.) 326; *Thornburg v. Hand*, 7 Cal. 554.

When the holder of a note for a greater sum than \$100, in order to sue in a justice's court, relinquished the excess of the note above that sum, and the justice issued a distress warrant thereupon, no bond being given nor affidavit made till after the issuing of the warrant; and the defendant appeared, and made no objection, but, by agreement; the matter was submitted to arbitrators, and upon their award in the plaintiff's favor, an execution was issued by the justice, and the defendant's goods sold, it was held, that the defendant could not maintain trespass against the justice, either on the ground of jurisdiction, or of the improper issuance of the distress, he having waived the right by his appearance and submission. *Mabry v. Little*, 19 Tex. 337.

Where an officer acts under process in the discharge of his ministerial duty, and does not exceed his authority, he will be protected, though the process is not sufficient; but where he acts officiously and as a volunteer, he must, himself, show that the process was legal and sufficient. *Hunt v. Ballew*, 9 B. Mon. (Ky.) 390.

An officer who acts according to his precept in making an arrest, is not a trespasser, although the party arrested is privileged from arrest. *Chase v.*

Fish, 16 Me. 132; *Carle v. Delesdernier*, 13 Me. 363; 29 Am. Dec. 508. See also *Woods v. Davis*, 34 N. H. 328.

Where a person acting under a void deputation levied on property, and the property, together with the execution, was returned into the hands of the sheriff, and by him sold, it was held, that the sheriff was protected by such execution in a suit against him. *Crockett v. Latimer*, 1 Humph. (Tenn.) 272.

Trespass cannot be maintained for an act done under the authority of a constitutional statute. *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 389.

An officer, who holds an execution in the common form, issued by a court having jurisdiction against the defendant, who had been discharged under the insolvent law of *Massachusetts* of 1838, ch. 163, after the judgment on which the execution issued was rendered, is not liable to an action of trespass for arresting and committing such defendant on the execution, although the defendant shows his discharge to the officer before he is arrested. *Wilmarth v. Burt*, 7 Met. (Mass.) 257.

An action will not lie against an officer who arrests Jonathan A. Trull on an execution against George A. Trull, the former being the real defendant, and having been served with the original process, by the same erroneous name, but having suffered judgment by default. *Trull v. Howland*, 10 Cush. (Mass.) 109; 57 Am. Dec. 82.

The fact that a note has been paid before judgment upon it, does not make the judgment void, so that the judgment creditor becomes a trespasser by suing out an execution upon it. *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574.

2. **Those Assisting Protected.**—The person who assists an officer in making a legal levy, will not become a trespasser, by a subsequent abuse by the officer of his authority. *Wheelock v. Archer*, 26 Vt. 380.

The process, being sufficient to justify the marshal acting under it, was held sufficient for the protection of the other defendants who were acting as his aids, and they were not required to prove any formal deputation. *Killpatrick v. Frost*, 2 Grant's Cas. (Pa.) 168.

Persons summoned by an officer to

have been irregularly issued, although the officer may be protected, those at whose instance it was issued are liable.¹ The officer serving process must, at his peril, see that it is regular on its face and issued by a court of competent authority.² Only the person to whom it is directed can serve process.³ The officer must

assist in the execution of legal process, are justifiable in their acts to the same extent that the officer would be. *Payne v. Green*, 10 Smed. & M. (Miss.) 507.

When the party does not control or direct the course of an officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser by relation, the party is not affected by it, even when he receives the money coming by such irregularity, although aware of the course pursued by the officer. He is not liable unless he consents to the officer's course or subsequently adopts it. *Hyde v. Hooper*, 26 Vt. 552.

In trespass, the defendant may show as a justification, that he acted under the command of an officer in the execution of process, although the process may not be regular and valid; but if he acted officiously, he must show a valid process. *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44; 19 Am Dec. 122.

If Officer Not Protected, Deputy Not.—A sheriff who, acting by his deputy under color of his office, makes an unauthorized conversion of intoxicating liquors held in *Maine*, is liable in an action of trespass *de bonis*, whether such liquors are intended for illegal sale in this, or another state, or not. *Hamilton v. Goding*, 55 Me. 419.

Where the officer is not justified by the process, one assisting him by his command is liable as a trespasser. *Elder v. Morrison*, 10 Wend. (N. Y.) 128; 25 Am. Dec. 548; *Hooker v. Smith*, 19 Vt. 151; 47 Am. Dec. 679.

1. Those Having Warrant Irregularly Issued Liable.—One who procures and has served a replevin writ by which the property of a third person is taken, is liable in trespass to the owner, and the fact that he acted as the servant of the officer, in making the service, would not protect him, even though the officer himself might have a valid defense. *Williams v. Bunker*, 78 Me. 373.

A writ unlawfully sued out in the name of another by the defendant, and irregularly served by his procurement, can afford him no protection in taking the property of another under color

thereof. *Baldwin v. Whittier*, 16 Me. 33.

An execution, not supported by any judgment authorizing it, is no justification for taking goods. *Lincoln v. Cross*, 11 Wis. 91.

Although, in trespass, an officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject-matter, without showing the judgment on which it is founded, yet the plaintiff in the process, or a stranger, must show a regular judgment. *Dixon v. Watkins*, 9 Ark. 139.

2. Issued by Proper Authority.—Under the laws of *Minnesota*, a writ of attachment cannot be allowed by a clerk of the court; and one so issued is void, and the sheriff taking property thereunder, is liable for trespass. *Guerin v. Hunt*, 8 Minn. 477; *Merritt v. St. Paul*, 11 Minn. 223.

An order from the plaintiff's attorney to a prothonotary to issue a *fi. fa.* on a justice's judgment, will not protect him from liability to the defendant in the judgment, if he issues the *fi. fa.* without a certificate of the justice, of his execution issued and returned. *Frankem v. Trimble*, 5 Pa. St. 520.

The order of highway commissioners is no justification in trespass for opening the plaintiff's fence so as to let cattle into his corn, when it is not shown that there was a highway legally established at the place. *Caldwell v. Evans*, 85 Ill. 170.

Where a justice notifies a constable that an appeal has been entered and an execution in his hands superseded, any subsequent sale under the execution is void, and the constable is a trespasser. The regularity of the appeal is the justice's business and not the constable's. *O'Donnell v. Mullin*, 27 Pa. St. 199; 67 Am. Dec. 458.

3. Person to Whom Directed Must Serve.—No one but the proper officer can execute a search warrant; and if any other person undertakes to do so, the warrant will afford him no protection. *Halsted v. Brice*, 13 Mo. 171.

A constable who levies upon and sells property under an execution not

not exceed the authority of his process,¹ and must levy it on the proper property or person.² A mere levy, unauthorized, is trespass.³ Voidable process may be a protection, void process is not.⁴

directed to him, and illegally in his hands, may be treated as a mere trespasser; the constable must derive his authority from the justice who rendered the judgment or his successor in office. *Barley v. Tipton*, 29 Mo. 206.

1. Must Not Exceed Authority.—A special officer, holding an execution against the debtor's property, but none against his body, with the creditor, attempted to levy on a mare which the debtor had sold to W., but in the scuffle arising by the debtor's and W.'s resisting the change of halters, the mare escaped, and was overtaken and was ridden off by W. The officer then directed the creditor to seize and hold the debtor, while he went after the mare, although the debtor had not threatened to interfere to prevent the officer's going for her. It was held that in so confining the debtor, the officer and the creditor were joint trespassers. *Leach v. Francis*, 41 Vt. 670.

The mere fact that the execution debtor was found on the land, is no justification to the officer for digging up and removing gold-bearing earth. *Rowe v. Bradley*, 12 Cal. 226.

A writ of attachment, not returned to the court to which it is returnable, constitutes, after the time limited by law for its return, no justification of an officer who has attached and removed property under it. *Williams v. Ives*, 25 Conn. 568.

An officer seizing intoxicating liquors by a warrant issued under *Massachusetts Laws* (1855), ch. 215, § 25, is liable as a trespasser, upon the subsequent abatement of the proceedings, because the notice to the keeper was not returned to the proper court; although no order is passed for the return of the liquors, and notwithstanding section 38. *Ewings v. Walker*, 9 Gray (Mass.) 95.

2. Must Levy on Right Property or Person.—An entry upon the land of a stranger to the process, under a writ of possession, will not oust him of his possession, or right of possession; but the entry, and every subsequent act done under it, will be a trespass. *Warren v. Cochran*, 30 N. H. 379.

In *Ohio*, a writ of replevin issues, to

enforce the claim of an owner of property for its delivery to him, by one who wrongfully detains it, and for that purpose the property is specifically described, but it confers no authority on the officer to seize property which is not actually or constructively in the possession of the party named in the process, and where the property is taken from the possession of a third person, who is the *bona fide* owner thereof, the process will not justify the officer, although the property is the identical property described therein. *State v. Jennings*, 14 Ohio. St. 73.

If horses belonging to two persons are accidentally placed in a stable together, and an officer selects two of them as the horses of one of the persons and attaches them, intending to hold them at all events, and insists upon holding them after notice that one of them belongs to the other person, the officer will be liable in trespass if the horse did belong to the person claiming it, and the latter will not be estopped to claim it by some fraudulent act on his part. *Moore v. Bowman*, 47 N. H. 494. See also *Colt v. Eves*, 12 Conn. 243.

3. Mere Levy a Trespass.—A mere levy upon personal property by an officer, where it is not authorized by law, is without either a sale or a removal, a trespass. *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Gibbs v. Chase*, 10 Mass. 125; *Robinson v. Mansfield*, 13 Pick. (Mass.) 139; *Miller v. Baker*, 1 Met. (Mass.) 27; *Stevens v. Somerindyke*, 4 E. D. Smith (N. Y.) 418; *Welsh v. Bell*, 32 Pa. St. 12.

4. Void Process.—An execution which is voidable only, and not void, affords full and ample protection to the officer who obeys its mandate. *Cogburn v. Spence*, 15 Ala. 549; 50 Am. Dec. 140; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Kissock v. Grant*, 34 Barb. (N. Y.) 144.

An execution issued by a magistrate against a person who has not been summoned before him, is void, and the constable who levies such an execution is a trespasser. *Tobin v. Addison*, 2 Strobb. (S. Car.) 3.

Trespass lies against a sheriff pro-

2. Trespasser Ab Initio; Abuse of Process.—A trespasser *ab initio* is one who goes upon the premises of another under authority of law, and does any unwarrantable act; such an one is deemed a trespasser *ab initio*, and is held responsible for all the injury committed.¹ If one goes upon the property of another by the latter's authority, and does unwarrantable acts, he is not a trespasser *ab initio*, but may be held responsible for the particular wrongful act.² Trespass *ab initio* frequently occurs through abuse of authority vested in one by the law, as for abuse of process;³ to make one so liable it must be shown that he grossly abused his authority. Such a mistake as a person of ordinary care and intelligence might make will not amount to such an abuse.⁴

ceeding to sell under an execution where the judgment has been satisfied. *Kuhn v. North*, 10 S. & R. (Pa.) 399.

1. Authority for Entry as Affecting Unlawful Act.—The Six Carpenters' Case, 8 Coke 146 A; *Smith's Lead. Cas.*, vol. 1 (5th Am. ed.), 257, is the leading case on this subject. In this case, six carpenters entered a tavern, and were served with wine, for which they paid; they were afterwards, at their request, served with bread and more wine, for which they refused to pay. On these facts, an action in trespass was brought against the six carpenters, and the point in the case was, whether the non-payment made the entry into the tavern tortious. It was decided that the mere non-payment did not make the carpenters trespassers *ab initio*.

Further illustrations are: a sheriff or other officer, either by himself or his agent, unlawfully selling property. *Everett v. Herrin*, 48 Me. 537; *Griel v. Hunter*, 40 Ala. 542; *Brackett v. Vining*, 49 Me. 356; *Bond v. Wilder*, 16 Vt. 393; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Purington v. Loring*, 7 Mass. 388; *Frisbee v. Langworthy*, 11 Wis. 375. So one wrongfully impounding cattle before damages have been ascertained. *Sackrider v. McDonald*, 10 Johns. (N. Y.) 253; *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369. So a fish warden who took and kept a net unlawfully for fourteen days. *Russell v. Hanscomb*, 15 Gray (Mass.) 166.

2. The Six Carpenters' Case, 8 Coke 146 A; *Smith's Lead. Cas.*, vol. 1 (8th Am. ed.), 257.

3. Abuse of Process Makes One a Trespasser Ab Initio.—*Mussey v. Cummings*, 34 Me. 74; *Burton v. Calaway*, 20 Ind. 469; *Bradley v. Davis*, 14 Me.

44; 30 Am. Dec. 729; *Jarratt v. Gwathmey*, 5 Blackf. (Ind.) 237; *Wilson v. Ellis*, 28 Pa. St. 238; *Freeman v. Smith*, 30 Pa. St. 264; *Parish v. Wilhelm*, 63 N. Car. 50; *McGough v. Wellington*, 6 Allen (Mass.) 505.

Not Held as Trespassers Ab Initio.—Where an officer used property held by him, see *Paul v. Slason*, 22 Vt. 231; and levied an attachment in favor of creditors against the rights of those holding under a fraudulent conveyance, although there was no order of court for the levy. *Hartshorn v. Williams*, 31 Ala. 149.

Omission to take out the execution within thirty days, where the officer afterwards levied on goods upon the original writ. *McGough v. Wellington*, 4 Allen (Mass.) 502.

4. To make one, who originally acted with propriety under legal process, liable, *ab initio*, for subsequent illegal acts, he must be shown to have grossly abused the authority under which he acted; such a mistake as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be such an illegal exercise of the authority, to the prejudice of another, as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover to his illegal conduct. *Taylor v. Jones*, 42 N. H. 25.

Where an act is lawfully done, it cannot be made unlawful *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act. The mere intention of doing a subsequent illegal act will not render the first act unlawful. *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427.

An officer who, after selling on an execution sufficient property to satisfy

3. Entry Under Authority of Government, Statute, or Military Necessity.—It sometimes happens that an officer or agent may justify acts, that would otherwise make him liable as a trespasser, by the authority derived from government, from a legislature, a statute, or from military necessity.¹

it, proceeds to sell other property of the judgment debtor, does not merely become liable as a trespasser, *ab initio*, to one who holds an unrecorded mortgage of a portion of the property which was rightfully sold. *Wolcott v. Root*, 2 Allen (Mass.) 194.

An officer who serves a search warrant, which commands him to search a dwelling-house therein described, for sole-leather and other goods, is not rendered a trespasser *ab initio* merely by taking and examining a case of "uppers" found in the house, and laying them down again, although they were not specially mentioned in his warrant, and he knew they were not, if in so doing he acted in good faith; or by searching a shop without license, before searching the dwelling-house. *Dwinnels v. Boynton*, 3 Allen (Mass.) 310.

Public officers cannot be made trespassers *ab initio*, unless by proof of some positive wrongful act, giving character to the original act, incompatible with the exercise of the legal right to do the first act. *Stoughton v. Mott*, 25 Vt. 668.

A revenue officer, who has seized a vessel, may become a trespasser *ab initio*, by violating his trust. *Van Brunt v. Schenck*, Anth. (N. Y.) 157.

1. Orders of President or Cabinet Officer.—It is a good defense to an action of trespass against an officer of the navy for acts done by him, to show that the same were done by virtue of lawful and public orders from the president of the *United States* and the secretary of the navy. *Durand v. Hollins*, 4 Blatchf. (U. S.) 451.

In trespass by the *United States*, a permit to enter upon the lands which contained lead ore, may be admitted in evidence to show the nature and object of the entry. *U. S. v. Gear*, 3 McLean (U. S.) 571.

Authority of Statute.—Where trespass is brought against a supervisor, executing powers given by the *Indiana Revised Statutes* of 1843, he is bound to show that he acted in good faith, and in a proper discharge of his duty to the public. *Conwell v. Emrie*, 4 Ind. 209.

A surveyor of highways, in *Maine*, was required by the selectmen of a town to put a road therein, then lately laid out, and running through the land of A, in a condition to be traveled with safety and convenience; and, in doing it, he, and those acting under his direction, took for the purpose, from the land of A, which lay contiguous to the way, "not planted or inclosed," a quantity of stone, necessary for the proper repair of the road. It was held that A could not maintain trespass *quare clausum fregit* against the surveyor or those acting under him, such act being authorized by Rev. Stat., ch. 25, § 72, and the remedy for compensation being in a different mode. *Keene v. Chapman*, 25 Me. 126.

Authority of Military and Navy.—Trespass will not lie for an actual trespass committed under orders of a military officer in a case of extreme necessity. *Barrow v. Page*, 5 Hayw. (Tenn.) 97.

Trespass does not lie against the commander of a national ship for stopping, under instructions from the secretary of the navy, a neutral ship, though the neutral is afterwards captured on that account, unless there is collusion between the captor and commander. *Ruan v. Perry*, 3 Cal. (N. Y.) 120.

The command of a superior to commit a trespass, or other unlawful act, is no justification to his inferior. *Brown v. Howard*, 14 Johns. (N. Y.) 119.

A person in command of armed forces of the so-called Confederate States, is not liable for a trespass committed by any of his command without his knowledge or abetment; but if he advises or aids such trespass, the fact that he was acting under such so-called government is no defense. *Echols v. Staunton*, 3 W. Va. 574.

Authority of State.—Where the legislature authorizes an act which, in its natural consequences, may be injurious to the property of another, and prescribes the method in which damages are to be ascertained, he who does the act is not liable as a trespasser. *Woods v. Nashua Mfg. Co.*, 4 N. H. 527; *Lebanon v. Olcott*, 1 N. H. 339.

4. Under Title, Possession, or Right of Possession.—One having title to property, and wrongfully denied possession, can enter without being guilty of trespass;¹ so a tenant, mortgagor, or other

Although a trespass is committed by order of the authorities of a state, acting in pursuance of the law thereof, it cannot be justified when the state is engaged in rebellion against the government and laws of the *United States*. *Lively v. Ballard*, 2 W. Va. 496.

Where one who seeks a license under the statute, to erect a milldam, makes parties to the proceeding all who should be made parties, he is not liable for an injury to the land of others, where such injury could not have been foreseen. *Wilson v. Hanthorn*, 72 Iowa 451.

A surveyor of highways may lawfully remove a fence run across the highway, without first requiring the owner to remove it. *Cool v. Crommet*, 13 Me. 250.

In case of an intrusion upon private property, there is no presumption of lawful authority arising from the commission of the act, simply because done or directed by a municipal corporation having general powers in respect to acts of the kind in question. *Bradt v. Albany*, 5 Hun (N. Y.) 591.

Public Necessity.—A house in a town may be pulled down and removed, to arrest the spread of a fire, where it is inevitable that it will take fire and be consumed, and, in such case, will inevitably spread the fire to other houses; but it must be impossible in such case, to prevent its taking fire, or to prevent its communicating fire to other houses, by use of the means within the power of the parties pulling it down. *Beach v. Trudgain*, 2 Gratt. (Va.) 219.

The defendants, one as superintendent of public streets, and the other as dockmaster, of the city of New York, notified the plaintiff, who was the owner of a quantity of pig iron lying on a pier in North River, to remove the same on or before a specified day, or it would be taken to the public yard, and there disposed of as the ordinances of the city direct. On the morning and early part of the afternoon of the day specified, the defendants caused the iron to be removed, and the plaintiff was obliged to pay a large amount of charges and expenses to obtain the possession and return of it. The iron would have been removed

the same day by one who had purchased it, had it not been taken to the public yard. It was held first, that under the notice, the plaintiff had a right to the whole of the day specified in which to make the removal of the iron, and that the defendants were therefore trespassers; second, that the defendants, as public officers, were bound to conform to the ordinances of the city and the terms of the notice, and could not set up in defense that, as private citizens, they were authorized to remove the iron as a nuisance. *Coddington v. White*, 2 Duer (N. Y.) 390.

1. Owner Denied Possession Can Enter.—*Smith v. McAdam*, 3 Mich. 506; *Walker v. Newhouse*, 14 Mo. 373; *Henderson v. Grewell*, 8 Cal. 581; *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 617; *Cann v. Warren*, 1 Houst. (Del.) 188; *Gatewood v. Head*, 2 Litt. (Ky.) 60; *Freeman v. Thayer*, 29 Me. 369; *Dabney v. Manning*, 3 Ohio 321; 17 Am. Dec. 597; *Erwin v. Olmstead*, 7 Cow. (N. Y.) 229.

A person cannot be made liable in trespass *quare clausum fregit* for entering upon his own land, in the wrongful possession of another, and exerting a right of ownership; nor can any unlawful acts, committed in the exertion of this right, be so connected with it, as to make him liable in damages as a trespasser *ab initio*. *Johnson v. Hannahan*, 1 Strobb. (S. Car.) 313.

A person having the right of entry upon land, is not liable in trespass *quare clausum fregit* for entering against the will of the person in possession. *Yeates v. Allin*, 2 Dana (Ky.) 134; *Walton v. File*, 1 Dev. & B. (N. Car.) 567.

In an action of trespass, where the plaintiff had title, and at least constructive possession, and the defendant had knowledge that he was cutting on the plaintiff's premises, with no evidence to show any right in the defendant, and no connection with a stranger who claimed title, it was held that the defendant was a mere intruder, and that evidence of title in a third person would not justify the act, or present an available defense. *Miller v. Decker*, 40 Barb. (N. Y.) 228.

A, with the permission of B, erected a house on B's land, and then conveyed the house to C, but continued to

person, without title, may have a present right of possession which will justify his entry, or enable him, if in possession, to maintain trespass for the wrongful entry of another.¹

5. Under License.—(See LICENSE, vol. 13, p. 514.)

reside in it. B conveyed the land on which the house stood to D, who requested A to leave the house, and, upon A's refusal, entered and tore down the chimneys, and put it in such a situation that A could not reside in it. It was held that A could not maintain trespass for such breaking and entering. *Harris v. Gellingham*, 6 N. H. 9; 23 Am. Dec. 701.

It is no trespass for the owner of the freehold to enter, cut and carry away the grain of one in wrongful possession. *Barnes v. Dean*, 5 Watts (Pa.) 543; 30 Am. Dec. 346.

Right of Owner to Use Force.—Whether one having right of entry may use force if necessary to exert his right, is an unsettled question, according to common law; but the authorities may be reconciled on this distinction. One having a right of entry may use force, provided it does not amount to a breach of the peace; but one not having such right is guilty of indictable trespass, if he enter with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. *State v. Ross*, 4 Jones (N. Car.) 315; 69 Am. Dec. 751.

1. Right of Possession Entitles One to Enter.—*Ralph v. Bayley*, 11 Vt. 521; *McCrary v. Miller*, 14 Vt. 128; *Rossiter v. Russell*, 18 N. H. 73; *Culver v. Smart*, 1 Ind. 65; *Hope v. Cason*, 3 B. Mon. (Ky.) 544; *Cressey v. Bradford*, 45 Me. 16; *Paine v. Marr*, 35 Me. 181; *Williston v. Morse*, 10 Met. (Mass.) 17; *Presnell v. Ramsour*, 8 Ired. (N. Car.) 505; *Spencer v. Wetherly*, 1 Jones (N. Car.) 327; *Sloane v. McConahy*, 4 Ohio 157; *Ives v. Ives*, 13 Johns. (N. Y.) 235; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; 4 Am. Dec. 258; *Van Deusen v. Young*, 29 N. Y. 9.

Occasional entries and the commission of acts of trespass upon the land of another, do not constitute such a possession as will interfere with that which is incident to the ownership of the legal title. The owner may maintain trespass *quare clausum fregit* against such a party. *Hughes v. Stevens*, 36 Pa. St. 320.

In an action of trespass, the defendant may offer as many titles to the land

in dispute as he pleases, and if they all fail him, he may resort to, and depend upon, his possessory rights. *Mackay v. Reynolds*, 2 Bay (S. Car.) 474; *Strange v. Durham*, 2 Bay (S. Car.) 429.

A mortgagee of a house entered into it, with an officer, by opening the outer door thereof, in the absence of the mortgagor and his family, before the condition of the mortgage was broken, and without giving notice to the mortgagor to quit, and the officer, by the mortgagee's directions, attached the mortgagor's goods in the house. The mortgagor brought an action of trespass against the mortgagee and the officer, for breaking and entering the house and carrying away the goods. It was held that the action could not be maintained. *Lackey v. Holbrook*, 11 Met. (Mass.) 458.

A town laid out certain lots, which had been reserved, by its charter, for public schools and other purposes; part of these lots were afterward annexed to the territory of the neighboring town, and the parts so annexed passed into the possession of the plaintiff. It was held that leases of these lots executed by the proper authorities of the first town, to the defendant after the annexation, were a sufficient defense for the defendant in an action of trespass. *White v. Fuller*, 38 Vt. 193.

Where a person who has entered under a parol agreement for the purchase of land, cuts timber, and afterwards rescinds the agreement, he is a trespasser. *Clough v. Hosford*, 6 N. H. 231.

An execution creditor, who cuts hay upon land of which he is in possession under the levy of his execution, and before he reconveys his interest in the land, is not liable in trespass *quare clausum fregit* for remaining in possession, or for removing the hay while in possession, after such conveyance. *Drown v. Foss*, 39 N. H. 525.

A mere possessory title is sufficient to support a plea of *liberum tenementum*, in an action by a person holding without color or claim of title. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; 4 Am. Dec. 258; *Wood v. Hyatt*, 4 Johns. (N. Y.) 313; *Concord v. McIntire*, 6 N. H. 527. See also *Shank v. Cross*, 9 Wend. (N. Y.) 160.

6. Under Warrant.—(See SEARCHES AND SEIZURES, vol. 21, p. 955; WARRANT.)

V. TRESPASS AS TO PERSONS—1. False Imprisonment.—(SEE FALSE IMPRISONMENT, vol. 7, p. 675.)

2. Assault and Battery.—(See ASSAULT, vol. 1, p. 778.)

VI. TRESPASS AS TO PERSONALTY—1. What Constitutes—*a.* IN GENERAL.—Every unlawful interference by one person with the goods of another is a trespass.¹ An actual and forcible manucaption of goods is not necessary to constitute a trespass, but any exercise or claim of dominion, though by mere words, may warrant an action of trespass.² So a mere levy upon personal property not authorized by law is a trespass, although there has been neither a sale nor a removal.³ And, in the case of an actual taking, it is not necessary to show that the act was done with a

1. Falke v. Fletcher, 34 L. J. C. P. 46; Winteringham v. Lafoy, 7 Cow. (N. Y.) 735; Morgan v. Varick, 8 Wend. (N. Y.) 594; Phillips v. Hall, 8 Wend. (N. Y.) 610.

The same doctrine is applicable in trespass as in trover. See TROVER, vol. 26.

License Revoked.—One who interferes with goods which he held under a license which has been revoked, is a trespasser *ab initio*. A sale of lumber to be taken and measured from a larger bulk, is not complete, as between the parties, until selected and measured; and a mere license, after the contract of sale, for the purchaser to measure and take the lumber, may be revoked; and if he takes the lumber after revocation, he will be a trespasser. Ockington v. Ritchie, 41 N. H. 275.

2. McCombie v. Davies, 6 East 540; Baldwin v. Cole, 6 Mod. 212; Syeds v. Hay, 4 T. R. 260; Price v. Helyar, 4 Bing. 597; Wilson v. Baker, 4 B. & Ald. 614; Miller v. Baker, 1 Met. (Mass.) 27; Reynolds v. Shuler, 5 Cow. (N. Y.) 326; Gibbs v. Chase, 10 Mass. 125.

Merely making an inventory and threatening to remove goods, if prevented by giving a receipt for them, is sufficient, though they were not attached by the officer. Winteringham v. Lafoy, 7 Cow. (N. Y.) 735. See also Hardy v. Clendening, 25 Ark. 436.

It has been held that trespass was committed against a passenger in unlawfully carrying his baggage beyond the terminus without allowing him time to land the baggage. Holmes v. Doane, 3 Gray (Mass.) 328.

Wrongful Distress.—A party making a distress of animals *damage feasant*,

who fails to comply with the statutory requirements, is a trespasser *ab initio*. Brewster v. Wilson, 43 Hun (N. Y.) 261.

A landlord who distrains upon goods, knowing them to be the property of another, left with the tenant for sale on commission, is a trespasser *ab initio* and is liable to the owner of the goods in an action of trespass. Brown v. Stackhouse, 155 Pa. St. 582.

Part Owner in Possession.—The part-owner of goods who is in possession, may recover all the damages resulting from a trespass committed upon the goods by a stranger. Hasbrouck v. Winkler, 48 N. J. L. 431; Luse v. Jones, 39 N. J. L. 707.

3. Robinson v. Mansfield, 13 Pick. (Mass.) 139; Miller v. Baker, 1 Met. (Mass.) 27; Gibbs v. Chase, 10 Mass. 125; Welch v. Bell, 32 Pa. St. 12; Stewart v. Wells, 6 Barb. (N. Y.) 79; Stevens v. Somerimdyke, 4 E. D. Smith (N. Y.) 418.

After an officer has obtained access to, and control over, property, with intent to attach the same, the attachment is complete, and if it is wrongful, the owner's right to maintain trespass accrues immediately. Morse v. Hurd, 17 N. H. 246.

In Bayles v. Usher, 4 Moo. & P. 790, a broker distraining, who merely left a memorandum stating that he had seized all the goods on the premises, and put a man nominally in possession, although the tenant was never interrupted for one moment in the free use of his goods, was held liable for the seizure, and damages were recovered.

A private person who, assuming to act as a constable, seizes the property of another, cannot escape liability for

wrongful intent, but it is sufficient if it has been done without justifiable cause, though by accident or mistake.¹

b. WRONGFUL LEVY OR ATTACHMENT.—A sheriff or other officer may be liable for a trespass for wrongful levy or attachment, as where goods are seized which are exempt by law;² or

trespass by the fact that he then had in his possession an execution against such person lawfully issued. *M'Mellen v. Rowe*, 15 Neb. 620.

1. *Colwell v. Reeves*, 2 Camp. 576; *Guille v. Swan*, 19 Johns. (N. Y.) 381; *Pearson v. Inlow*, 20 Wis. 322; *Hazleton v. Week*, 49 Wis. 661; *Dexter v. Cole*, 6 Wis. 320.

In *Hobart v. Hagett*, 12 Me. 67, an action of trespass was brought for taking an ox belonging to the plaintiff. It was shown that the defendant met the plaintiff in the street and bought of the latter an ox, which the plaintiff directed him to go and take out of his inclosure, and the defendant by mistake took the wrong ox. He was held liable in an action of trespass. The court said: "Taking the plaintiff's ox was a deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing; neither does the officer when, on a precept against A, he takes by mistake the property of B, intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division cuts timber on his neighbor's land; and yet in both cases the law would hold them as trespassers."

In *Guille v. Swan*, 19 Johns. (N. Y.) 381, *Spencer, C. J.*, said: "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether intentional or unintentional, trespass is the proper action to redress the wrong."

What is essentially a trespass cannot become lawful from having been done with good intention; neither can the manner of doing the thing affect it; if unlawful in its nature, it must continue to be so. Untying and removing a horse from a hitching post standing in the highway, to which he had been hitched by the plaintiff, being the owner, and to the use of which post the plaintiff had, if not an exclusive right, as good a right as defendant, amounts to at least a technical trespass, and is sufficient to warrant the recovery of nomi-

nal damages. *Burch v. Carter*, 32 N. J. L. 554.

Wife's Consent No Defense.—It is no defense to an action of trespass for carrying away personal property from the plaintiff's house, that it was done with the approval, and at the request, of the plaintiff's wife, then living apart from her husband, although some of the property belonged to her before marriage. *Schindel v. Schindel*, 12 Md. 108.

Parties volunteering to aid one to take away chattels that have been conveyed by a bill of sale which was absolute on its face, but in fact a security for a debt since extinguished, will not be heard to allege ignorance of this fact, but must stand, if at all, upon the justification of the principal. *Wallard v. Worthman*, 84 Ill. 446.

2. *Gibson v. Jenney*, 15 Mass. 204; *Brown v. Waite*, 19 Pick. (Mass.) 470; *Foss v. Stewart*, 14 Me. 312; *Cook v. Baine*, 37 Ala. 350; *Van Dusen v. King*, 34 Pa. St. 201; *Wilson v. Ellis*, 28 Pa. St. 238; *Freeman v. Smith*, 30 Pa. St. 264; *Perry v. Lewis*, 49 Miss. 443; *Spencer v. Long*, 39 Cal. 700; *Tuller v. Sparks*, 39 Tex. 136; *Elliott v. Whitmore*, 3 Mich. 532.

A purchaser from the defendant in execution, of property exempt from levy and sale, may maintain an action against the sheriff for a subsequent levy and sale. *Cook v. Baine*, 37 Ala. 350.

An officer who seizes all the property of a debtor, knowing that part of it is exempt, cannot justify, by the omission of the debtor to designate the exempt portion. *Cantwell v. Connor*, 51 How. Pr. (N. Y.) 45; *Sullivan v. Farley*, 63 How. Pr. (N. Y.) 371; *Frost v. Mott*, 34 N. Y. 253.

A mere levy upon personal property when it is not authorized by law, is, without either a sale or removal, a trespass. *Stewart v. Wells*, 6 Barb. (N. Y.) 19; *Freeman v. Apple*, 39 Leg. Int. (Pa.) 180.

Withdrawal of Consent to Levy.—In *Hutchinson v. Campbell*, 25 Pa. St. 273, it was held that where a defendant in an execution consented to a levy on articles

where the levy or attachment was made upon property of a third person.¹ A valid and lawful act cannot be accomplished by any unlawful means; so an attachment made upon property, the possession of which has been obtained by fraud, renders the parties thereto liable as trespassers.² The officer, however, is not alone liable, but the attorney who ordered, and the plaintiff who by some act or direction connects himself with the wrongful act, are likewise trespassers.³ If the party in whose name and for whose benefit the trespass is committed, with full knowledge of the facts, sanctioned the act and appropriated the proceeds of the trespass,

which were exempt, it was competent for him to withdraw such consent before the day of sale, and that the officer selling such articles after notice of such withdrawal was liable to an action for so doing.

Wrongful Sale.—Trespass lies against a sheriff who makes a lawful levy, but sells on only five days' notice. *Carrier v. Esbaugh*, 70 Pa. St. 239.

1. *State v. Conover*, 28 N. J. L. 224; *Pike v. Colvin*, 67 Ill. 227; *Boulware v. Craddock*, 30 Cal. 190; *Markley v. Rand*, 12 Cal. 276; *Yarborough v. Harper*, 25 Miss. 112; *Weston v. Dorr*, 25 Me. 176; *Weber v. Henry*, 16 Mich. 399; *Freeman v. Apple*, 39 Leg. Int. (Pa.) 180; *Gillingham v. Clark*, 1 Phila. (Pa.) 51.

In an action against a constable for levying on and selling the plaintiff's goods under an execution against a third person, it is no defense, as to unlawful seizure and detention, that the plaintiff subsequently recovered the goods in replevin against the purchaser at the constable's sale. *Nagle v. Mullison*, 34 Pa. St. 48.

Trespass lies for a wrongful levy, although the sale took place after the commencement of the suit. *Graheem v. Lane*, 3 Brew. (Pa.) 92.

A return of "attached," when the goods are the property of a third person, renders the sheriff liable in trespass, without a manual seizure. *Paxton v. Steckel*, 2 Pa. St. 93.

Partnership Property.—If the title of one partner to a moiety of partnership chattels be bad as against an execution creditor, and the title of the firm be good as to the other moiety, the partners may maintain a joint action in trespass against the officer seizing and selling the entire property. *Farrel v. Colwell*, 30 N. J. L. 123.

2. In *Parsons v. Dickinson*, 11 Pick. (Mass.) 352, where unlawful means had been used to keep the property of the

debtor from passing to the vendee, and to continue its liability to attachment until the next day, and an attachment was thereupon made, it was held that such attachment was ineffectual and that the parties making it were trespassers. See also *Ilseley v. Nichols*, 12 Pick. (Mass.) 270.

So, in *Deyo v. Jennison*, 10 Allen (Mass.) 410, where a debtor, who resided in another state, was fraudulently induced by procurement of his creditors to bring into the state property, which by the law of his residence was exempt from attachment, in order that it might be attached, and it was so attached, the attachment was held to be void and both the creditors and the officer who made the attachment were liable as trespassers, although the officer did not know of the fraud and simply obeyed the terms of his precept.

3. *Bates v. Pilling*, 7 B. & C. 38; 13 E. C. L. 104; *McDougold v. Dougherty*, 12 Ga. 613; *Atkinson v. Gatcher*, 23 Ark. 101; *Goodyear v. Williston*, 42 Cal. 11; *Cainfax v. Chapman*, 7 Mo. 175; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Allen v. Carey*, 10 Wend. (N. Y.) 349; *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Armstrong v. Dubois*, 1 Abb. App. (N. Y.) 11.

An attorney is not liable for a tortious seizure of goods, who merely issues the execution and conveys to the sheriff the instruction of his client to seize the goods in question. *Ford v. Williams*, 13 N. Y. 577.

In an action of trespass for the unlawful taking of property under attachment, brought against the constable and original plaintiff, wherein they answered jointly, admitting the taking, but denying ownership in the present plaintiff, it was held that the attachment plaintiff would be held to have adopted the taking, and to be jointly liable with the constable. *Taylor v. Ryan*, 15 Neb. 573.

this is evidence for the jury from which they may infer a previous command or authority.¹ But the law will not presume an authority from the parties to commit a trespass or do an unlawful act, and no liability will attach unless it appear that such party directed or assented to it.²

c. RECEIPT OF GOODS FROM TRESPASSER.—One who innocently purchases or acquires possession of goods taken by a trespasser without his knowledge or subsequent assent, and not for his benefit, is not guilty of a trespass, though he may sell the property;³ but to bring one within this principle, it must appear that he obtained possession of the property by delivery and with-

→ A plaintiff who indemnifies a constable in levying on the goods of a third person, is liable in trespass. *Moran v. Hart*, 11 Luz. L. Reg. (Pa.) 45.

1. *Welch v. Cochran*, 63 N. Y. 181; *Vanderbilt v. Richmond*, etc., Co., 2 N. Y. 479; *Brainerd v. Dunning*, 30 N. Y. 211; *Fox v. Jackson*, 8 Barb. (N. Y.) 355.

A receipt by the parties of the proceeds of a sale, in ignorance of the facts, is not a ratification, and they are not affected by knowledge on the part of their attorney, as he has no authority to bind them by directing a trespass, or by ratifying one when committed. *Clark v. Woodruff*, 83 N. Y. 518. See also *Averill v. Williams*, 4 Den. (N. Y.) 295.

2. *Welch v. Cochran*, 63 N. Y. 181; *Foster v. Wiley*, 27 Mich. 245; *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96; *Freeman v. Rasher*, 13 L. R. Q. B. 780.

3. *Wilson v. Barker*, 4 B. & Ad. 614; *Justice v. Mendell*, 14 B. Mon. (Ky.) 10; *Marshall v. Davis*, 1 Wend. (N. Y.) 111; *Nash v. Mosher*, 13 Wend. (N. Y.) 431; *Millsbaugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Barrett v. Warren*, 3 Hill (N. Y.) 348; *Talmadge v. Scudder*, 36 Pa. St. 517; *Hammon v. Fisher*, 2 Grant (Pa.) 330; *Ward v. Taylor*, 1 Pa. St. 238.

In *Brooks v. Olmstead*, 17 Pa. St. 28, Porter, J., said: "It is, no doubt, true that one who comes to the possession of goods by delivery, and who has been guilty of no fault on his part, although it may turn out that the person who made the delivery to him had no title himself and was a wrongdoer, yet the receiver, guilty of no fault, cannot be treated as a trespasser; for, in such case, he has done no act which aided in depriving the true owner of his property. He, nevertheless, holds the property of the true owner, who may recover in trover, if the receiver of the property

has converted it to his own use; or he is liable in replevin. So it may be stated, safely, that he who buys property from a trespasser, without any knowledge whatever of the original trespass, cannot be treated as a trespasser himself, because he has been guilty of no fault, nor assisted in any way in depriving the true owner of his property."

In Bac. Abr., "Trespass" E 3, the rule is thus stated: "If the goods of J. S. are legally taken in execution by a sheriff, and delivered by him to J. N., trespass will not lie against the latter because he obtained the possession of the goods lawfully." So in *Day v. Olmstead*, Owen 70, it was held that, "If a stranger take my horse or goods and sell it to J. S., and J. S. take it accordingly, no action of trespass lies against him."

In *McCarty v. Vickery*, 12 Johns. (N. Y.) 348, the defendant removed a quantity of wood, which the plaintiff had sold, and although the purchaser had obtained the delivery by fraud, it was held that trespass would not lie against the defendant. In *Barrett v. Warren*, 3 Hill (N. Y.) 348, Bronson, J., in criticising this case, said: "I am aware that this decision was questioned by Cowen, J., in *Carey v. Hotelling*, 1 Hill (N. Y.) 313, and if the case, as he assumes, is to be taken as deciding that the owner could not maintain trespass against the fraudulent vendee, then I agree that the decision cannot be supported, but it should be observed that the action was brought against a third person, who had probably acted under the authority of the vendee, and then the case comes within the principle that one, who, without any fault on his part, receives goods from a wrongdoer, cannot be made answerable in trespass; as against him the remedy of the owner is an action of trover, and unless he

out any fault on his part;¹ and in the case of a purchaser it is held that if he take the goods without delivery from a trespasser, he is himself a wrongdoer, and liable for trespass.²

2. Property Subject to Trespass.—Everything in which the law recognizes property, may be the subject of trespass.³ A dog is a species of property, for an injury to which an action may be maintained, and it is not necessary to show that he has a pecuniary value.⁴ In general, the action will lie for injuries to all domestic animals,⁵ or wild animals which have been reclaimed.⁶

has sold or otherwise converted the goods, that action will not lie without a demand."

Purchaser at Judicial Sale.—A mere purchaser at a sale by an officer, who receives from him immediate possession, is not responsible in trespass. His purchase does not, of itself, make him a participant in the wrongful seizure, and he is not made a trespasser by relation. *Gloss v. Black*, 91 Pa. St. 418.

1. *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333; in the absence of such proof, a demand need not be shown. *Tallman v. Turck*, 26 Barb. (N. Y.) 167. In *Pierce v. Van Dyke*, 6 Hill (N. Y.) 613, a promissory note had been taken from the pocket of the plaintiff's intestate and delivered to the defendant, an attorney, who claimed that he had received it for collection; but failing to show that he had received it for that purpose, a non-suit, granted in his favor, was set aside. *Bronson, J.*, said: "The burden lies on the purchaser or bailee to show that he came to the possession of the property for a lawful purpose and in good faith. If he knew, or had any reason to believe, that he was dealing with one who acquired the property unlawfully, he may then be treated as a wrongdoer without any demand by the owner. The fact that he is an attorney standing alone proves nothing to the purpose; it is the naked case of a man's receiving goods by delivery from a trespasser without showing why or to what end the delivery was made. I think the owner may treat such a one as a wrongdoer without any prior demand. Trespass or replevin in the *cepi* would lie."

2. *Stanley v. Gaylord*, 1 Cush. (Mass.) 136; *Hyde v. Noble*, 13 N. H. 495.

So, where goods are sold by a carrier, and the purchaser takes them without delivery, it seems that trespass or replevin in the *cepi* will lie by the owner

against the purchaser, although he bought the goods in good faith. *Ehle v. Ehle*, 5 Comst. (N. Y.) 506.

"If I bail goods to a man, and he gives or sells them to a stranger, and the stranger takes them without delivery, he is a trespasser, and I shall have a writ of trespass against him, for by the gift or sale the property was not changed, but by the taking; but if he make delivery of them to the vendee or donee, then I shall not have a writ." *Bac. Abr.*, "Trespass" E 20; *Vin. Abr.*, "Trespass" M 11.

So, if a bailee of a chattel who has no authority as against the bailor to retain or dispose of the property mortgaged as a security for his own debt, and the mortgagee takes possession under the mortgage, the bailor may maintain trespass against him. *Stanley v. Gaylord*, 1 Cush. (Mass.) 536.

Sales by an Infant.—So, if an infant gives or sells his goods and delivers them with his own hands, the act is voidable only; but if he gives or sells goods, and the donee or vendee takes them by force of the gift or sale, the act is void, and the infant may bring trespass. *Vonda v. Van Horne*, 15 Wend. (N. Y.) 631.

3. *Cooley on Torts* (2d ed.), p. 516.

4. 2 Bl. Com. 393; *Wright v. Ramscot*, 1 Saund. 84; *King v. Kline*, 6 Pa. St. 318; *Dodson v. Mock*, 4 Dev. & B. (N. Car.) 148; *State v. Latham*, 13 Ired. (N. Car.) 33; *Parker v. Wise*, 27 Ala. 480; *Wheatley v. Harris*, 4 Sneed (Tenn.) 468; *Wright v. Clark*, 50 Vt. 130.

5. See *ANIMALS*, vol. 1, p. 574.

6. Pursuit alone gives no right of property in animals *fera natura*, and an action will not lie against a man for killing and taking an animal pursued by and in view of the person who originally found, started or chased it, and was on the point of seizing it. *Pierson v. Post*, 8 Cai. (N. Y.) 175. One who pursues a deer and wounds it, and follows it until night, and then abandons

3. Who May Maintain Trespass—*a.* **IN GENERAL.**—The plaintiff must have either actual possession, or property and constructive possession, that is, the right to redeem the article to his possession at pleasure, in order to maintain this action.¹

pursuit until morning, when he resumes it, cannot maintain trespass against one who killed it the night before. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75.

Bees.—Bees are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or inclosing them, gives property in them. If a swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them, and the owner may bring an action of trespass against the person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees and takes the honey. *Goff v. Kilts*, 15 Wend. (N. Y.) 550. See also *Adams v. Burton*, 43 Vt. 30; *Ferguson v. Miller*, 1 Cow. (N. Y.) 243.

Oysters.—In *Fleet v. Hageman*, 14 Wend. (N. Y.) 42, it was held that oysters planted by an individual in a bed clearly designated in a bay or arm of the sea, which is a common fishery, are the property of him who planted them, and that for the taking or destruction by another, trespass will lie. See also *Lowndes v. Dickerson*, 34 Hun (N. Y.) 586; *State v. Taylor*, 27 N. J. L. 117. Others cannot impair his title by depositing other oysters in the same place, if the first planter has sufficiently marked and designated his bed. *Decker v. Fisher*, 4 Barb. (N. Y.) 592. See also *OYSTERS*, vol. 17, p. 306.

Fish.—In *Young v. Hichens*, 6 Ad. & El., N. S. 606; 51 E. C. L. 606, it was held that a person who had nearly encompassed a quantity of fish with his net, had no title to them so as to have an action against a party who, by rowing his boat and splashing the water, frightened the fish so that they escaped.

1. *Ward v. Macauley*, 4 T. R. 489; *Smith v. Milles*, 1 T. R. 480; *Dunlap v. Steele*, 80 Ala. 424; *Miller v. Kirby*, 74 Ill. 242; *Marshall v. Davis*, 1 Wend. (N. Y.) 409, *per* Savage, C. J.; *Putnam v. Wiley*, 8 Johns. (N. Y.) 432; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Cheney v. Dallett*, 1 Del. Co. Ct. (Pa.) 225; *Winship v. Neale*, 10 Gray (Mass.)

382; *Howe v. Farrar*, 44 Me. 220; *Stevenson v. Fitzgerald*, 47 Mich. 166.

In *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 385, *Van Ness, J.*, said: "For an injury done to a personal chattel, the person who has the general property, provided he is entitled to immediate possession, may support this action, although he has never had actual possession; the general property draws to it the possession so as to enable the owner to maintain trespass, and this rule holds even by relation, as in the case of executors and administrators, who may maintain trespass for an injury done to the goods of their testator or intestate, after his death or before probate or administration; so may a legatee after the executor assented to the legacy, for a trespass committed before such assent."

A commissioned her brother to buy a cow for her, which he did, but before the animal had either passed into A's hands or she had assented to the purchase, the cow was taken by the defendant. It was held that A had such a property in the cow as would entitle her to maintain an action of trespass. *Thomas v. Phillips*, 7 C. & P. 573.

If the owner of a chattel gratuitously permits another to use it, the owner may maintain trespass for injury done to it while it is so used. *Lotan v. Cross*, 2 Campb. 464. Trespass lies in favor of the owner for killing a dog which was at the time in the possession of a third person under a loan. *White v. Brantley*, 37 Ala. 430.

One who cuts and stacks hay on an uninclosed prairie owned by others, without authority, acquires no property in such hay, and, having neither ownership nor possession, cannot maintain an action for its destruction. *Murphy v. Sioux City, etc., R. Co.*, 55 Iowa 473; *Tuly v. Tucker*, 6 Mo. 583.

An owner of a farm who is the actual owner of personality thereon, may, without having any actual or constructive possession at the time, maintain trespass *de bonis asportatis* for its wrongful removal from the farm under an execution against a tenant or occupant in a state where the distinction between that action and trespass

The general owner may so part with his right to possession as not to be able to maintain the action,¹ as where he so parts with

on the case is abolished. *Coe v. English*, 6 Houst. (Del.) 456.

When the owner of property permits it to remain in the possession of a third person, and while in his possession it is sold at a sheriff's sale, on an execution against such third person, but the purchaser does not take possession of it, but suffers it to remain there as before, the owner is not divested of his right to the property, nor can the creditor of the purchaser take it under attachment, unless there is fraud. *Cilley v. Cushman*, 12 Vt. 494.

The real owner of a stock of goods exposed for sale, though only occasionally present himself in his store and conducting his business through clerks and servants, is, in contemplation of law, the actual possessor of the goods, and an action of trespass for seizing them wrongfully must be brought in his name, and not that of such clerks and servants so trusted by him; nor is such a one less owner than the actual possessor because he had bought the goods in the name of another and shipped them in that name, if he paid for them with his own money. *Willis v. Hudson*, 63 Tex. 678.

One who buys property at an execution sale, which in fact is owned by another person than the judgment debtor, and who does not take possession, acquires no right by which he can maintain trespass against the owner for taking and converting the property to his own use. *Austin v. Tilden*, 14 Vt. 325.

Where an act authorized the widow of minor children of a decedent to retain property to the value of \$300, and the widow of an intestate whose entire property consisted of less than \$300, had transferred her interest in the chattel to the children, it was held that the children had sufficient ownership in the property to entitle them to bring trespass against a stranger. *Roberts v. Messinger*, 134 Pa. St. 298.

In *Pennsylvania*, an action in the form of trespass may be maintained upon facts showing the cause of action in trespass on the case, or trover, under the act of May 25th, 1887, P. L. 271, abolishing the distinction in such acts so far as procedure is concerned. *Duffield v. Rosenz*, 144 Pa. St. 520.

One who has goods taken under dis-

tress against another, and who refuses to bring replevin therefor, as required by the statute, when requested by the landlord, cannot maintain an action of trespass for the wrongful seizure. *Easterly Machine Co. v. Spencer* (Pa.), 29 W. N. C. 493.

Possession of Attached Property.—The owner of goods wrongfully attached cannot maintain trespass therefor, where, at the time they were attached, they were not in his possession, but were in the possession of the sheriff, under prior attachments by other of his creditors. *Joseph v. Henderson* (Ala. 1892), 10 So. Rep. 843.

Action by Widow.—Where the administrator refuses or neglects, upon requests made, to allow the property, claimed to be appraised and set apart for the widow, she cannot maintain trespass, for she has neither a general nor special property in any particular goods after election and appraisal; her remedy is a special action on the case, unless the estate has been sold and converted into money. *Neely v. McCormack*, 25 Pa. St. 255.

Assignment.—An assignment of chattels by which the right of property passes, draws after it the constructive possession, and the assignee may maintain trespass upon injury thereto. *North v. Turner*, 9 S. & R. (Pa.) 244; *Power v. Geesman*, 17 S. & R. (Pa.) 251.

1. *Bourne v. Merritt*, 22 Vt. 429; *Corfield v. Coryell*, 4 Wash. (U. S.) 371; *Lewis v. Carsan*, 15 Pa. St. 31.

When property was sold by a conditional sale and the time of payment for the same by the vendee had not elapsed, and while in possession of the vendee it was attached by one of his creditors, it was held that, although the vendor continued the general owner, yet not having the right of the present possession, he could not maintain trespass for the property against the attaching creditor of the vendee. *Hurd v. Fleming*, 34 Vt. 171.

If the vendor has parted with the possession he cannot maintain trespass, though the purchaser be insolvent. *McCarty v. Vickery*, 12 Johns. (N. Y.) 348.

Trespass does not lie by the general owner for taking from the pledgee personal property pledged for a debt. *Gay v. Smith*, 38 N. H. 171.

his possession as to give the bailee a right to use the property.¹ Where one has made a parol lease of personal property for a specified time, he cannot maintain trespass for the taking of the property, if taken during that time, as the property of the lessee.² If a second trespasser takes goods out of the possession of the first trespasser, the owner may maintain an action against such trespasser, the injury being against his possession.³

b. PERSONS HAVING SPECIAL PROPERTY—MORTGAGEES, PLEDGEES, ETC.—One having special property may maintain an action against a stranger and recover the full value of the property;⁴ and bare possession is *prima facie* sufficient to entitle

Right to Immediate Possession.—If, however, the general owner parting with the custody to a mere bailee, retains the right to immediate possession, he may maintain trespass. *Becker v. Smith*, 59 Pa. St. 469.

1. *Wilson v. Barker*, 4 Barn. & Ad. 614; *Smith v. Miller*, 1 T. R. 475; *Gordon v. Harper*, 7 T. R. 9; *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 377; *Neff v. Thompson*, 8 Barb. (N. Y.) 213.

A party having a lien upon goods may transfer the possession subject to the lien of a third person, who may lawfully hold the property until the lien be paid; if the transferee sells the goods, the owner is remitted to his original rights, free from the lien, and may bring trover against him. The owner, however, cannot bring trespass, as the transferee came lawfully into possession by the delivery of the bailee. *Nash v. Mosher*, 19 Wend. (N. Y.) 431.

2. *Lunt v. Brown*, 13 Me. 236. In *Ward v. Macauley*, 4 T. R. 480, the plaintiff had let to Lord Mountford a ready furnished house, and the lease contained a schedule of the furniture; pending the lease the defendants seized part of the furniture on execution against Lord Mountford. It was held that trespass did not lie against the defendants, because the plaintiffs had neither possession nor a right of possession at the time.

Upon default, however, the general owner may bring an action of trespass. *Horn v. Davis*, 155 Pa. St. 57.

3. *Wilbraham v. Snow*, Sid. 438. The taking of property held by an officer under an attachment against the owners is an unlawful act against the possession of the owner. *Cox v. Hall*, 18 Vt. 191.

Vendee.—A vendee of goods may recover in trespass, before they are delivered, against one who takes them from

the custody of the vendor. *North v. Turner*, 9 S. & R. (Pa.) 244.

4. *Haythorn v. Rushforth*, 19 N. J. L. 160; *Outcalt v. Durling*, 25 N. J. L. 443; *Browning v. Skillman*, 24 N. J. L. 352; *Pool v. Simons*, 1 N. H. 289; *Harker v. Dement*, 9 Gill (Md.) 7.

In *Haydon's Case*, 6 Coke 69, the rule is thus stated: "He who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath the general property, and upon the evidence, damages shall be mitigated; but clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger and shall recover all damages because that he is chargeable over."

Lessee.—The lessee of stock, under a lease to return the same in good condition at its expiration, may maintain an action of trespass for an injury to such stock while in his possession, by a railroad. *St. Louis, etc., R. Co. v. Taylor*, 57 Ark. 136; *St. Louis v. Biggs*, 50 Ark. 169.

One who takes up an animal as an estray, may maintain trespass against a wrongdoer, who takes it out of his possession. *Hendricks v. Decker*, 35 Barb. (N. Y.) 298.

Custodian of Property.—When one is in possession of property, under such an arrangement that he is accountable for it or for any injury to it in any event, such person may sue to recover for any loss or injury done the property while in his possession. In such a case the person in possession is treated as the owner, and is entitled to all the rights of the owner. *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55; *New York, etc., R. Co. v. Auer*, 106 Ind. 219.

A purchaser at a judicial sale may

the plaintiff to maintain the action;¹ but a willful trespasser acquires no such property or possession as will support the action.² The action may be maintained by a mortgagee who has possession

maintain the action against a mere wrongdoer. *Smith v. Hill*, 22 Barb. (N. Y.) 656.

1. *Sutton v. Buck*, 2 Taunt. 309; *Rooth v. Wilson*, 1 B. & Ad. 39; *Estes v. Cook*, 22 Pick. (Mass.) 295; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Sickles v. Gould*, 51 How. Pr. (N. Y.) 32; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 41; *Wilson v. Lawson*, 103 N. Y. 40; *Stowell v. Otis*, 71 N. Y. 38; *Entriken v. Brown*, 32 Pa. St. 364; *Darnell v. Thompson*, 13 Ala. 440; *Governor v. Campbell*, 17 Ala. 566; *Miller v. Clay*, 57 Ala. 162; *Louisiana Land, etc., Co. v. Gasquet (La.)*, 13 So. Rep. 171; *Swift v. Mosley*, 10 Vt. 208; *Edwards v. Edwards*, 11 Vt. 587; *Wustland v. Potterfield*, 9 W. Va. 438.

Mere peaceable possession will support the action as against one who disturbs the possession without right. *Warner v. Capps*, 37 Ark. 32. Bare possession is itself sufficient title against all the world except the true owner. *Potter v. Washburn*, 13 Vt. 564.

Actual possession, though without the consent of the real owner, when even adverse to him, will be sufficient as against the wrongdoer, or one who can show no better title. *Miller v. Kirby*, 74 Ill. 242; *Hurd v. West*, 7 Cow (N. Y.) 752.

Immediate right to the possession is sufficient against one who takes or injures property tortiously. *Hare v. Fuller*, 7 Ala. 717; *Davis v. Young*, 20 Ala. 151.

One who has possession of a cow, title to which is in his wife, may maintain trespass against one who shot it. *Taylor v. Hayes*, 63 Vt. 475.

Although the plaintiff has not title to the property, if lawfully in possession he may maintain the action. So where the owner of goods assigns and delivers them to another person as security for the payment of a debt by a valid assignment, and the assignee makes an assignment of them to the plaintiff, by an instrument which is void as against the provisions of the statute in that state, and delivers them over to the plaintiff, with the assent of the original owner, the plaintiff may maintain an action of trespass against one who takes them without right. *Barker v. Chase*, 24 Me. 230.

Possession under an equitable title is

sufficient to maintain trespass. *McCurdy v. Potts*, 2 Dall. (Pa.) 98.

Where the property is owned by the state, which, it has declared, it holds for the common benefit of all its citizens, one citizen cannot obtain possession, so as to exclude another. *La. Land, etc., Co. v. Gasquet (La.)*, 13 So. Rep. 171.

Possession of agent is that of his principal, for the purpose of enabling the latter to maintain trespass. *Gillett v. Ball*, 9 Pa. St. 13.

2. See *Murphy v. Sioux City, etc., R. Co.*, 55 Iowa 473.

In *Turley v. Tucker*, 6 Mo. 583, in delivering the opinion of the court, *Napton, J.*, said: "To maintain this action, plaintiff must have a property, either absolute or special, and the possession or right to immediate possession of the goods which are the subject of controversy. There is no pretense that plaintiff had the absolute. . . . had he such a special property as will enable him to maintain an action of trover? The cases of special property, referred to by the authorities in the illustration of the maxim that mere possession is sufficient *prima facie* evidence of property to maintain an action against a wrongdoer, are those of a bailee, a carrier, a lessee for life, a lord who seizes an estray, a sheriff who levies on goods, and the finder of a jewel. In all these cases, and every other instance of special property, the possession has been peaceable and lawful possession, or a possession acquired by some show of title from the absolute owner. Did plaintiff, by cutting the timber on government land, acquire such possession? There is no case of a mere trespasser acquiring by his trespass such constructive possession. It seems to be contrary to settled usage of law for courts to interfere in such cases, and aid one trespasser against another. For the peace of society the law will interfere so far as to protect actual possession, but will not raise a presumptive possession as the foundation of a special property."

The mortgagee of personal property, who has the right to take possession whenever he deems himself in danger of losing the mortgage debt, cannot sustain trespass, unless the contingency on which his right to the possession was to accrue has happened, followed

or the right to immediate possession,¹ or by a pledgee,² or a naked bailee.³ The second mortgagee in possession, though the prior mortgage is unsatisfied and the legal title is in the first mortgagee,

by some act on his part asserting such right. *Skiff v. Solace*, 23 Vt. 279.

1. *Perry v. Chandler*, 2 Cush. (Mass.) 237; *Kimball v. Marshall*, 8 N. H. 291; *Howell v. Caryl*, 50 Mo. App. 440; *Brown v. Cook*, 3 E. D. Smith (N. Y.) 123.

Where, under a mortgage, the mortgagee is authorized to take possession and sell the property, should the mortgagor fail to pay the indebtedness at the time and in the manner provided, or should sell or attempt to sell the property or any part thereof, or should move the same beyond the limits of the county, or should the property be levied on or taken possession of by any other person, the right to immediate possession is simultaneous with the levy, and the moment the right of possession accrues by reason of a levy, the mortgagee may maintain trespass if the levy is forcible and unlawful, being regarded as having constructive possession. *Dunlap v. Steele*, 80 Ala. 484; *Nelson v. Bondurant*, 26 Ala. 441; *Welch v. Whitmore*, 25 Me. 26.

In the absence of any stipulation that the possession shall remain with the mortgagor, the right of possession follows as an incident to the right of property, and the possession of the mortgagor is the possession of the mortgagee. *Boise v. Knox*, 10 Met. (Mass.) 43.

2. A pawnee of goods may maintain trespass against a stranger who takes them away, and recover the whole value in damages, though they were pledged for less. *Lyle v. Barker*, 5 Binn. (Pa.) 457.

3. *Chamberlain v. West*, 37 Minn. 54; *Laing v. Nelson*, 41 Minn. 521; *Orser v. Storms*, 9 Cow. (N. Y.) 687; *White v. Webb*, 15 Conn. 302; *Cowen v. Snow*, 11 Mass. 417; *Brownell v. Carnley*, 3 Duer. (N. Y.) 9; *Bass v. Pierce*, 16 Barb. (N. Y.) 595.

"Though a mere servant has not such a special property as will enable him to maintain trover, yet a bailee or trustee or other person who is responsible to his principal may maintain an action, and lawful possession is *prima facie* evidence of property." *Faulkland v. Brown*, 13 Wend. (N. Y.) 63.

A shopkeeper who has the possession of goods sent to him on sale or return,

may maintain trespass for the injury in his own name. *Colwell v. Reeves*, 2 Campb. 575.

Even a gratuitous bailee may maintain trespass against a wrongdoer. *Rooth v. Wilson*, 1 B. & Ald. 59.

An expressman who is in possession of goods for the purpose of moving them for the owner, may maintain trespass against one who wrongfully seizes them. *Matthews v. Smith's Exp. Co.*, (Co. Ct.) 23 N. Y. Supp. 132.

"This distinction was formerly taken, namely: that if goods which have been delivered generally to a man to be kept, are taken from him by a stranger, the bailee may maintain an action of trespass, because he is answerable for the goods to the owner; but that if goods, which have been delivered to a man to be kept as he keeps his own, are taken by a stranger, the bailee cannot maintain this action; because he is not answerable for the goods to the owner. But in a modern case, in which *Southcote's Case* (4 Rep. 84), and all the old cases were considered, this distinction is exploded. It is in this case laid down, that the bailee of goods which have been delivered to be kept, is not, although the delivery is general, answerable to the owner for the goods, unless they were lost or injured by neglect or default of the bailee; for that it would be very unreasonable to make a man, who receives no benefit from keeping the goods of another, answerable for the taking or injuring thereof, unless he has been guilty of neglect or default. It seems to follow from this case, that the bailee of goods, when delivered generally to be kept, cannot maintain an action of trespass for the taking or injuring of them by a stranger." *Bac. Abr. "Trespass," C.*

Action by Bailor or Bailee.—Unless the bailee has an absolute right to retain the possession of the property for a definite time, trespass may be brought against the wrongdoer for the property either in the name of the bailee or bailor. *Strong v. Adams*, 30 Vt. 221. See also *Overby v. McGee*, 15 Ark. 459.

Fixtures.—Where an auctioneer was put into possession of goods attached to the freehold for the purpose of selling them, the purchaser being bound to detach and remove them, it was held that

may maintain trespass against a stranger.¹ The action may be maintained by an administrator or an executor for an injury done to the property of the deceased after his death;² and by an executor *de son tort*, who has not obtained probate at the time of trial.³

The finder of an article may maintain the action against anyone save the true owner.⁴

c. PUBLIC OFFICERS.—Trespass may be maintained by a sheriff, or other officer who holds goods under legal process, when such goods are taken from him or injured while in his possession.⁵ The action, however, will not lie if the levy be void;⁶ or if the officer has so parted with his goods as not to be entitled to immediate possession.⁷ The possession of a receptor, however, is the

he had not such a possession as would support trespass — *de bonis asportatis* for their wrongful removal. *Davis v. Danks*, 3 Exch. 435.

1. *White v. Webb*, 15 Conn. 302.

2. *Hutchins v. Adams*, 3 Me. 174; *Thorpe v. Stallwood*, 12 L. J. R. N. S. C. P. 341; *Kirk v. Gregory*, 1 Exch. Div. 55.

Goods and chattels, on the death of the owner, vest in his personal representatives; and if they be afterwards tortiously taken or wrongfully converted, he may sue for them in his own name, without describing himself as executor or administrator. *Patchen v. Patchen*, 4 Hill (N. Y.) 57.

3. 1 Chitt. Pl. 170; *Husband v. Smith*, Hill Term. 1823.

4. *Catteris v. Cowper*, 4 Taunt. 547.

5. *Wilbraham v. Snow*, 2 Saund. 47; *Huntley v. Bacon*, 15 Conn. 67; *Parker v. Dean*, 45 Miss. 408; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484; *Smith v. Woodward*, 6 Johns. (N. Y.) 197; *Rogers v. Darnby*, 4 B. Mon. (Ky.) 238; *Teller v. Burtis*, 6 Johns. (N. Y.) 197; *Lockwood v. Bull*, 1 Cow. (N. Y.) 320; *Rhoads v. Woods*, 41 Barb. (N. Y.) 471; *Marsh v. White*, 3 Barb. (N. Y.) 518; *Hilliard v. Austin*, 17 Barb. (N. Y.) 141; *Dezill v. Odell*, 3 Hill (N. Y.) 215; *Dankin v. McKee*, 23 Ind. 447.

A sheriff cannot maintain trespass for goods removed by a stranger, after an execution came into his hands, but before an actual levy. *Clerley v. Lockhart*, 59 Pa. St. 376.

6. *Earl of Bristol v. Wilsmore*, 2 Dowl. & Ry. 755; *Earle v. Camp*, 16 Wend. (N. Y.) 564; *Horton v. Hendershot*, 1 Hill (N. Y.) 118.

Where a sheriff seizes goods of one person upon process against another,

and the real owner rescues them, he may, in an action by the sheriff, show his right and defeat the action. *Merritt v. Miller*, 13 Vt. 417. But see *Wudensaul v. Reynolds*, 49 Pa. St. 73. 7. *Blade v. Arundal*, 1 Maule & S. 711, where a sheriff, after making a levy on personal property, left the property in the possession of two other persons than the defendant in the execution, taking from them a paper under seal, by which they acknowledged the receipt of the property from the sheriff, and agreed to deliver it at a certain time and place specified, it was held that trespass would not lie by the sheriff against the defendant for taking away the property levied on before the time of delivery had expired, because till its expiration he was not entitled to the possession of the property. *Lewis v. Parsons*, 15 Pa. St. 31.

In *Taintor v. Williams*, 7 Conn. 271, where an officer, by attachment, on the 8th of May, took the goods of A, in that part of the house which A occupied, and, without removing them, put them into the custody of B; on the next day, C, who lived in another part of the same house, at the request of the officer, took the goods into his charge, and had the custody of them until the 10th; from that time till the 12th, they remained in A's part of the house under the particular charge of no one; on the 12th the officer removed them into C's part of the house, and put them into his possession, but he immediately afterwards bade the officer take them away, declaring that he wished to have nothing to do with them; there they remained, though not in C's custody, until the 14th, when they were taken and carried away by a stranger, it was held, in an action of trespass *de bonis aspor-*

possession of the sheriff, and his special property necessary to maintain the action continues.¹

VII. REMEDIES—1. **Trespass; Case; Trover.**—Sometimes either case or trespass may be brought, and frequently trespass and trover are concurrent remedies.²

2. **Trespass.**—The action, generally called "trespass," sometimes regulated by statute, may be brought for a great variety of injuries either to the person or property.³

tatis brought by the officer against such stranger, that the plaintiff was not entitled to recover.

1. *Hanchett v. Ives*, 33 Ill. App. 471.

Where goods attached by a deputy of the sheriff, are deposited in the hands of a keeper, to be forthcoming on demand, the sheriff has a special property in them, and may maintain an action for them, against the keeper for the benefit of the attaching creditor. *Baker v. Fuller*, 21 Pick. (Mass.) 318.

3. **Case or Trespass.**—Either trespass or case will lie against an officer for selling a defendant's goods under an execution, in disregard of his claim for the benefit of the exemption law. They are concurrent remedies. *Van Dresor v. King*, 34 Pa. St. 201; 75 Am. Dec. 643.

Where the direct cause of an injury was the act of the defendant, but unintentionally and through negligence on his part, either trespass or case may be maintained. *Johnson v. Castleman*, 2 Dana (Ky.) 377. But see *Case v. Mark*, 2 Ohio 169. See **TRESPASS ON THE CASE**, vol. 26.

Trespass or Trover.—*Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209.

A person is liable in trover for killing swine which have broken through his inclosures, the fence viewers having found such inclosures sufficient, and which he has impounded; but if the swine when killed were not in the pound, but at large and trespassing on his land, he is liable only in trespass, the act abolishing the distinction between case and trespass not going so far as to allow either trespass or trover to lie in the latter case. *Cannon v. Horsey*, 1 Houst. (Del.) 440; *Conrad v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262; *Phillips v. Hall*, 8 Wend. (N. Y.) 610; 24 Am. Dec. 108; *Hayden v. Shed*, 11 Mass. 500; *Prince v. Puckett*, 12 Ala. 832. See **TROVER**, vol. 26.

3. **When Trespass May Be Brought.**—It includes assault and battery and false imprisonment. *Williams v. Ivey*, 1 Ala. Sel. Cas. 198; *Kimball v. Mo-*

lony, 3 N. H. 376. For an arrest made on legal process, but by one not authorized to serve it, trespass is the proper remedy. *Beebe v. Steel*, 2 Vt. 314.

For arrest under void process. *Allen v. Greelee*, 2 Dev. (N. Car.) 370; *Price v. Graham*, 3 Jones (N. Car.) 545; *O'Boyle v. Brown*, Wright (Ohio) 465.

Wrongful issuing of process. *Coltraine v. McCain*, 3 Dev. (N. Car.) 308; 24 Am. Dec. 256; *Muse v. Viall*, 6 Munf. (Va.) 27; *Boscher v. Roullier*, 4 Abb. Pr. (N. Y.) 396.

Injury by steamboat. *Case v. Mark*, 2 Ohio 159; *Port v. Munn*, 4 N. J. L. 61.

For illegally assessed tax. *Crandall v. James*, 6 R. I. 144.

For improper bail. *Clay v. Sweet*, 1 A. K. Marsh. (Ky.) 194.

For wrongful breaking of close. *Dingley v. Buffum*, 57 Me. 379; *Wheeler v. Meshinggomiesia*, 30 Ind. 402.

Scalding by hot water. *Sullivan v. Murphy*, 2 Miles (Pa.) 298.

For seduction. *Logan v. Murray*, 6 S. & R. (Pa.) 175; 9 Am. Dec. 422; *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359. See *Hornketh v. Barr*, 8 S. & R. (Pa.) 36; 11 Am. Dec. 568.

For injury to realty. H., with E.'s consent, placed a log and rails in a boundary ditch between their lands to prevent a ditch of his own from being choked by silt; E. afterwards removed that part of the obstruction on his own half of the ditch, whereby sand was carried down and filled H.'s ditch, causing an overflow on H.'s land. *Held*, that trespass would lie therefor. *Hogwood v. Edwards*, Phil. (N. Car.) 350.

Under *Colorado* Gen. Stats., ch. 90, a settler on public land, to enable him to maintain trespass for injuries thereto, must be in the actual occupancy, or have made improvements to the value of \$100. *Martin v. Pittman*, 3 Colo. App. 220.

For cutting trees. *Montague v. Papin*, 1 Mo. 757; *Tackett v. Huesman*,

19 Mo. 525; *Graham v. Moore*, 4 S. & R. (Pa.) 467; *McClosky v. Powell*, 123 Pa. St. 62; *Lowenberg v. Rosenthal*, 18 Oregon 178.

For injury from careless driving. *Rappelyea v. Hulse*, 12 N. J. L. 257; *Burdick v. Worrall*, 4 Barb. (N. Y.) 596; *Waldron v. Hopper*, 1 N. J. L. 339.

For wrongful execution process. *Vail v. Lewis*, 4 Johns. (N. Y.) 450; 4 Am. Dec. 300; *Young v. Hyde*, 14 N. H. 35; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Brown v. Stackhouse*, 155 Pa. St. 582; *Holton v. Taylor*, 80 Ga. 508. For executing legal process in an unlawful manner, trespass is the proper remedy. *Green v. Morse*, 5 Me. 291; *Collins v. Waggoner*, 1 Ill. 186; *State v. Becker*, 132 Ind. 371.

For knowingly allowing stray sheep to join flock. *Brownell v. Flagler*, 5 Hill (N. Y.) 282.

For setting dog on animals. *Wood v. La Rue*, 9 Mich. 158; *Painter v. Baker*, 16 Ill. 103.

For unlawfully impounding beasts. *Coffin v. Field*, 7 Cush. (Mass.) 355.

For injuring beast by insufficient inclosure. *Stewart v. Jewell*, 7 T. B. Mon. (Ky.) 110.

For wrongful levy on goods. *Wickliffe v. Sanders*, 6 T. B. Mon. (Ky.) 296; *Tatum v. Morris*, 19 Ala. 302.

For wrongfully using an estray. *Barrett v. Lightfoot*, 1 T. B. Mon. (Ky.) 241; 15 Am. Dec. 110.

For wrongful arrest. *Maher v. Ashmead*, 30 Pa. St. 344; 72 Am. Dec. 708. For taking wrong beast by mistake. *Hobart v. Haggett*, 12 Me. 67; 28 Am. Dec. 159; *Delevan v. Bates*, 1 Mich. 97.

For not fencing, by which a crop is destroyed. If a person is bound to put up a fence, and, by neglect thereof, the cattle of others get into his neighbor's field and destroy his neighbor's corn, trespass is not the proper remedy. *Crawford v. Hughes*, 3 J. J. Marsh. (Ky.) 433.

For killing slave. *Nash v. Primm*, 1 Mo. 178; *Greer v. Emerson*, 1 Overt. (Tenn.) 13.

To recover stolen goods. *Howe v. Clancey*, 53 Me. 130; *Howk v. Minnick*, 19 Ohio St. 462; 2 Am. Rep. 413.

For destroying milldam. *Conwell v. Brookhart*, 4 B. Mon. (Ky.) 580; 41 Am. Dec. 244; *Wilson v. Smith*, 10 Wend. (N. Y.) 324.

For negligence or accident. *Hodges v. Weltberger*, 6 T. B. Mon. (Ky.) 337.

For levying on exempt property. *Dow v. Smith*, 7 Vt. 465; 29 Am. Dec. 202. See *Stamer v. Nass*, 3 Grant Cas. (Pa.) 240.

For injury by stray animals. *Mitchell v. Wolf*, 46 Pa. St. 147.

By owner of vessel for discharge of fire-arms on ship. *Rhodes v. Roberts*, 1 Stew. (Ala.) 145.

For any injury caused by some direct act. *Winslow v. Beal*, 6 Call (Va.) 14; *Cottler v. Cummins*, 6 S. & R. (Pa.) 343.

For injury by infant. *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; 19 Am. Dec. 561.

For breach of sealed agreement between riparian proprietors adjusting rights to waters of a stream. *Horn v. Miller*, 136 Pa. St. 640.

For the destruction of a boundary fence erected by plaintiff. *Dhein v. Benscher*, 83 Wis. 316.

For a lessee refusing to remove buildings at the termination of his lease and forcibly preventing the lessor from removing them. *Emry v. Roanoke, etc., Power Co.*, 111 N. Car. 94.

For a licensee allowed to enter premises exceeding his license. *Capel v. Lyons*, 3 Misc. Rep. (N. Y.) 73.

Against the society for the prevention of cruelty to animals, for killing plaintiff's horse. *Brill v. Ohio Humane Soc.*, 4 Ohio C. C. Rep. 358.

For a trespass committed by contractor in grading defendant's lot, Appeal of *Braithwaite*, 131 Pa. St. 46; or for a contractor trespassing on a lot next to that on which he is building, though not willful or malicious, and the one for whom he is building is not responsible. *Davison v. Shannahan*, 93 Mich. 486. For a railroad casting rocks and debris on land adjacent to its right of way. *G. B. & L. R. Co. v. Eagles*, 9 Colo. 544; 13 Pac. Rep. 696; *G. B. & L. R. Co. v. Doyle*, 9 Colo. 549; 13 Pac. Rep. 699.

By a conditional vendor against a party wrongfully taking the property sold from the conditional vendee after the condition is broken. *Fields v. Williams* (Ala.), 8 So. Rep. 808.

Trespass Will Not Lie.—Not against captain for enrolling an exempt person. *Merriman v. Bryant*, 14 Conn. 200.

Not against plaintiff in attachment (when suit abated by another suit). *Hayden v. Shed*, 11 Mass. 500; *Hunt v. Pratt*, 7 R. I. 283.

Not against individual members of

3. Trespass Quare Clausum Fregit.—The action of *quare clausum fregit* is the remedy made use of for a violent or forcible injury to the real property.¹ The close or parcel of land trespassed must be described either by ancient names, abutments, or, generally

council. *Gay v. Bradstreet*, 49 Me. 580; 77 Am. Dec. 272.

Not against sheriff for lawful acts. *Farmers' Bank v. McKinney*, 7 Watts (Pa.) 214.

Not where adequate and full remedy already pursued. *Parker v. Hall*, 55 Me. 362.

Not against tenant in possession. *Brown v. Carter*, 52 Mo. 46.

Not for killing wild animals. *Piereson v. Post*, 3 Cal. (N. Y.) 175; 2 Am. Dec. 264.

Not where consent has waived. *Hogwood v. Edwards*, Phil. (N. Car.) 350.

It will not lie for milk sold and delivered. *Weisberger v. White*, 12 Pa. Co. Ct. Rep. 224. Nor by the owner of the fee in a highway against a railway company for committing acts of trespass thereon while constructing the approaches of a bridge, the acts merely being against the possession and not against the fee. *Fitch v. Boston, etc., R. Co.*, 59 Conn. 414. Nor where the injury is occasioned by the execution of a regular process of a court of competent jurisdiction. *Lowry v. Hatley*, 30 Ill. App. 297. Nor where entry upon land is by virtue of a valid execution. *Bergeron v. Dartmouth Savings' Bank*, 62 N. H. 655.

One may take his property from the possession of a wrongful holder, if he can do so without a breach of the peace. *Harding v. Sandy*, 43 Ill. App. 442. But one is not justified in breaking the close of another and taking the lands in his possession under claim of right, although he is the lawful owner. *Salisbury v. Green*, 17 R. I. 758.

One summoned by a marshal to appraise goods is not liable to the owner for a trespass—he is bound to obey. *Thrallkill v. Dally*, 16 Neb. 114.

Trover Instead of Trespass.—Where a party became possessed of the wagon of another, and changed part of its appendages, and the owner then repossessed himself of it, without knowledge of the changes, it was held that trespass would not lie against him for the substituted article. Trover is the proper remedy, if any. *Parker v. Walrod*, 13 Wend. (N. Y.) 296; 16 Wend. (N. Y.) 514; 30 Am. Dec. 124.

The *bona fide* purchaser of goods wrongfully taken from the owner, is not answerable to the owner in trespass, but only in trover or replevin in the detinet, after demand. *Barrett v. Warren*, 3 Hill (N. Y.) 348.

1. Definition.—Walker's Am. Law (8th ed.), p. 593. Trespass *quare clausum* lies for every unlawful intrusion, whether the land is inclosed or not, though only the grass is trodden. *Dougherty v. Stepp*, 1 Dev. & B. (N. Car.) 371.

Trespass *quare clausum* will not lie for breaking and entering a wooden "tent" or other property not real estate. *Burleigh v. Ford*, 59 N. H. 536.

The entering upon real estate, and severing a part therefrom and carrying it away, by one continuous act, can be recovered for, by the tenant, only by an action of trespass *quare clausum*. *Sturgis v. Warren*, 11 Vt. 433; *Haskin v. Record*, 32 Vt. 575.

Proof of cutting and removing wood is sufficient. *Maxwell v. Maxwell*, 31 Me. 184; 50 Am. Dec. 657; *Oswalt v. Smith* (Ala.), 12 So. Rep. 109; so building, *Russell v. Brown*, 63 Me. 203; so permitting hogs to damage, *Morrison v. Mitchell*, 4 Houst. (Del.) 324.

An action for forcibly entering upon land owned and possessed by the plaintiff, and tearing down a dwelling house and out-buildings and carrying away the materials of which they were built, and for digging up and carrying away fruit trees, is *quare clausum fregit*. *Uttendorffer v. Saegers*, 50 Cal. 496; not for consequential injuries. *Richardson v. Milburn*, 11 Md. 340. The working of quarries and blasting of rocks, whereby large quantities of rocks and stones were thrown upon the dwelling house and premises of the plaintiff, breaking the doors, windows, etc., is a case for an action of trespass *quare clausum fregit*, and not for an action on the case, *Scott v. Bay*, 3 Md. 431; action survives, *McCallion v. Gegan*, 1 Pa. Leg. Gaz. Rep. 414; force is necessary, *Pearson v. Smith, Cam. & N.* (N. Car.) 376; act must be unlawful, *Munson v. Mallory*, 36 Conn. 165; 4 Am. Rep. 52.

Trespass *quare clausum* does not lie for being prevented from using the water of a well on the land of the de-

in the *United States*, by lines and distances, any mistake being fatal.¹ The gist of the action is the disturbance of possession.² The action can be brought by³ or against a corporation aggregate.⁴

4. Trespass for Meane Profits.—This form of action is supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation.⁵ The plaintiff is only entitled to it after judgment in ejectment.⁶ The right of recovery is based on four things: *first*, title to, or possession of premises; *second*, expulsion of plaintiff; *third*, reception of rents or profits by defendant; *fourth*, re-entry by plaintiff.⁷ A judgment in ejectment is conclusive as to possession of defendant at service of writ, but not

defendant, but which the plaintiff had the right to use; the proper remedy is case. *Shafer v. Smith*, 7 Har. & J. (Md.) 67.

If a party claiming to be landlord enter upon the premises occupied by his alleged tenant, under valid legal process, the tenant cannot maintain an action of trespass *quare clausum fregit*; his remedy is on the case for suing out the process maliciously. *Melson v. Dickson*, 63 Ga. 682; 36 Am. Rep. 128.

Trespass *quare clausum fregit*, will not lie in favor of one who has a right of way across a proprietor's land against another, for using the way under permission of the proprietor. *Morgan v. Boyes*, 65 Me. 124. But it will in favor of a mortgagee having a right to cut grass from the mortgaged premises and apply the proceeds to the discharge of the debt, against a stranger cutting grass, *Burley v. Pike*, 62 N. H. 495; or the lessee of a pond with a right to cut ice, against a stranger encroaching on his right. *Richards v. Gauffret*, 145 Mass. 486.

1. Gould Pleading (5th ed.), p. 170; 2 Chitt. Pl. 387, note (n.)

2. *Brown v. Manter*, 22 N. H. 468; *Rogers v. Brooks* (Ala.), 11 So. Rep. 753.

In cases of disseisin, the owner may maintain trespass if the entry was made while he was himself in possession. *Scheffel v. Weller*, 41 Ill. App. 85.

In *Rogers v. Duhart*, 97 Cal. 500, it was held that although plaintiff could not maintain trespass *quare clausum* for want of possession, yet as under the *California* Code technical forms of action are discarded, the allegation of possession was immaterial and might be treated as surplusage.

If the plaintiff negatives possession in his pleadings, he cannot recover. *Moon v. Avery*, 42 Minn. 405.

As to what is sufficient evidence of possession to enable an alleged owner to maintain trespass, see *Odd Fellows' Savings Bank v. Turman* (Cal. 1892), 30 Pac. Rep. 966.

Trespass *quare clausum fregit* lies, however temporary plaintiff's interest may be, even though it be merely in the profits of the soil as *vesture terra*, etc., if it be in exclusion of others. Plaintiff brought an action against defendant for breaking into his close and destroying the crops. The evidence showed that the title to the lands entered was in plaintiff's wife. Plaintiff's witnesses testified that the crops injured were plaintiff's. It was held sufficient to sustain a finding in favor of plaintiff. *Stevens v. Adams*, 1 Thomp. & C. (N. Y.) 587.

3. *Cumberland, etc., Canal Corp. v. Hitchings*, 59 Me. 206.

4. Trespass *quare clausum fregit* will lie against a railroad company or other private corporation. *Main v. North-Eastern R. Co.*, 12 Rich. (S. Car.) 82; *Riddle v. Proprietor*, 7 Mass. 169; 5 Am. Dec. 35. And see *CORPORATIONS*, vol. 4, p. 250.

But see *contra*, *Foot v. Cincinnati*, 9 Ohio 31; 34 Am. Dec. 420.

5. **Definition.**—*Bouvier Law Dict.*, vol. 2, p. 748.

6. *Donford v. Ellys*, 12 Mod. 138; *Wilkinson v. Kirby*, 15 C. B. 430; 80 E. C. L. 428; *Barnett v. Earl of Guildford*, 11 Exch. 19; *Caldwell v. Walters*, 22 Pa. St. 378; *Fry v. Branch Bank*, 16 Ala. 282; *Carson v. Smith*, 1 Jones (N. Car.) 106; *Stancil v. Calvert*, 63 N. Car. 616.

7. *Waterman on Trespass*, vol. 2, § 1160.

It cannot be maintained by the lessor against the mortgagee making formal

after.¹ After recovery by default in ejectment, the defendant is precluded from setting up any defense that might have been done in the original action, as that he was not in possession.² The trespasser cannot recover the whole value of improvements made while in possession; but if made in good faith, he may offset them to the extent of rent and profits.³

5. **Forcible Entry and Detainer.**—(See **FORCIBLE ENTRY**, vol. 8, p. 101.)

6. **Trespass Vi et Armis.**—This is the form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property.⁴ It will lie in a great variety of cases.⁵

7. **Criminal Trespass.**—(See **FORCIBLE ENTRY AND DETAINER**, vol. 8, p. 101).—Usually there is a criminal action for trespass, by statute in the several states, where certain circumstances connected

entry upon the premises in possession of a tenant in order to foreclose his mortgage, unless he shows actual possession, or a reception of the rents and profits, or an ouster himself by defendant, notwithstanding the mortgage is invalid. *Baker v. Kimball*, 140 Mass. 120.

1. *Lane v. Harrold*, 72 Pa. St. 267, and cases cited; *Avent v. Hord*, 3 Head. (Tenn.) 458; *Holmes v. Davis*, 19 N. Y. 488; *Buntin v. Duchane*, 1 Blackf. (Ind.) 56; *Lloyd v. Nourse*, 2 Rawle (Pa.) 49.

2. *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Chesround v. Cunningham*, 3 Blackf. (Ind.) 83; *Bailey v. Hastings*, 15 N. H. 525.

3. *Russell v. Blake*, 2 Pick. (Mass.) 505; *Loomis v. Green*, 7 Me. 386; *Abbott v. Abbott*, 51 Me. 575; *Brown v. Ware*, 25 Me. 411.

4. **Definition.**—*Bouvier L. Dict.*, vol. 2, p. 748.

Trespass *vi et armis* lies if the injury be immediate and direct, but if it be consequential, the action will be trespass on the case. Trespass on the case lies for a violent and immediate injury, unless willful, if occasioned by the carelessness or negligence of the defendant. *Jordan v. Wyatt*, 4 Gratt. (Va.) 151; 47 Am. Dec. 720. Plaintiff had wood on defendant's land. Defendant set fire to some rubbish on another part of the land. The fire escaped him and unintentionally burned plaintiff's wood. It was held that trespass *vi et armis* would lie against the defendant for the injury.

Trespass for direct injury. Where an act not willful, but the result of negligence, is the immediate and direct cause of an injury, trespass *vi et armis*

will lie. Accordingly, where a belligerent cruiser chased a neutral, supposing her to be an enemy, and through negligence ran her down in the night and sunk her, trespass *vi et armis* will lie for the damages sustained. *Percival v. Hickey*, 18 Johns. (N. Y.) 257; 9 Am. Dec. 210.

5. The following instances will serve to illustrate when an action of trespass *vi et armis* will lie: It will lie for chasing the plaintiff's horse with dogs, and causing her to run upon a stake, so that she died. *James v. Caldwell*, 7 Yerg. (Tenn.) 38. See *Scott v. Shepherd*, 2 Wil. 403, a similar case.

For levy under a void warrant. *Bagwell v. Jamison*, Cheves (S. Car.) 249.

For loss of crop consequent on breaking a way fence. *Hardin v. Kennedy*, 2 McCord (S. Car.) 277.

For an injury by an accident or misfortune. *Loubz v. Hafner*, 1 Dev. (N. Car.) 185.

For injury occasioned by force. *Crawford v. Waterson*, 5 Fla. 472; *Barber v. Barnes*, 2 Brev. (S. Car.) 491.

For killing, shooting or starving cattle. *McCoy v. Phillips*, 4 Rich. (S. Car.) 463.

By parent for taking away child. *Vaughan v. Rhodes*, 2 McCord (S. Car.) 227; 13 Am. Dec. 713.

For enticing away slave, although no force used. *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185.

For wrongful entry on lands for the purpose of surveying. *Harry v. Graham*, 6 Jones (N. Car.) 460.

In some cases, for injury to real property. *Caldwell v. Julian*, 2 Mill (S. Car.) 294.

For cutting trees on one's own land

with the acts complained of show wantonness or malice. The facts which make out a case of such criminal trespass depend usually upon the statute.¹

so that they fall on the land of the neighbor to the latter's injury. *Neusom v. Anderson*, 2 Ired. (N. Car.) 42.

For injury done to property in building. *Caldwell v. Julian*, 2 Mill (S. Car.) 294.

Not for malice, if no force. *Outlaw v. Davis*, 27 Ill. 467.

1. Illustrations in Several States Under Statute, of Criminal Trespass. *Alabama*.—Under Code, warning not to enter premises unless necessary. *Matthews v. State*, 81 Ala. 66; *Goldsmith v. State*, 86 Ala. 55; *Owens v. State*, 74 Ala. 401.

"The place or premises sometimes known and called as the little place" is a sufficient description. *Watson v. State*, 63 Ala. 19. An action for pursuing with dogs and killing a hog. *Thompson v. State*, 67 Ala. 106; 42 Am. Rep. 101. "For willfully and maliciously cutting timber on another's land." *Pippen v. State*, 77 Ala. 81. "Premises" means an inclosed pasture a mile from the dwelling house. *Sandy v. State*, 60 Ala. 18. For opening a road on another's premises without sufficient necessity, prosecution must be undertaken by owner. *Bellinger v. State*, 92 Ala. 86. Since *Alabama Code*, 1886, § 3861, interdicts and punishes the taking for temporary use, or using temporarily, of another's animal or vehicle, without the owner's consent, and prescribes no other element of the misdemeanor, an instruction, or indictment for such offense, to acquit if there was no wrongful intent coupled with the wrongful act, is properly refused. *Bellinger v. State*, 92 Ala. 86.

Arkansas.—Malicious mischief includes all malicious physical injuries to the rights of another which impair utility or materially diminish value, and is an indictable offense under the common law of this country. *State v. Watts*, 48 Ark. 56.

The *Arkansas Act of 1838* (Mansfield's Digest, section 1658), making it a misdemeanor to carry away wood or timber from the owner's ground, is not repealed by *Arkansas Act of March 18th, 1883* (Mansfield's Digest, § 1659). *State v. Malone*, 46 Ark. 140.

An indictment for trespass upon a sixteenth section of land, appropriated

to the use of common schools, need not have the name of the prosecutor indorsed thereon, in *Arkansas*; this is required only in case of trespass on private property. *State v. Brown*, 10 Ark. 104.

Connecticut.—Knowledge that the act was unlawful is immaterial. Gen. St. Conn., § 1454, provides that every person who shall enter upon the inclosed land of another, without the permission of the owner thereof, for the purpose of fishing, etc., shall be fined. It was held in a prosecution by a grand juror for a violation of such statute, that the knowledge of defendant that his act was unlawful is immaterial, and evidence thereof will be excluded.

In a prosecution for entering on the inclosed land of another without the owner's permission, for the purpose of fishing, evidence that signs forbidding fishing had been posted upon adjoining land by a fishing club, which had no control thereof, introduced to show that defendant believed the signs upon the land in question to be also invalid, was immaterial.

The fact that the complaint was not prosecuted by the owner of the land on which the alleged offense occurred, is immaterial. *State v. Turner*, 60 Conn. 222.

Georgia.—One may be guilty, criminally, of malicious mischief in wantonly destroying crops on land over which defendant is authorized to open a way, if he uses his right maliciously. *Harris v. State*, 73 Ga. 41.

An indictment for malicious mischief, held defective for not naming the day and month when the offense was committed. *Bailey v. State*, 65 Ga. 410.

One cannot be accused criminally of taking and carrying away cotton without consent of owner, as a criminal trespass, as to that cotton of which he has the rightful possession, and in which he has a beneficial interest. *Padgett v. State*, 81 Ga. 466.

Indiana.—Carrying off and converting property of another is not malicious trespass. *State v. Cole*, 90 Ind. 112. Entry without license is not indictable. *Arbuckle v. State*, 32 Ind. 34. One not guilty of criminal trespass, if in possession by virtue of a contract ob-

tained through fraud, *Arbuckle v. State*, 32 Ind. 34, must allege kind and character of injury done. *Brown v. State*, 76 Ind. 85. A dog held to be property that may be the subject of malicious trespass. *Kinsman v. State*, 77 Ind. 132. One not guilty for removing fence of another in good faith which obstructs a road he has been using. *Palmer v. State*, 45 Ind. 388. For hunting with fire-arms on land of another without consent. *Winlock v. State*, 121 Ind. 531. Requisites for allegation and proof. *Squires v. State*, 59 Ind. 261. See also *Hughes v. State*, 103 Ind. 344; *Sample v. State*, 104 Ind. 289; *State v. Burns*, 123 Ind. 427; *State v. McKee*, 109 Ind. 497; *Beggs v. State*, 122 Ind. 54; *State v. Blackwell*, 3 Ind. 529; *Boswell v. State*, 8 Ind. 499; *State v. Pitzer*, 62 Ind. 362; *State v. Sparks*, 60 Ind. 298; *Lossen v. State*, 62 Ind. 437.

Iowa.—An indictment for trespass on real estate, charging that defendant, at a time stated, wrongfully cut down trees growing upon certain tracts of land described, which were in different sections, and which were not contiguous, is not bad for duplicity.

An indictment charging that defendant did "wrongfully . . . cut down . . . and then and there carry . . . and haul away" certain trees, does not charge two offenses, under *Iowa Code*, § 3983, which provides: "If any person commits any trespass by cutting down or destroying any timber or wood standing or growing upon the land of another, or by carrying away any timber or wood being on such land, . . . he shall be punished," etc. *State v. Paul*, 81 Iowa 596.

Kentucky.—A claimant of land who, aided by others, enters against the will of the owner in possession, and in violent and abusive language announces his intention to hold possession, commits a breach of the peace. Both his entry and his holding are forcible. *Johnson v. Clem*, 82 Ky. 84.

Kansas.—Where a person acting in good faith, and with reasonable prudence, cuts down a tree growing on the land of another, he is not liable to a criminal prosecution under *Kansas Comp. L.* (1879), ch. 113. *Wagstaff v. Schippel*, 27 Can. 450.

An information for a trespass on school lands, under *Kansas laws* (1876) 287, ch. 122, § 26, must aver the amount or value of the damage done; for, without this, the fine of "double

the amount of damage proved" cannot be computed. *State v. Grewell*, 19 Kan. 189.

A complaint under *Kansas Comp. L.* (1879), ch. 31, § 107, for maliciously severing growing corn from a freehold, must allege that the owner of the corn had some possessory right in the land. *State v. Haney*, 32 Kan. 428.

Either or both the criminal prosecution and the civil action allowed by *Kansas Gen. Stat.* 1096, ch. 113, § 2, for a trespass, may be prosecuted by the injured party, but the two cannot be united in one proceeding. *Manville v. Felter*, 19 Kan. 253.

The provision of the *Kansas Laws* of 1862, ch. 208, which punishes any person who shall cut down or carry away any tree growing for use, "or any timber, rails, or wood, standing, being, or growing on the land of any other person," embraces the wrongful cutting and carrying away of any kind of trees of value from the land of another. *Simpson v. Woodward*, 5 Kan. 571.

Louisiana.—A trespasser convicted and sentenced to fine and imprisonment, cannot claim indemnification from one at whose instigation, or by whose misrepresentations, he had been induced to commit the trespass. *Landreaux v. Marsoudet*, 4 La. Ann. 335.

On an indictment for cutting timber from the land of another, it is error to refuse a charge that, in order to convict, it must be proved that the act was done knowingly and willfully, and not through mistake or inadvertence. *State v. Prince*, 42 La. Ann. 817.

Missouri.—In *Missouri*, a prosecutor is not necessary on an indictment for a trespass to school lands. A prosecutor is only necessary in case of trespasses to private property. *State v. Roberts*, 11 Mo. 510.

Under the *Missouri* statute making it an offense to cut timber on land not one's own, there can be no conviction without proof of a criminal intent. One believing himself to have a right to cut cannot be punished. *State v. Kempf*, 26 Mo. 429.

An information, charging the defendant with having wantonly cut down the hedge of another, is not sustained by proof that he cut the hedge properly as an act of husbandry, believing it to be on his own land. *State v. Zinn*, 26 Mo. App. 17.

Where a trespasser acts simply upon a mistaken view of his rights, and not

from wantonness or other evil intent, he is not amenable to a statute punishing criminally a party guilty of malicious trespass. *State v. Newkirk*, 49 Mo. 84.

Mississippi.—If a party intending to cut timber on public land, through mistake cuts timber on the land of another person, he is liable under the statute. *Perkins v. Hackleman*, 26 Miss. 41; 59 Am. Dec. 243.

Under the *Mississippi* statute, neither the title nor the right to possession is involved. Nor is defendant's honest belief that he had a right to enter on the land a defense. *Knight v. State*, 64 Miss. 802.

A person who has occupied land, merely by permission of the owner, without pretense of title thereto, and who has abandoned the actual occupancy and gone elsewhere, intending to return at some indefinite time, though he has "posted" the place before leaving, has not such possession as will bring a person entering upon the land within *Mississippi* Code, § 2980, which makes a person liable to a fine for going upon the land of another without his consent. *Hester v. State*, 67 Miss. 129.

Michigan.—The complaint under *How. Michigan St.*, § 9174, is sufficient in charging the intent of the entry in the words of the statute, without averring such intent to have been malicious. *People v. O'Brien*, 60 Mich. 8.

As the statute aforesaid applies to trespasses on "improved land," it cannot be construed to apply to lands within the limits of a highway.

New York.—An indictment, charging that the defendant, "with force and arms, unlawfully, willfully and maliciously, did break in pieces and destroy two windows in the dwelling house of A, to the great damage of A, and against the peace," etc., does not set forth any offense indictable, the act charged being merely a private trespass. *Kilpatrick v. People*, 5 Den. (N. Y.) 277.

Under the statute which gives the court of special sessions jurisdiction over "malicious trespass on lands, trees or timber," a warrant issued out of that court charging defendant with having committed "malicious trespass" on designated land is sufficient, without stating the circumstances of the offense. *People v. Upton* (Supreme Ct.), 9 N. Y. Supp. 684.

An indictment under the statute

providing that any person guilty of using any force or violence in entering upon the possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor, need not specify the particular force or evidence used. *People v. Farrell* (Supreme Ct.), 8 N. Y. Supp. 230.

New York Penal Code, section 467, makes it an indictable offense to intrude on land without authority. It was held on the trial of an indictment, that evidence that defendant entered under legal advice was properly excluded, the facts making it apparent that there was no color of right of entry. *People v. Stevens*, 109 N. Y. 159.

Under that statute, providing a penalty for willfully severing from the freehold of another anything attached thereto, it is not necessary to show malice, but it is sufficient to show that the act was done intentionally with design. *Anderson v. How*, 116 N. Y. 336.

North Carolina.—There must be such a demonstration of force as is calculated to intimidate. *State v. Covington*, 70 N. Car. 71. Entry under void warrant constitutes forcible trespass. *State v. Yarborough*, 70 N. Car. 250; *Atlantic, etc., R. Co. v. Johnston*, 70 N. Car. 348. Compare *Perry v. Tupper*, 70 N. Car. 538.

Shouting, cursing, and using violent and menacing language in the highway in front of prosecutor's house is sufficient. *State v. Widenhouse*, 71 N. Car. 279.

In forcible trespass, the offense must have been committed in the presence of the owner. *State v. Love*, 2 Dev. & B. (N. Car.) 267; *State v. Mills*, 2 Dev. (N. Car.) 420; *State v. Fort*, 4 Dev. & B. (N. Car.) 192; *State v. Bennett*, 4 Dev. & B. (N. Car.) 43.

Threats and a show of guns and pistols and an array of numbers, by which one is driven out of the house, give the latter the action. *State v. Smith*, 100 N. Car. 466; *State v. Lyle*, 100 N. Car. 497; *State v. Tolever*, 5 Ired. (N. Car.) 452.

Actual force must be used. *State v. Armfield*, 5 Ired. (N. Car.) 207; *State v. Ray*, 10 Ired. (N. Car.) 39; *State v. King*, 74 N. Car. 177; *State v. Lloyd*, 85 N. Car. 573. But see *State v. Fisher*, 1 Dev. (N. Car.) 504; *State v. Drake*, 1 Winst. (N. Car.) 241.

Intentionally and willfully injuring personal property includes an injury to stock unlawfully running at large. *State v. Brigman*, 94 N. Car. 888.

To constitute forcible trespass there must be a breach of the peace. *State v. Jacobs*, 94 N. Car. 950.

Forcible trespass is the high-handed invasion of actual possession of another. *State v. Laney*, 87 N. Car. 535. In forcible trespass, it was shown that defendant rode into the yard of prosecutrix after being forbidden by her, and asked where her husband was; she ordered him off; but he remained cursing her and her husband; she told him the second time to leave, and that, if he did not, she would call A., when defendant left. It was held that the facts showed a case of forcible trespass. *State v. Hinson*, 83 N. Car. 640.

Entry without license, after being forbidden, does not include the case of the servant of a *bona fide* claimant, who enters at his master's commands. *State v. Winslow*, 95 N. Car. 649; *State v. Mace*, 65 N. Car. 345. Mere entry on land after being forbidden, without a display of weapons or threats of violence, and without doing or saying anything which should intimidate a man of ordinary firmness, does not amount to forcible trespass. *State v. Mills*, 104 N. Car. 905.

On an indictment under the statute for going or entering on land after being forbidden, and without a license, defendant may show that he went on the land in good faith, claiming or having title thereto; but such defense will not avail unless he show reasonable ground for a belief that his claim was well founded. *State v. Crawley*, 103 N. Car. 353.

Breaking the outer door to levy an attachment is forcible trespass. *State v. Whitaker*, 107 N. Car. 802.

See also *State v. Barefoot*, 89 N. Car. 565; *State v. Hause*, 71 N. Car. 518; *State v. Tolever*, 5 Ired. (N. Car.) 452; *State v. Armfield*, 5 Ired. (N. Car.) 207; *White v. Fort*, 3 Hawks (N. Car.) 251; *State v. Hemphill*, 4 Dev. & B. (N. Car.) 109; *State v. Bogue*, 9 Ired. (N. Car.) 360; *State v. Walker*, 10 Ired. (N. Car.) 234; *State v. Talbot*, 97 N. Car. 494.

Pennsylvania.—An entry into a building under a claim of right, without violence and a strong hand, or other circumstances of terror, cannot be made the subject of a criminal prosecution. *Thompson v. Com.*, 116 Pa. St. 155; *Hoffman v. Com.*, 123 Pa. St. 75. An indictment cannot be supported against an individual, for being in the frequent practice of going to the house

of another, and grossly abusing his family, thereby rendering their lives uncomfortable, this being a mere civil injury. Nor is it an offense for which the party may be held to surety of the peace. *Com. v. Edwards*, 1 Ashm. (Pa.) 46.

Rhode Island.—The statute providing for the punishment of "every person who shall be convicted of taking and carrying away, without the consent of the owner thereof," any growing fruit, etc., although not containing the word "wantonly" or "maliciously," does not apply to taking openly, under a fair claim of right; and the question of the good faith of the accused therein is for the jury. *State v. Luther*, 8 R. I. 151.

South Carolina.—A's verbal permission to B to plant a patch of turnips in A's field, without consideration or specification of the portion thereof, does not give to B such possession as to support an indictment for malicious trespass against A for destroying B's growing turnips. *State v. Gadsden*, 20 S. Car. 456.

Trespass to the person is indictable, but trespass to goods and chattels is not. Hence, to stop one's carriage forcibly, without intention to do bodily harm, is not an indictable assault. In such a case, the jury should be instructed to find the defendant guilty or not, according as they should decide that he intended to do an injury to the person of the prosecutor or not. *State v. Edge*, 1 Strobb. (S. Car.) 91.

The *South Carolina* Act declaring that "Every entry on the inclosed or uninclosed lands of another, after notice from the owner or tenant, prohibiting the same, shall be deemed a misdemeanor," was not directed only against those who have entered claiming title. The language of the act is used in its ordinary acceptation. *State v. Cockfield*, 15 Rich. (S. Car.) 53.

South Carolina Gen. St., § 2507, makes it a misdemeanor to enter on land after notice from the owner or tenant. One put into possession by the owner cannot be convicted on proof of notice from one whose rights were equitable, and which might or might not have been enforced in a suit for specific performance. *State v. Mays*, 24 S. Car. 190.

Texas.—Knowingly cutting timber on land of another is trespass. *State v. Arnold*, 39 Tex. 74.

To constitute malicious mischief,

8. **Trespass De Bonis Asportatis.**—This action lies for goods that have been carried away.¹ It is brought to recover damages for the goods as carried away; trover and replevin are generally concurrent remedies.²

VIII. PLEADING—1. **Declaration.**—(See DECLARATION, vol. 5, p. 349.)

a. **THE ALLEGATIONS.**—The declaration, petition, or summons is the statement of the plaintiff's cause of action, and should con-

under the *Texas* statute, the articles injured and destroyed must be an agricultural product or property, not a set of buggy harness, *Terry v. State*, 25 Tex. App. 714; nor a private storehouse. *Beeson v. State*, 23 Tex. App. 406.

Under a statute making it an offense to pull down the fence of another without his consent, one joint owner of the fence may be convicted, if he pulls it down without the consent of the other. *Hurlburt v. State*, 12 Tex. App. 252.

One may be guilty of malicious mischief in pulling down a fence, although he claims title, if another was in peaceable possession. *Carter v. State*, 18 Tex. App. 573.

In a suit for damages for maliciously poisoning plaintiff's dogs, the defendant's acts need not be proved beyond a reasonable doubt, but only by a preponderance of evidence, notwithstanding they constitute a crime also. *Heiligmann v. Rose*, 81 Tex. 222. See also *Brumley v. State*, 12 Tex. App. 609; *Coggins v. State*, 12 Tex. App. 109; *White v. State*, 14 Tex. App. 449; *Lackey v. State*, 14 Tex. App. 164.

Tennessee.—An entry without force, although unlawful, is only a civil trespass. *Temple v. State*, 6 Baxt. (Tenn.) 496.

To make the crime of maliciously destroying, injuring, or secreting personal property, the primary motive must be to do injury and thus gratify a malevolent disposition. *Hampton v. State*, 10 Lea (Tenn.) 639.

One found masked in a hen-house, for the purpose of stealing chickens, was held properly convicted under the "ku-klux" law, and sentenced to not less than ten years in the penitentiary. *Walpole v. State*, 9 Baxt. (Tenn.) 370.

If the owner of land removes therefrom a building placed upon it without right by a mere trespasser, the owner cannot be charged with malicious mischief under *Tennessee* Code, § 4652. *Malone v. State*, 11 Lea (Tenn.) 701.

Virginia.—A party indicted for a trespass, with force and arms, may be prosecuted to outlawry, in *Virginia*. *Com. v. Hale*, 2 Va. Cas. 241. In such case, the coroner ought to pronounce the judgment of outlawry, and his name ought to be stated by the sheriff, in his return to the exigent. *Com. v. Anderson*, 2 Va. Cas. 245.

An indictment, under *Virginia* Laws (1822-3), ch. 34, § 1, for punishing willful trespasses, must allege that the property taken away by the defendant belonged to another person, and that the taking was "knowingly and willfully without lawful authority," in the terms of the statute. *Israel's Case*, 4 Leigh (Va.) 675; *Percavill's Case*, 4 Leigh (Va.) 686.

1. *Bouv. Law Dict.*, vol. 2, p. 748.

Trespass *de bonis asportatis* may be maintained for taking and carrying away fixtures, or the portions of a building temporarily dismembered therefrom. *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780.

The owner of land having, for a valuable consideration, given license to another by parol to build a bridge on his land, an action of trespass *de bonis asportatis* will lie against him, for taking away the bridge without the consent of him who erected it. *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 38.

In *Grafton v. Carmichael*, 48 Wis. 660, the complaint alleged that on, etc., defendant broke and entered upon plaintiff's farm, and took from his possession certain personal property of the plaintiff, carried it away and converted it to his own use. This was held an action *de bonis asportatis*, and not of trover.

2. *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Pangburn v. Partridge*, 7 Johns. (N. Y.) 140; 5 Am. Dec. 250; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Clark v. Skinner*, 20 Johns. (N. Y.) 465; 11 Am. Dec. 302; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Barrett v.*

tain a distinct and positive¹ allegation of every fact essential to state completely the cause of action.² It need, however, only

Warren, 3 Hill (N. Y.) 348; Pierce v. Van Dyke, 6 Hill (N. Y.) 613; Ely v. Ehle, 3 N. Y. 506; Erisman v. Walters, 26 Pa. St. 467; Parker v. Hall, 55 Me. 362.

1. **Recitals Positively Made.**—If in trespass, the plaintiff declares "for that whereas," etc., it is not a positive averment and is bad. Moore v. Dawney, 3 Hen. & M. (Va.) 127; Hord v. Dishman, 2 Hen. & M. (Va.) 595; Collier v. Moulton, 7 Johns. (N. Y.) 109; Gordon v. Hood, Minor (Ala.) 122.

Where trespass is relied upon as the ground of action, it should be set forth distinctly, so that the principal act complained of may be seen with reasonable certainty, and kept distinct from matters alleged merely in aggravation. Clark v. Langworthy, 12 Wis. 441.

An act of trespass cannot be alleged by way of recital under a *quod cum*. Sturdevant v. Gains, 5 Ala. 435.

Vi et armis, should be stated, but if not stated, does not make the declaration bad except on special demurrer. Marshall v. White, Harp. (S. Car.) 122; Higgins v. Hayward, 5 Vt. 73.

Where a count alleged that the defendant *vi et armis*, broke and entered, etc., and *vi et armis* committed a certain trespass on a chattel there being, on special demurrer, that the close was not alleged to be the plaintiff's, it was held that, as there appeared sufficient in the count to sustain trespass to the chattel, the breach and entry might be considered as surplussage, the defective statement of which would not vitiate. Hawley v. Clerk, 2 Tyler (Vt.) 20.

The plaintiff had a verdict for damages, in an action of trespass *vi et armis*, for the "abduction" of his daughter, who was under twenty-one years of age; and on motion in arrest of judgment, the action was held to be maintainable, although it was not laid in the declaration that thereby the plaintiff lost the services of his child, and although there was no evidence of a forcible taking. Kirkpatrick v. Lockhart, 2 Brev. (S. Car.) 276.

2. **Allegations.**—In an action for stopping the plaintiff's lights, it is not necessary to allege an ancient or a prescriptive right to the lights. Story v. Odin, 12 Mass. 157; 7 Am. Dec. 46.

No more trespasses can be recovered

for than are laid in the declaration. Gillen v. Wilson, 2 T. B. Mon. (Ky.) 11.

Under *Illinois* statute, the "owner" can bring trespass; such owner must allege he is the owner in fee simple. Wright v. Bennett, 4 Ill. 258; Edwards v. Hill, 11 Ill. 22.

One suing on contract for a personal injury must set up such contract. Moseley v. Wilkinson, 24 Ala. 411. A declaration in trespass for shooting a horse must describe the shooting as "willful and malicious." Ridge v. Featherston, 15 Ark. 159. Must give defendant's name accurately. Perkins v. Maysville, etc., Assoc. (Ky. 1889), 10 S. W. Rep. 659. Must distinctly state every essential fact. Hall's Case, 5 Me. 409.

An allegation in a complaint that a wrong complained of was done without the fault or negligence of the plaintiff, is not necessary in a case of trespass, and where the wrong complained of was committed by some positive, affirmative act; it is necessary only where the issue is solely a question of negligence. Roll v. Indianapolis, 52 Ind. 547.

Illustrations; Good Declaration.—A complaint charging that defendant "unlawfully broke and entered plaintiff's close, situate . . . and took and carried away two hundred dozen sheaves of wheat, plaintiff's personal property, without license, to his damage," etc., sufficiently charges an injury to personal property and states a cause of action. Richardson v. Brewer, 81 Ind. 107.

A complaint charging defendant with malicious trespass, in entering plaintiff's close in a designated township, and breaking down plaintiff's "grain" there growing, is open to the objection of not sufficiently describing either the land or the grain; but these objections will be deemed waived if not taken at the trial. People v. O'Brien, 60 Mich. 8.

A petition in trespass which alleges the conversion of trees, etc., cut and carried away from the land of plaintiff, etc., sets out a good cause of action at common law, and is not bad on demurrer, although it calls for treble damages awarded by the statute, and fails to state that defendant has no

interest or right in the timber, or is otherwise insufficient as a statutory pleading. Nor is it held bad for failing to state in terms that the trees were the property of plaintiff. *Atlantic, etc., R. Co. v. Freeman*, 61 Mo. 80.

In trespass *qu. cl. fr.*, the declaration alleged, that the defendant on a day specified, broke and entered the plaintiff's close, and ejected him therefrom, and kept and continued him so ejected from thence hitherto, whereby the plaintiff, during all that time, lost the use of the benefit of said close. It was held that the declaration was good; that it did not present a claim for damages for the continuance of the trespass, but only showed the character of the original trespass, as being a complete disseisin, and not mere temporary possession. *Bailey v. Butcher*, 6 Gratt. (Va.) 144.

Where, in an action of trespass *qu. cl. fr.* the petition alleges the unlawful entry upon plaintiff's land, and that the defendant unlawfully cut and felled timber growing thereon, and carried off and converted the same to his own use, "to the injury of said land and damage of your petitioner \$1,000," it is a sufficient allegation to admit proof of the value of the timber so cut and removed without any more particular averment of the same. *Kolb v. Bankhead*, 18 Tex. 228.

A complaint in an action of trespass against a railroad company, which alleges that the company on, etc., entered on lands of which the plaintiff was possessed and seised in fee (describing them), and constructed its roads over the same, and ever since used its portions over which the track was constructed, by running trains of cars over it, to the damage of the plaintiff, sets forth a good cause of action in trespass. *Pomeroy v. Milwaukee, etc., R. Co.*, 16 Wis. 640.

A declaration in trespass for cutting down and carrying away the plaintiff's trees, is good, without an averment that the land where the trees were growing belonged to the plaintiff. *Gronour v. Daniels*, 7 Blackf. (Ind.) 108.

A declaration in an action of trespass, for taking and conveying away "four horses, the property of the plaintiff," is sufficiently certain and descriptive of the property taken. *Beaumont v. Yantz*, 1 Ill. 26.

It is sufficient where the facts set forth in a complaint for trespass, show a "wrongful" taking, although this

phrase is not used in the plea. *Buck v. Colbath*, 7 Minn. 310; 82 Am. Dec. 91.

In an action for killing cattle, declaring that they were "his" cattle is a sufficient assertion of property in the plaintiff. *Heath v. Conway*, 1 Bibb. (Ky.) 398; *Smith v. Hancock*, 4 Bibb. (Ky.) 222.

An indictment charging the defendant with cutting and removing from the land of B, a certain quantity of ice of the value of ten dollars, the property of B, held good, although it was not alleged how B acquired property in the ice. *State v. Pottmeyer*, 30 Ind. 287.

In *Griffin v. Gilbert*, 28 Conn. 493, the following was held on error to be a sufficient count in trespass: Then and there to answer unto the plaintiff in a plea of the case, whereupon the plaintiff declares that on, etc., he being lawfully seised of a certain tract of land (describing it), on which his dwelling house stood, the defendant did, on, etc., without law or right, and for the purpose of vexing and injuring the plaintiff, wrongfully and wantonly plow and dig a deep ditch on the highway and land of the plaintiff, in the front part of said tract of land, thereby obstructing and endangering the plaintiff in going to and from his dwelling house and premises to said highway; and the defendant then and there obstructed the water course leading from the pond of the plaintiff on said premises to other land of the plaintiff on the opposite side of said highway; and did then and there also wantonly and wrongfully dig up and draw a large rock from said highway, and place the same on said tract of land of the plaintiff, within said inclosure, to his great injury and annoyance, whereby the plaintiff has been put to great inconvenience and damage. The above count was preceded by two counts in trespass, for an entry at the same time.

A count which avers that the defendant falsely and maliciously made an affidavit, in writing, etc., and upon said affidavit falsely and maliciously caused and procured said plaintiff to be arrested by his body and to be imprisoned, and to be kept and detained in prison for a long time, to wit, for the space of ten days then next following, at the expiration of which said time the said plaintiff, in order to procure his release and discharge from said imprisonment, was forced and obliged to, and did, then and there, pay to said defendant a large sum of money, to wit, etc., and was

state such facts as uncontradicted would warrant the plaintiff's recovery.¹

b. MATTERS IN AGGRAVATION.—Matters in aggravation need not be stated to make a good cause of action; they may be shown in evidence.²

thereupon discharged and released from said arrest and imprisonment, etc., is a good cause in trespass. *Sheppard v. Furniss*, 19 Ala. 760.

Bad Declaration.—A declaration which alleges that defendant railroad company, without leave or license, tore down plaintiff's fences, dug up and removed the soil, made excavations and embankments, and built a road bed on plaintiff's land, excluding plaintiff from the possession of the part thus occupied, sounds in trespass, though it recites that plaintiff complains of defendant "of a plea of trespass on the case." *Wood v. Michigan Cent., etc., R. Co.*, 81 Mich. 358.

A declaration in trespass for the taking of documents and receipts to prove the plaintiff's claim for \$1,200 due from the British government, sundry notes of hand and accounts in five books, and other papers of the plaintiff, and a plea thereto, justifying the taking of the "books and certain papers of the plaintiff, viz., a quantity of papers in a fruit basket, part of the goods in the declaration mentioned," as an officer, are both bad for uncertainty. *Oystead v. Shed*, 12 Mass. 506.

A special finding of a jury will not remedy the defect in a declaration in which the description is too general. *Freen v. Cruikshanks*, 3 McCord (S. Car.) 84.

A declaration against a corporation in case alleged, in two counts, that the plaintiff was possessed of a dwelling house situated on a public street, and that the defendants, by their agents and servants, unjustly and wrongfully cut a deep canal across the street, and kept it open for five months, by which the plaintiff was obliged to go further to transact business, obtain necessities, etc. It was also charged that the defendants, by their agents and servants, wrongfully and unjustly blasted and threw large quantities of gravel, slate, and stones, upon the dwelling house of the plaintiff, breaking the windows, chimney, etc., of the house, and also shut and darkened the windows of the house. The plaintiff showed that he was in possession of the dwelling house, and that

the acts alleged were committed by a contractor and his servants, employed by the defendants. It was held that the declaration might be sustained as a declaration in case, notwithstanding the defendants owned the fee of the land where the rocks were blasted, and also of the public street. *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) 42.

1. Facts to be Stated.—If one aver the breaking and entering, he need not recite the damage which would be a matter of aggravation. *Van Leuven v. Lyke*, 1 N. Y. 515; 49 Am. Dec. 346; *Loeb v. Mathis*, 37 Ind. 306.

2. Matter in Aggravation.—In actions of trespass *qu. cl.*, where the declaration, in addition to the averments of breaking and entering the plaintiff's close, contains allegations of other matters, such as the expulsion of the plaintiff from the premises, or the taking and carrying away of personal property, leaving it equivocal whether the plaintiff intends such additional matter as an aggravation of the principal trespass, or whether it was inserted as a distinct trespass, for which the plaintiff seeks to recover, as a substantive ground of action, the defendant has a right to regard it as aggravation merely, and in his plea pass over it in silence, answering only the alleged trespass on the freehold. *Carpenter v. Barber*, 44 Vt. 441.

Separate entries on land are properly united in one action of trespass; and allegations of injury to personal property which constitutes mere matter of aggravation are properly set forth. *Whatling v. Nash*, 41 Hun (N. Y.) 579.

A count in trespass alleged that defendant broke plaintiff's close on a day stated, and then and there trod down the grass and assaulted and beat plaintiff. It was held that the count was good, but one cause of action being stated, and the other matter being but in aggravation. *Gilbert v. Pritchard*, 41 Hun (N. Y.) 46.

In trespass *qu. cl.*, the gist of the action is the breaking and entering the plaintiff's close. The injury done therein is a matter of aggravation only. In such case it is not an objection to the

c. POSSESSION.—The gist of an action for injury to realty is the possession,¹ which should be alleged in the declaration.² The action in trespass may be good, although possession may not be alleged, when an averment of ownership is made,³ or where other language is used showing a right of action.⁴ A declaration bad on

whole count, that the matter in aggravation is not well laid. *Rucker v. M'Neely*, 4 Blackf. (Ind.) 179.

A complaint which alleges that the defendant, with force and arms, entered the plaintiff's dwelling house, and then and there, with force and arms, assaulted, debauched, and carnally knew one B., then and there being the daughter and servant of the said plaintiff, and her did forcibly ravish and deflower, against her consent, to the damage of the plaintiff, etc., is not demurrable for want of an allegation of loss of service, the gist of the action being the trespass in entering the plaintiff's dwelling house, and the other allegations being merely consequential and in aggravation of damages. *Donohue v. Dyer*, 23 Ind. 521.

In a declaration of trespass *qu. cl. fr.*, allegations of trespass to the person and of conversion may be inserted as matters of aggravation. *Waldo v. Waldo*, 52 Mich. 94.

In *New York*, in a complaint charging a trespass by the defendant's horses on the plaintiff's lands, and alleging, by way of aggravation, the kicking and breaking of the collar-bone of the plaintiff's horse, it is not necessary to aver that the defendant's horses were accustomed to kick, or that the defendant had notice of their vicious propensity. *Dunkle v. Kocker*, 11 Barb. (N. Y.) 387.

The advantage of specially pleading matters of aggravation is to put an adversary on notice of claim. *Dickinson v. Boyle*, 17 Pick. (Mass.) 78; 28 Am. Dec. 281.

1. Gist of Action is Possession.—1 Chitty Pl. 188, 195; 2 Greenl. Ev., § 614.

2. Possession Should be Alleged.—O'Connor v. Corbitt, 3 Cal. 370; McDonald v. Bear River Water, etc., Co., 13 Cal. 220; Cowenhoven v. Brooklyn, 38 Barb. (N. Y.) 9.

3. Allegation of Ownership Sufficient.—Renshaw v. Lloyd, 50 Mo. 368; Leihy v. Ashland Lumbering Co., 49 Wis. 165; Humphreys v. Merritt, 51 Ind. 197.

A petition in an action for trespass to land, and for carrying away timber therefrom, which alleges that defend-

ant "entered the close of plaintiff—that is to say, a certain tract of land, and the lines and boundaries thereof," and cut down and carried away a lot of timber therefrom, without otherwise alleging possession or seisin of the land, or ownership of the wood by plaintiff, is demurrable. The *Kentucky* Act of March 10th, 1854, allowing an owner of land, although not in actual possession, to maintain trespass *qu. cl.*, is not in force, and possession must be shown. *Duzan v. Ferguson* (Ky. 1886), 1 S. W. Rep. 539.

A declaration in trespass, for entering and cutting timber on plaintiff's close, need not aver that the plaintiff was in possession. *Gray v. Cooper*, Wright (Ohio) 500.

The allegation in the declaration, in an action of trespass *qu. cl. fr.*, that the "defendant broke and entered the plaintiff's close," is a sufficient averment of possession. *Finch v. Alston*, 2 Stew. & P. (Ala.) 83.

In an action of trespass, the declaration alleged that the plaintiff was the lawful owner and possessor of a farm abutting on the highway, and that in front of his farm, and nearer to his land than any other person's, was a pond of water, from which the owners of the farm had immemorially enjoyed the privilege of taking water and manure. It was held that this was not an averment that the plaintiff was in possession of the pond or of such privilege. *Wetmore v. Robinson*, 2 Conn. 529.

4. In an action of trespass for taking and carrying away certain goods, it is sufficient to aver in the declaration that the goods were the property of the plaintiff, without also averring that they were in the possession of the plaintiff at the time of the taking. *Donaghe v. Roudeboush*, 4 Munf. (Va.) 251.

A petition in trespass need not state that the plaintiff was in possession of the real estate at the time of the alleged injuries thereto. *Fitzpatrick v. Gebhart*, 7 Kan. 35.

A mortgagee who would maintain an action against a trespasser on the mortgaged property must allege facts

demurrer may be cured by verdict.¹ If the action is brought under a statute, the statute should be strictly followed.² In trespass *de bonis asportatis*, title must be alleged.³

d. WHERE ACTION BROUGHT.—Usually the action is brought in the county in which the *locus in quo* is situated.⁴

e. JOINDER OF COUNTS.—Different counts, if not inconsistent,

showing that something is still due on the mortgage. *Vogel v. Walker*, 3 Utah 227.

In trespass *qu. cl.* the plaintiff need not set out his title in his petition. *Dorsey v. Patterson*, 7 Iowa 420.

1. **Verdict May Cure.**—If, on the general issue in an action of trespass, the facts stated in the declaration are proved, and are not disproved by the defendant, the plaintiff is not entitled to a verdict, even though the declaration might be bad on demurrer. *Allen v. Parkhurst*, 10 Vt. 557.

In an action of trespass for taking and carrying away goods, the omission to state the value of the goods in the declaration, is a matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value. *Baker v. Baker*, 13 Met. (Mass.) 125; 46 Am. Dec. 725.

In an action of trespass for an injury to the plaintiff's cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer, and is therefore cured by the *Massachusetts* Act of 1826, ch. 273, § 3, by which special demurrers are abolished. Such defect would also be cured as a circumstantial error, by Rev. Stat., ch. 100, § 21. *Dean v. Green*, 4 Cush. (Mass.) 279.

2. **Statute Must Be Followed.**—*Var-den v. Ritchie*, 86 Mich. 197; *Campbell v. Bridwell*, 5 Oregon 311; *Keiny v. Ingraham*, 66 Barb. (N. Y.) 250; *Mitchell v. Smith*, 4 Md. 403; *Bowen v. Fuller*, 2 Tyler (Vt.) 86; *Hall's Case*, 5 Me. 409; *Sawyer v. Goodwin*, 34 Me. 419; *Gebhart v. Adams*, 23 Ill. 397; 76 Am. Dec. 702; *Boyle v. Lindsley*, 2 N. J. L. 250; *Jessup v. Sharp*, 2 N. J. L. 344.

The provisions of *Louisiana* Act of March 18th, 1855, that the right of action for damages on account of "personal injuries shall survive, in cases of death, in favor of the minor children and widow of the deceased, or either of them, and in default of them, in

favor of the surviving father or mother, or either of them, for the space of one year from the death," is a legal subrogation in favor of the persons designated, to the right of action of the deceased; and in case of a suit under that subrogation, the plaintiff should allege that his cause of action was derived from the deceased under the statute, and a neglect to do this will be fatal. *Earhart v. New Orleans, etc., R. Co.*, 17 La. Ann. 243.

3. **De Bonis Asportatis.**—The declaration in trespass *de bonis asportatis* must aver the plaintiff's title to the goods. *Carlisle v. Weston*, 1 Met. (Mass.) 26; *Neal v. Clautice*, 7 Har. & J. (Md.) 372; *Hite v. Long*, 6 Rand. (Va.) 457; 18 Am. Dec. 719.

Where a declaration in trespass *de bonis asportatis* omitted to allege that the goods taken were the property of the plaintiff, and the defendant did not appear, and the plaintiff proved the trespass complained of, and that the property was his, it was held that the declaration was sufficient to uphold the judgment, although it would have been bad on demurrer. *Copley v. Rose*, 2 N. Y. 115.

4. **Action Brought in County of Locus Quo.**—*Chapman v. Morgan*, 2 Greene (Iowa) 374; *Prichard v. Campbell*, 5 Ind. 494; *Loeb v. Mathis*, 37 Ind. 306.

In some states, by statute, the action is brought, not in the county of the *locus in quo*, but in the county wherein the defendant may be found.

Under the Code, the complaint in trespass *qu. cl. fr.*, need not state that the land on which the alleged trespass was committed, is in the county in which the action is brought. *Pike v. Elliott*, 36 Ala. 69.

In *Alabama*, it is a sufficient description of the *locus in quo*, simply to allege and prove the county in which the trespass was committed. *Jean v. Sandiford*, 39 Ala. 317.

A citizen of one state cannot bring an action against a citizen of another state for trespass. *Hurd v. Miller*, 2 Hilt. (N. Y.) 540; *Doulson v. Matthews*, 4 T. R. 503.

may be joined in the declaration; a count for *de bonis asportatis* may be joined with a count for trespass *quare clausum fregit*;¹ *vi et armis* with trespass *quare clausum fregit*,² and other counts illustrated below.³

f. DESCRIPTION OF CLOSE.—It is not necessary at common law to describe the premises by boundaries.⁴ The plaintiff may show in evidence where the close is situated.⁵ A substantial description is sufficient, though not exact or accurate.⁶ In *England*,

1. *De Bonis Asportatis and Quare Clausum.*—A count for the asportation of goods may be joined with a count for trespass *qu. cl. fr.* *Wilson v. Johnson*, 1 *Greene* (Iowa) 147; *Heimer v. Wilcox*, 1 *Ind.* 29; *Moulton v. Smith*, 32 *Me.* 406; *Carter v. Wallace*, 2 *Tex.* 206; *McClees v. Sikes*, 1 *Jones* (N. Car.) 310; *Floyd v. Floyd*, 4 *Rich.* (S. Car.) 23.

2. *Vi et Armis and Quare Clausum.*—In trespass *vi et armis*, counts for distinct trespasses on lands and goods may be joined. *Floyd v. Floyd*, 4 *Rich.* (S. Car.) 23; *McClees v. Sikes*, 1 *Jones* (N. Car.) 310; *Moats v. Witmer*, 3 *Gill & J.* (Md.) 118.

3. *Other Cases Illustrated.*—It is not a misjoinder of counts in trespass to charge in the first count that the trespass was committed by defendant as a corporation, and in the second that defendant committed it by its agent. *Illinois Cent. R. Co. v. Latimer*, 128 *Ill.* 163.

A complaint in trespass, alleging that defendants entered plaintiff's close, and diverted the waters of his well, and frightened his wife, is not objectionable as presenting a misjoinder of causes of action. *Razzo v. Varni*, 81 *Cal.* 289.

The *Kentucky* Act of 1838-9 does not change the common-law form of proceeding in trespass, nor authorize a joint action for several trespasses. *Fergusons v. Terry*, 1 *B. Mon.* (Ky.) 96.

A count in trespass for forcibly entering the plaintiff's close may be joined with a count for an assault and battery. *Flinn v. Anders*, 9 *Ired.* (N. Car.) 328; *Sampon v. Henry*, 13 *Pick.* (Mass.) 36.

Counts in trespass and trover cannot be joined. *Hines v. Kinnison*, 8 *Blackf.* (Ind.) 119.

The *Connecticut* statute which allows the joining in the same declaration of trespass on the case with trespass and also with *assumpsit*, does not authorize the joining of trespass with

assumpsit; nor the joining of case, trespass and *assumpsit*. *McWheeney v. Waterbury*, 46 *Conn.* 295.

A trespass for damage feasant may be joined with a count for rescue, or pound breach. *Baker v. Dumbolton*, 10 *Johns.* (N. Y.) 240.

Where a count for trespass to real property contained also an allegation for personal injuries, it was held that the plaintiff might recover for the latter, although he could not sustain an action for trespass to the real estate. *Wright v. Chandler*, 4 *Bibb* (Ky.) 422.

It is no misjoinder of causes of action to claim, in an action of trespass to try title to land, damages for trespasses committed on the premises. *Hillman v. Baumbach*, 21 *Tex.* 203.

An action for willfully killing a horse may be joined with a count for trespass in entering on the plaintiff's tenement. *Ripley v. Miller*, 1 *Jones* (N. Car.) 480; 62 *Am. Dec.* 177.

4. *Boundaries Unnecessary.*—In a declaration in trespass *qu. cl. fr.* it is not necessary to describe the close either by name or by abutments. *Noyes v. Colby*, 30 *N. H.* 143; *Palmer v. Tuttle*, 39 *N. H.* 486. But see *Moody v. Hinkley*, 34 *Me.* 200; *Smethurst v. Journey*, 1 *Houst.* (Del.) 196; *Whitaker v. Forbes*, 68 *N. Car.* 228; *State v. Guernsey*, 9 *Mo. App.* 312; *Hall v. Mayo*, 97 *Mass.* 416.

5. *Noyes v. Colby*, 30 *N. H.* 143; *Palmer v. Tuttle*, 39 *N. H.* 486; *Goodright v. Rich*, 7 *T. R.* 335.

6. *What Sufficient Description.*—A declaration, in an action of trespass *qu. cl. fr.* described the close as bounded northerly by land of S. and others, easterly by the old N. B. turnpike, southerly by the road leading to W., and westerly on W. river. It was held that the description sufficiently complied with the *Massachusetts* Act of 1839, ch. 159, § 3, which requires that "the close or place of the alleged trespass shall be designated by name or abutments, or

this common-law rule has been changed, and the place where the trespass was committed must be described in the declaration.¹

g. ALLEGATIONS AS TO TIME.—The plaintiff need not state the time of the act of trespass exactly,² and he can prove any act at any time before the filing of the declaration.³ A trespass may be charged with a *continuando* for trespasses committed continuously from day to day, where it is desired to recover all the damages in

other proper description." *Forbush v. Lombard*, 13 Met. (Mass.) 109.

In trespass, premises are sufficiently described as "the close of the plaintiff, situated, lying and being in A," naming the town. *Rice v. Hathaway, Brayt.* (Vt.) 231.

An indictment for trespass to lands charged that the defendants, on, etc., at, etc., did unlawfully cut down and remove, on and from land belonging to M. S., in said county, one tree of the value, etc. It was held that this description of the land upon which the trespass was committed was sufficiently certain. *Newland v. State*, 30 Ind. 111.

A declaration in trespass described the premises entered by stating the number and street in a certain city, and referring to a certain recorded deed. Defendant did not demur, or ask for a statement of particulars, as provided by statute. It was held that he was not entitled at the trial, to a ruling that the declaration was insufficient under *Massachusetts* Pub. St., ch. 167, § 6, providing that in such a declaration, "the place of the alleged trespass shall be designated . . . by name, abutments, or other proper description." *Leatherbee v. Barrett*, 152 Mass. 532.

In an action of trespass for damages before a justice, a statement in these words: "E. W. Warne in account with Calvin C. Burt, Dr. To damage done to building and premises in block 84 of the city of St. Louis, \$50," is sufficient, under the *Missouri* statute. *Burt v. Warne*, 31 Mo. 296.

In an action of trespass, the declaration alleged that the defendant "broke and entered the plaintiff's dwelling house, occupied by the plaintiff, with force and arms, and did then and there imprison the plaintiff for the space of one hour, without any legal or probable cause." It was held that this was an action of trespass on real estate—an action of trespass *qu. cl.*—and that the place of the alleged trespass was sufficiently designated by name, according to the requisition of the statute. *Sawyer v. Ryan*, 13 Met. (Mass.) 144.

Where a close was described as abutting southerly on W.'s land, it was held that this did not imply that it was abutting all the way southerly on W.'s land. *Wheeler v. Rowell*, 6 N. H. 215.

Plaintiff alleged that he was seised and possessed of certain premises, which were described by metes and bounds, subject to a public easement in a part thereof used as a public street; that defendant unlawfully entered on that portion so used as a highway, and committed a trespass. It was held that a cause of action was set forth. *Hussner v. Brooklyn City R. Co.*, 96 N. Y. 18.

1. *Waterman on Trespass*, vol. 2, p. 456.

2. *Time*.—It is not material to state, in a declaration in trespass, the exact day on which the injury was committed, if it is proved to have been committed prior to the commencement of the action. *Caldwell v. Julian*, 2 Mill (S. Car.) 294; *Knapp v. Slocomb*, 9 Gray (Mass.) 73. Where a day is laid in the declaration, and from such day to the commencement of the action, divers trespasses were committed, one trespass only may be proved prior to the day named, but divers may be proved within the time laid. *U. S. v. Kennedy*, 3 McLean (U. S.) 175.

3. Under a declaration in trespass, which alleges that the defendants on a certain day, and on divers other days and times between that day and another day specified, broke and entered the plaintiff's barn, and took and carried away his hay, the plaintiff may recover for as many distinct acts of trespass as he can prove were committed by the defendants between the days mentioned in his declaration. *Myrick v. Downer*, 18 Vt. 360.

The levy, the carrying away, and the sale of a sheriff's goods, although taking place upon different days, will constitute but one act of trespass, and the plaintiff cannot be put to his election, as to which he will proceed upon. *Browning v. Skillman*, 24 N. J. L. 351.

one action.¹ Where the trespasses are separate and distinct, it has been held that they could not be laid with a *continuando*.²

h. ALLEGATIONS AS TO DAMAGES—(See *infra*, this title, *Damages*). To recover damages they need not be specially averred.³

i. AMENDMENT OF DECLARATION.—The declaration in trespass *quare clausum* may be amended by adding a count alleging the

1. The *allegata* and *probata* must correspond; but a trespass of a permanent nature may be declared against with a *continuando*. *Sanders v. Palmer*, 1 McCord (S. Car.) 165.

Successive trespasses of the same kind to personal property may be sued for, and damages recovered therefor, under a declaration containing one count with a *continuando*. *Folger v. Fields*, 12 Cush. (Mass.) 93.

A declaration in trespass, for an assault and battery with a plank, "and there afterwards continuing" the assault with a rope, was held not to import a technical *continuando*, and to be good. *Benson v. Swift*, 2 Mass. 50.

2. When *Continuando* Not Allowed.—Where a declaration in trespass is not for a continuing trespass, begun at one time, and continued up to another, but for a series of distinct acts of trespass, the first being laid on or about a specified day, and the others at divers other times, it is competent for the court to put the plaintiff to his election, by confining him to proof, either of a single act prior to the date specified, or of so many as the truth allows between that date and the commencement of suit. *McDiarmid v. Caruthers*, 34 Mich. 49.

It is not competent for a plaintiff to declare with a *continuando* for injuries occasioned by the obstruction, or sufficiency, of a highway, or to allege a repetition of such injuries upon diverse days and times between a day specified and the commencement of a suit. It is the *per quod*, in such case, which is the gravamen of the action, and not the insufficiency of the road; and the injury sustained at any one time cannot be continued or repeated. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; 52 Am. Dec. 84.

Although a declaration in trespass against a person for cutting down trees on the land of the plaintiff, on several occasions, may allege the trespasses to have been committed on different days and times, yet they cannot be laid with a *continuando*. *Rucker v. McNeely*, 4 Blackf. (Ind.) 179.

In two actions of tort for trespasses *qu. cl. fr.*, by a plaintiff against the same defendant, the fact that the time described in one declaration is included in the other, raises no presumption that both refer to the same trespass. *Wilcox v. Conway*, 115 Mass. 561.

3. Averment of Damages.—To recover damages in an action of trespass for the necessary and natural results of the injury charged, no special averment is necessary. *Argotsinger v. Vines*, 82 N. Y. 308.

A state of demand in an action for damage by swine, which does not state upon whose land the damage was done, nor that it was done upon any; nor that the defendant had notice that the damage had been appraised, is deficient. *Voorheis v. Perrine*, 16 N. J. L. 359.

In an action of trespass on the case, one count disclosed injuries for which damages were recoverable in trespass, the other for which they were recoverable in case, and part of the proof sustained the latter count. It was held that a prayer which required the court to treat all the injuries complained of as resulting in damages recoverable in trespass and not in case, was erroneous, and was properly rejected. *Scott v. Bay*, 3 Md. 431.

In trespass, the complaint need not allege that the damage is due and unpaid. *Atkinson v. Mott*, 102 Ind. 431.

A declaration charging an entry on premises without a license must set up consequential damages in order to sustain a recovery. *Ives v. Williams*, 53 Mich. 636.

Damages consisting in the loss of profits on plaintiff's crops of vegetables are special, and if recoverable at all, must be pleaded. *Razzo v. Varni*, 81 Cal. 289.

In an action before a justice of the peace for damages sustained from trespassing animals, under *Indiana* Rev. Stat., ch. 22, §§ 5, 6, 7, a demand for payment of such damage need not be alleged in the declaration, although it must be proved. *Smith v. McFall*, 1 Ind. 127.

facts, already set up, by way of aggravation of damages;¹ but not by setting up in a new count the facts already alleged in aggravation;² in other words, it is not usually allowed to add a new cause of action by amendment.³

2. Pleas—*a.* GENERAL ISSUE.—The plea of the general issue raises the question of the commission of the trespass, and puts in issue the title of the plaintiff, whether in freehold or in possession.⁴ If there be a new assignment to the cause of action, the general issue denies the whole cause of action.⁵ The defendant may plead the general issue as to part, and some special plea as to

1. Amendment—When Allowed.—An action of trespass cannot be changed by an amendment of the complaint into a special action on the case. *Mobile, etc., R. Co. v. McKellar*, 59 Ala. 458.

In *Pennsylvania*, a wide range is allowed in making amendments. The rule that a plaintiff may add a count substantially different from the declaration, if he adheres to the original cause of action, applies both to actions *ex delicto* and actions *ex contractu*. Thus, in trespass *quare clausum fregit, de bonis asportatis*, he may amend a declaration charging the asportation of oak, ash, beech and chestnut trees, by a count charging the taking of hickory logs. *Knapp v. Hartung*, 73 Pa. St. 290.

A declaration in trespass *qu. cl. fr.* is amendable, where the amendment does not require a change in the plea nor defense, and where, from the original declaration, the defendant could not have failed to understand the case. *Kelly v. Bragg*, 76 Me. 207.

2. In *Cunninge v. Rawson*, 7 Mass. 440, the plaintiff was allowed to amend by alleging any other torts in the same close.

In *Melvin v. Smith*, 12 N. H. 462, the declaration alleged that the defendant, by reason of the cutting of divers trees upon the plaintiff's lands, had become liable to certain penalties, which the plaintiff claimed a right to recover. An amended declaration charged the breaking and entering of the close and cutting the plaintiff's trees. It was held that the proposed amendment changed the cause of action.

3. *Sawyer v. Goodwin*, 34 Me. 419.

4. General Issue.—The commission of the trespass and the title are raised by the general issue. *Lyon v. Fairbanks*, 79 Wis. 455; *Maxim v. Wedge*, 69 Wis. 547.

The plea of "not guilty," in an action of trespass to try title, is an answer

to the entire petition, and entitles the defendant to prove any defense, whether legal or equitable; but to recover compensation for improvements made in good faith, he must aver that he entered under claim of title. *Ragsdale v. Gohlke*, 36 Tex. 286.

A plea that the defendant did not commit the act complained of on the land where he was alleged to have committed it in the plaintiff's declaration, but on another lot where he was justified in committing it, amounts to the general issue, and the plaintiff will be entitled to judgment on demurrer to the plea. *Dorman v. Long*, 2 Barb. (N. Y.) 214.

Where a defendant in trespass wishes to defend as having the right of possession, he must plead the general issue; he cannot plead such right specially. *Sage v. Keesecker, Morr.* (Iowa) 338.

A plea in trespass *qu. cl. fr.*, that a third person was seised in fee, and demised to the defendant for years, without giving express color to the plaintiff, amounts to the general issue, and is bad on special demurrer. *Collet v. Flinn*, 5 Cow. (N. Y.) 466.

Where, in trespass *qu. cl.*, after a new assignment, setting forth the *locus* as being a certain close called A B farm, the defendant pleaded thereto that the *locus* was the freehold of the defendant, and no part of the A B farm, it was held that the plea was bad, as amounting to the general issue. *Phillips v. Phillips*, 21 N. J. L. 42.

As to Personality.—A plea in trespass *de bonis*, that the goods belonged to a third person, and were taken by virtue of an execution against him, is bad, as amounting to the general issue. *Brown v. Artcher*, 1 Hill (N. Y.) 266; *Harris v. Miner*, 28 Ill. 135.

5. The general issue denies the cause of action after a new assignment of the same. *Hodges v. Raymond*, 9 Mass. 316; *Stewart v. Henry*, 5 Blackf. (Ind.) 445.

another part of the declaration.¹ The defense of stale demand may be set up under the general issue.²

b. SPECIAL PLEAS; WHEN REQUIRED.—A special plea is required when the declaration makes out a *prima facie* case of trespass, and the defendant justifies by authority of some title or easement which gives him the legal right to do the act which is the subject of the alleged trespass.³

(1) *License*.—Justification under a license should be specially pleaded, and usually cannot be set up under the general issue.⁴

1. General issue and special plea may be together pleaded as general issue and justification. *Hodges v. Raymond*, 9 Mass. 316. The pleas of the general issue and of *liberum tenementum* may be pleaded together. *Hext v. Jarrell*, 2 Strobb. (S. Car.) 172.

Where one defendant in trespass pleaded *son assault demesne*, and the others general issue, with notice of justification, *molliter manus*, etc., and verdict against him who pleaded specially, and part of the others, on appeal, they were ordered to plead *de novo*. *Kenny v. Kettle*, 2 Tyler (Vt.) 84.

In an answer to a complaint for an assault and battery, the defendant will not be allowed first to deny the charge, and then to set up *son assault demesne*. *Schneider v. Schultz*, 4 Sandf. (N. Y.) 664.

Where, in trespass, two defendants plead the general issue jointly, any separate justification which one might have pleaded is gone. *Bradley v. Powers*, 7 Cow. (N. Y.) 330.

The defense of estoppel may be raised under a plea of not guilty. *Dooley v. Montgomery*, 72 Tex. 429.

In trespass *de bonis asportatis*, facts in mitigation cannot be specially pleaded, but must be given in evidence under the general issue. *Hopple v. Higbee*, 23 N. J. L. 342.

The declaration in an action of trespass *qu. cl. fr.*, set out a breaking and entering and a conversion of goods; defendants pleaded the general issue and to the taking a special plea in bar, setting up an action of replevin, brought by plaintiff for the same goods, in which action plaintiff recovered judgment. It was held that a demurrer to the plea was properly sustained, as the gist of the action was the breaking, and the conversion was merely a matter of aggravation. *Savage v. French*, 13 Ill. App. 17.

2. Stale Demand.—The equitable defense of stale demand can be made

under the plea of not guilty. *Montgomery v. Noyes*, 73 Tex. 203.

Where plaintiff, alleging that land, the legal title to which was in his father, was subject to a resulting trust in plaintiff's favor as heir of his mother, delayed bringing suit to enforce the trust for a number of years, and until after the death of the father, who would have been an important witness as to the alleged trust, relief is properly denied, under the doctrine of stale demand. *Mayes v. Manning*, 73 Tex. 43.

A mere trespasser cannot defeat an action by the assignee of a bond to convey the land by a plea of stale demand. *Wright v. Dunn*, 73 Tex. 293.

Upon the issuance of a patent, the legal title passes by estoppel to the patentee's prior grantee, and, as the deed by operation of law gave constructive possession, the doctrine of stale demand does not apply. *Daniel v. Bridges*, 73 Tex. 149.

The plea of stale demand is not applicable, where plaintiff claims under legal title. *Bullock v. Smith*, 72 Tex. 545.

3. Special Plea.—Williams' ed. of Saunders' Reports, 2d vol., p. 402 n; 1 Chitty, 2 Pl. 495, says: "A justification under a rent charge or in respect of any easement or incorporeal right must be specially pleaded." Starkie on Ev. 1462, citing *Hawkins v. Wallis*, 2 Wils. 173.

In trespass, things done by authority should be specially pleaded. *Martin v. Clark*, 1 Hempst. (U. S.) 259.

If the plaintiff's title is proved or admitted, matters in discharge of the right of action must be specially pleaded. *Riley v. Denny*, 2 Rich. (S. Car. 539; *Walker v. Hitchcock*, 19 Vt. 634.

4. License.—In a suit for trespass to land, if defendant relies upon a license, it must be specially pleaded, and cannot be given in evidence under the general issue; but it is sufficient if the facts

(2) *Justification*.—Any facts in justification of the alleged trespass should be specially pleaded, and generally cannot be set up under the general issue.¹ A plea of justification admits the truth, and goes to the whole, of the declaration.² Where the defendant

constituting the license are averred. *Lockhart v. Geir*, 54 Wis. 133; *Senecal v. Labadie*, 42 Mich. 126; *Hill v. Morey*, 26 Vt. 178; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Stambaugh v. Hollabaugh*, 10 S. & R. (Pa.) 357.

In trespass to personal property, a license from the plaintiff to do the act complained of, if not specially pleaded, cannot be used in justification, but only in mitigation of damages. *Hendrix v. Trapp*, 2 Rich. (S. Car.) 93.

In trespass, the defense of license requires a special plea, only when such license was given by the plaintiff himself, and not when it was given to the defendant, by one claiming title against the plaintiff. *Child v. Allen*, 33 Vt. 476.

In trespass *qu. cl.*, defendant may set up a license obtained on a verbal and executed contract, and founded on a sufficient consideration. *Pursell v. Stover*, 110 Pa. St. 43.

A plea or license in an action *qu. cl. fr.*, from one having only a possessory right to the *locus in quo*, without giving color to the plaintiff, is bad, as amounting only to the general issue. *Underwood v. Campbell*, 13 Wend. (N. Y.) 78.

The freemen of M., in 1746, voted to sell a beach belonging to the town to E., in case he "will allow all such privileges as shall be thought necessary for the service of the town by a committee," hereafter chosen, etc. A committee was appointed to sell said beach, "to reserve the privileges by bond to be recorded with the deed; . . . the town clerk to give the deed," etc. The committee reported the sale of the beach, and the town clerk gave a deed thereof, and the purchaser a bond to the town treasurer, upon condition that he, his heirs, executors, administrators and assigns, should grant and allow the inhabitants of the town convenient drift ways to pass and repass, and full liberty to fetch sand, seaweed, shells, and certain drift stuff therefrom, etc. In 1885, an action of trespass was brought against defendant, an inhabitant of the town of M., for asporting sand and gravel from said beach, by the plaintiff, the successor in title of the purchaser E. Defendant pleaded an equitable defense under

Rhode Island Pub. St., ch. 204, § 33, setting forth the above bond, averring he was an inhabitant of M. at the time of the alleged trespass, and as such lawfully took sand and gravel from said beach, and plaintiff demurred. It was held that the plea was bad. The defendant is neither party nor privy to the contract, nor assignee, for a mere license does not amount to an interest, until the licensee has incurred expense or labor in consequence of it. *Newport Hospital v. Carter*, 15 R. I. 285.

1. Matters in justification must be specially pleaded. *Johnson v. Cuddington*, 35 Ind. 43.

In trespass *qu. cl. fr. et de bonis asportatis*, a plea justifying the breaking and entering only, is sufficient. *Herdon v. Bartlett*, 4 Port. (Ala.) 481. In trespass for entering plaintiff's close, and diverting the waters of his well, where plaintiff shows peaceable possession under a paper title for several years, if defendants have any right of entry it must be pleaded in justification. *Razzo v. Varni*, 81 Cal. 289.

2. *Admits Truth of Declaration*.—*Kingsbury v. Pond*, 3 N. H. 511; *Burton v. Sweaney*, 4 Mo. 1. A declaration in trespass containing two counts, in each of which it is alleged that the defendant took and carried away a gig, is answered by a plea justifying the taking of the said gig, in the several counts of the declaration mentioned. *Beekman v. Traver*, 20 Wend. (N. Y.) 67.

A declaration in trespass charged the defendant with taking a horse from the plaintiff's possession, but not his property, and with stopping his wagon and team, the rest of the horses being the plaintiff's property. The plea averred that the defendant's horse was geared with the others; that the plaintiff's wagoner attempted to carry off the defendant's horse by driving his team violently; and that the defendant stopped his team to retake his horse, using no more force than was necessary for that purpose. It was held that the plea was good, the defendant being justified in stopping the team for that purpose. *Hilte v. Long*, 6 Rand. (Va.) 457; 18 Am. Dec. 719.

Complaint in three paragraphs for

files this plea, he must make an exact enumeration of the personality of which he justifies the taking, or, if realty is the subject of the trespass, give an exact description of the same.¹

(3) *Title in Third Party*.—That the title is in a third person must be specially pleaded.²

(4) *Liberum Tenementum*.—The plea of *liberum tenementum* with a right of entry justifies a trespass *quare clausum fregit*.³

trespass to land. Each paragraph alleged the trespass to have been committed on the same day, "and at divers other times since that time and before the commencement of this action," and the act of trespass was described in all of the paragraphs in the same terms. It was held that each paragraph of the complaint covered all of the alleged trespasses, and in justifying by answer the trespasses charged in one paragraph, the defendant in fact justified all, though his answer in terms professed to be directed to one paragraph only of the complaint. *Holcraft v. King*, 25 Ind. 352.

Effect of Plea.—In an action of trespass *de bonis asportatis* against several, they filed a special plea of justification, admitting that all took and carried away the property and converted it to their own use, but failed to make good their plea of justification. It was held that all were not bound by the admission, though there was no evidence of the taking, etc., as to some of the defendants. *Norris v. Norton*, 19 Ark. 319.

Trespass to Different Closes.—In trespass *qu. cl.*, the plaintiff alleged several trespasses on several closes at different times, and the defendant pleaded that the several closes were one and the same close, and that it was his freehold, etc. It was held that this plea was bad; that defendant should have justified as to all the closes, or have denied the trespasses as to all the closes except one, and justified as to that. *Nevins v. Keeler*, 6 Johns. (N. Y.) 63.

A plea justifying a "taking," need not traverse an allegation of detention and conversion. *Burton v. Sweaney*, 4 Mo. 1.

1. **Exact Description.**—A plea of justification in trespass for taking goods, that they were taken under process, must specify and particularly describe the process, and set out every fact necessary to show the justification; and if it varies, it cannot be given in evidence. *Harrison v. Davis*, 2 Stew. (Ala.) 350.

In trespass *qu. cl. fr.*, the defendant

pleaded, as to so much of the land described in the declaration as lay on one side of a line described in a conveyance referred to, soil and freehold; and as to the rest of it, not guilty. It was held that as the plea did not describe the line by fixed monuments on the land, it was bad on the demurrer. *Orange v. Berry*, 24 N. H. 105.

Where in trespass *de bonis asportatis*, the plaintiff specifies in his declaration the articles of property taken, and the defendant justifies the taking by virtue of process, and in so doing enumerates the articles taken, the enumeration must contain all the articles specified in the declaration. *Sterry v. Schuyler*, 23 Wend. (N. Y.) 487.

The defendant's denial, in an action of trespass, that the property taken was of the value alleged in the complaint, is sufficient; he must allege it to be of no value or the value as he claims it to be. *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79.

2. **Title in Third Party Specially Pleased.**—*Patterson v. Clark*, 20 Iowa 429; *Foster v. Lane*, 30 N. H. 305; *Richardson v. Murrill*, 7 Mo. 333.

3. **Liberum Tenementum.**—*Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530; 17 Am. Dec. 98; *Jones v. Water-Lot Co.*, 18 Ga. 539. In an action of trespass *qu. cl.*, the plea of *liberum tenementum* gives the plaintiff an implied color of title. *Singleton v. Millet*, 1 Nott & M. (S. Car.) 355.

In trespass *qu. cl. fr.*, a plea of *liberum tenementum* is good only so far as supported by proof of right—of common or other similar right—to the specific premises described in the declaration; and the plaintiff can recover for a trespass committed on the close named therein, notwithstanding the record of a former judgment pleaded by way of estoppel, but covering only another part of the premises. *Providence v. Adams*, 10 R. I. 184.

The common-law right of the defendant in trespass *qu. cl. fr.* to justify under the plea of *liberum tenementum*, is not changed by the *Tennessee* statutes

(5) *Other Special Pleas: Accord and Satisfaction; Former Recovery; Arbitration and Award; Right of Way; Res Adjudicata; Prescriptive Right; Order of Court; Judgment; Warrant.*—So, also, all matters in defense of the action, showing accord and satisfaction,¹ former recovery,² arbitration and award,³ right of way,⁴ *res adjudicata*,⁵ prescriptive right,⁶ order of court,⁷ judgments in settlements of plaintiff's right,⁸ or warrant,⁹ should be specially pleaded.

regulating proceedings in forcible entry and detainer. *Roberts v. Tarver*, 1 Lea (Tenn.) 441.

In trespass *qu. cl.*, where the declaration describes the close with precision by metes and bounds, etc., the defendant may, nevertheless, plead *liberum tenementum*. *Fisher v. Morris*, 5 Whart. (Pa.) 358.

To an action of trespass *qu. cl.*, a plea that the close was the close and soil of the defendant, is not a plea of *liberum tenementum*, and the defendant has only to prove right of possession. *Millison v. Holmes*, 1 Ind. 45.

A plea of *liberum tenementum* is not good to a declaration for breaking the plaintiff's close and beating him, his servants and horses. *Tribble v. Frame*, 3 T. B. Mon. (Ky.) 13.

1. *Accord and Satisfaction.*—A plea of accord without satisfaction is not a good plea in defense to an action of trespass. *Goff v. Mulholland*, 28 Mo. 397.

2. *Former Recovery.*—In actions of trespass, a former recovery must be especially pleaded. *Hahn v. Ritter*, 12 Ill. 80.

3. *Arbitration and Award.*—In trespass, an arbitration and award must be specially pleaded, and cannot be given in evidence under the plea of accord and satisfaction. *Hubbert v. Collier*, 6 Ala. 269.

4. *Right of Way.*—A plea of a right of way, to an action of trespass *qu. cl. fr.*, admits the possession of the plaintiff, but not an absolute title in him; and, if otherwise, it would not admit that the persons under whom the plaintiff claimed title many years before were not being alleged in the declaration. *Law v. Hempstead*, 10 Conn. 23.

In pleading a right of way, it is necessary to state that the privilege of passing extends to servants, or the justification will not extend to them. *Bartlett v. Prescott*, 41 N. H. 493.

5. *Res Adjudicata.*—In an action for breaking and entering the defendant's

close and taking and carrying away stone, a plea which defends only the taking and carrying away of the stone is insufficient. If the defendant has the right to take and carry away the stone, he should plead that he entered the close for the purpose of exercising that right, and that, in so doing, he did no unnecessary damage. *Goodrich v. Judevine*, 40 Vt. 190.

6. *Prescriptive Right.*—A prescriptive right to divert part of a stream must be pleaded in an action of trespass; in case, it may be given in evidence under the general issue. *Whetstone v. Bowser*, 29 Pa. St. 59.

In trespass *qu. cl. fr.*, the defendant, under the general issue, cannot give in evidence that the *locus in quo* was a public highway; but he must plead it. *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Wood v. Mansell*, 3 Blackf. (Ind.) 125.

7. *Order of Court.*—An answer, in an action of trespass for entering the inclosed land of the plaintiff and removing fences, justified the entry and the removal of the fence under an order of the county commissioners, locating a township road; but failed to aver that the supervisor gave the occupant of the land sixty days' notice in writing to remove his fences, as required by statute. It was held that the answer was bad on demurrer. *Ruston v. Grimwood*, 30 Ind. 364.

8. *Judgments.*—In an action of trespass *qu. cl. fr.*, a sheriff pleaded justification under a judgment in ejectment, and a writ of *habere facias possessionem* thereon. The judgment did not include the land in question. It was held that the officer, having pleaded the judgment, could not justify under the writ alone. *Clarkson v. Crummell*, 37 N. J. L. 541.

9. *Warrants.*—In an action of trespass, a plea which alleges that the defendant, as agent of the plaintiffs in execution, directed the marshal to levy on goods in the hands of another than the defendant, because they had been fraudulently sold to him by the defend-

c. WHAT THE SPECIAL PLEA SHOULD CONTAIN.—The special plea should contain such allegations as, if true, are essential to the defense.¹ One justifying under title and possession must show

ant, is good, and not obnoxious to a demurrer. *McNall v. Vehon*, 22 Ill. 499.

In an action for assault and battery and false imprisonment, where the defendants, by plea, attempted to justify under a warrant of distress for the collection of taxes, and it appeared by the plea that the warrant was attempted to be executed more than three years after it was delivered to the collector, and no sufficient excuse was set forth for such delay in the execution, until after three years, it was held that the plea was fatally defective, unless the defect was supplied in the replication. *Shaw v. Peckett*, 25 Vt. 423.

1. **Special Plea Must State Essential Facts.**—In *Baptist Soc., etc. v. Fisher*, 18 N. J. L. 240, which was a case of entering the doors and windows of a meeting house, a plea that "the defendants entered as members of a religious society, peaceably, in order to engage in religious worship, as they might lawfully do, doing no unnecessary damage, which are the supposed trespasses," is bad on demurrer, in not averring that the defendants were members of the society, and not denying the acts charged as trespasses, nor setting forth any cause in justification of them.

In *Hamilton v. Windolf*, 36 Md. 301, which was an action for injuring the plaintiff's wall by inserting joists in it, the defendant offered to prove in justification that such wall was used by him in the erection of an adjoining building under a parol agreement with the plaintiff. It was held that, as license from the plaintiff was not specially pleaded, the evidence could only be received in mitigation of damages.

The declaration in an action of trespass, stated that "the defendant broke and entered the close of the plaintiff, and, with his oxen, etc., destroyed and carried off 200 bushels of corn." The plea alleged that "the premises of the plaintiff were not inclosed by a sufficient fence." It was held that it was not an answer to the declaration. *Miles v. Myers*, Walk. (Miss.) 379.

Where a recovery of land was based on the report of a referee, to whom the parties had agreed to submit the question of the true location of a line, with

a stipulation that the referee should examine that line, an answer charging that he did not, was held good on demurrer. *Elder v. McLane*, 60 Tex. 383.

A, B and C jointly committed a trespass on lands forming the homestead of the former owner, at that time held by the widow by virtue of her dower and quarantine rights, and ousted her therefrom. She then brought an action for the trespass, and subsequently filed a bill in chancery against A and B for dower and quarantine in said lands, and in such suit recovered judgment against them for about \$4,000. In consideration of \$3,000 she released B from all liability for the trespass, reserving in said release the right to enforce the balance of the decree against A, who paid it. It was held that these facts constituted no bar to her action for the trespass and ouster against C, when her complaint contained no claim for rents and profits, and that a plea setting up these facts in bar was bad on demurrer. *Smith v. Gayle*, 62 Ala. 446.

In trespass for entering a close and carrying away a quantity of corn, a plea "that the corn was taken, as the property of one M., by a constable under execution, and sold to the defendant," is defective in not averring that the corn was the property of M. *Teril v. Thompson*, 3 Bibb (Ky.) 272.

In an action of trespass against a railroad company, for breaking and entering the plaintiff's close, where the defendants justify under and by virtue of their charter, on the ground that the land in question was necessary for the construction of their railroad, and that the defendants, by their agents, surveyors and engineers, entered for the purpose of making surveys, an averment in the plea, that there was a disagreement between the plaintiff and the defendants, as to the price of the land, and that, while such disagreement existed, J. McLean, first judge, on the petition of the defendants, in writing, duly issued and delivered his warrant, etc., is a sufficient averment of the presenting of a petition; nor is it necessary in a plea to set out the names and places of abode of the twelve jurors drawn for the purpose of appraising the value of land taken for a railroad.

facts necessary to constitute title ;¹ and generally, one justifying

It is sufficient to mention the names of those who were actually sworn. *Polly v. Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.*

To a count in trespass *qu. cl.*, and for "cutting down and carrying away sixteen stocks of rye," and a count for "taking and carrying away sixteen stocks of other rye," the defendant pleaded as to force, etc., "and also the whole trespass and all the trespasses in the declaration mentioned, excepting breaking," etc., "and cutting down and carrying away sixteen stocks of rye then and there growing," not guilty, and plead soil and freehold in justification. It was held that this was an answer to both counts. *Parker v. Parker, 17 Pick. (Mass.) 236.*

In trespass, where the declaration contains two counts, one charging an unlawful entry into a cellar, and the other into a dwelling house, the defendant, instead of averring that the several closes are one and the same, should either justify as to both the closes, or plead not guilty as to one, and justify as to the other. *Sterry v. Schuyler, 23 Wend. (N. Y.) 487.*

1. Justification Under Possession and Title.—*Dunlap v. Glidden, 31 Me. 510; Dolloff v. Hardy, 26 Me. 545.* Where the plaintiff's possession and the trespass complained of were subsequent to his discharge in bankruptcy, and the plaintiff's title is not involved, a plea of his bankruptcy is frivolous; though if the title had been involved, and it had become necessary for the plaintiff to show title in himself at the time of the bankruptcy, the schedules filed with the plaintiff's petition would be relevant to show that the premises in dispute, if embraced in them, passed, by operation of law, to another; or, if omitted, to present that fact for the consideration of the jury. *Lankford v. Green, 62 Ala. 314.*

A plea of justification, in trespass, cannot be objected to for the want of a venue; the place being laid in the declaration, and the trespass justified being alleged to be the same as that complained of. *Levelling v. Leavel, 2 Blackf. (Ind.) 163.*

Plaintiff sued defendant for undermining a wall, the parties being occupants of adjoining premises. It was held that if the defendant acted recklessly, he could not justify under a

claim of right to use the wall or to dig under it; that an injury to the plaintiff's goods by flooding at a fire, caused by the falling of the wall, constituted an element of damages; and that the defendant could claim no deduction by reason of insurance money received by the plaintiff on policies taken out by him. *Hammond v. Schiff, 100 N. Car. 161.*

In an action for breaking and entering a close, a defendant need not set forth in his answer the lease under which he justifies. *Dillon v. Brown, 11 Gray (Mass.) 179; 71 Am. Dec. 700.*

Evidence of improvements offered by the defendant cannot be excluded because his plea does not state the grounds for alleging himself to be a possessor in good faith, such plea being otherwise sufficient, and not having been excepted to, though *Texas Rev. St., art. 4813, requires such grounds to be set out.* The objection should be taken by special demurrer. *Holstein v. Adams, 72 Tex. 485.*

The defendants pleaded that the *locus in quo* belonged to the *United States*, and that one of the defendants had, long before the commission of the supposed trespasses, and at the time thereof, a "claim title" to said land, and had built a dwelling house thereon, and was then and there the owner thereof, and, as such, he and the other defendants, as his servants, entered said land, as they lawfully might, and removed said dwelling house, etc. It was held that the plea was insufficient, as it did not allege possession in the defendant, at the time of the plaintiff's entry. *Ross v. Nesbit, 7 Ill. 252.*

In an action of trespass *qu. cl.*, the allegations, in the plea of title, that the title was in defendant's debtor on the 15th, and that defendant attached on the 16th; that examination was levied (there being no averment that it was in life); that, by reason of such levy, defendant became seised and possessed (the prior averments not necessarily implying seisin); were held bad. *Gleason v. Howard, Brayt. (Vt.) 190.*

The executor of a mortgagee entered for condition broken, and leased the land. In an action of trespass brought against the lessee by the mortgagor, the lessee justified under the lessor, without alleging in his plea, in what

under process,¹ or as an officer in the course of duty,² or one justifi-

capacity the lessor held the estate. It was held that the plea was sufficient. *Howe v. Lewis*, 14 Pick. (Mass.) 329.

1. **Under Process.**—Where the defendant, in an action of trespass, assault and battery, and false imprisonment, justifies under a certificate granted by a justice of the peace in pursuance of the act of Congress respecting fugitives from labor, the plea must show that all the facts existed, at the time of granting the certificate, contemplated by that act. *Fanny v. Montgomery*, 1 Ill. 247.

To an action of trespass against the selectmen of a town, for causing the goods of the plaintiff to be taken and sold for taxes, a plea justifying the taking and sale of the goods, for the payment of several distinct taxes, was held not to be double. *Adams v. Mack*, 3 N. H. 493.

In justification under *mesne* process, the cause of action for which the process was issued need not be stated. *Linsley v. Keys*, 5 Johns. (N. Y.) 123.

In justifying, in trespass under a writ of replevin, the defendant must allege a taking of a bond before the delivery of the chattels, but need not allege a delivery of a bond before the taking of them. *Moors v. Parker*, 3 Mass. 310; *Cushman v. Churchill*, 7 Mass. 97.

Under Warrant.—A plea that the goods taken were seized by a deputy sheriff, by virtue of a warrant, as the property of an absconding debtor (setting forth the proceedings, and that the plaintiff held the goods by a fraudulent conveyance from the debtor), "and the defendant, in aid of, and by command of the deputy," etc., is good. *Patcher v. Sprague*, 2 Johns. (N. Y.) 462.

In trespass, where defendant justifies under a writ of restitution issued on a judgment rendered in his favor in an action of unlawful detainer by a justice of the peace, it is not sufficient for him to plead the writ only, but he must also plead the judgment, giving the parties, the date, the justice by whom rendered, and the fact of his jurisdiction; or else set out the judgment in *hac verba*. *Olmstead v. Thompson*, (Ala. 1890), 8 So. Rep. 755.

In a plea of justification under a search warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month,

and year, when it was exhibited, or that any recognizance for cost was given, or that the warrant was returned. Nor is it necessary to state the ground of suspicion of the person praying out the warrant. *Chipman v. Bates*, 15 Vt. 51; 40 Am. Dec. 663.

Where the defendants in an action of trespass, attempt to justify the taking of the plaintiff's property, by their warrant, to satisfy a tax voted to be raised by a town, the plea must allege that the money was voted to be raised for necessary purposes; and it cannot be understood, by an allegation that "the town voted to raise \$2,000 for the expenditure of that year," that it was raised for legal purposes. *Adams v. Mack*, 3 N. H. 493.

Act of Congress.—In trespass for breaking the plaintiff's close, and carrying away stone, a plea of justification under the act of Congress for constructing a national road must aver and set forth the facts that constitute the necessity for such an invasion of private right, or it is bad. *Fulton v. Monahan*, 4 Ohio 426.

2. **Officers.**—A defendant in trespass, justifying a taking, as having been made by him as constable, by virtue of an execution, need not set out the judgment in his plea. *Burton v. Sweaney*, 4 Mo. 1; *Traylor v. McKeown*, 12 Rich. (S. Car.) 251.

When a defendant in an action of trespass justified the taking by virtue of a writ directed to him as an officer, and the action was brought against him previous to the term of court at which such writ was returnable, a special plea setting up such writ and taking thereunder, was held good on general demurrer, notwithstanding it did not allege that the writ was returned at the term of the court to which it was made returnable. *Briggs v. Mason*, 31 Vt. 433.

In an action against a constable, for taking the property of the plaintiff, upon three executions against third persons, the constable filed a special plea, in which he set up an indemnifying bond executed by the plaintiffs in the executions. It was held that the plea need not set out the judgments on which the executions issued. *Davis v. Davis*, 2 Gratt. (Va.) 363.

In a plea of justification by a tax collector, it is not necessary to set

fying an assault and battery,¹ must distinctly allege every essential fact. Where the declaration alleges distinct and different acts of trespass, the plea should cover all such allegations,² for a justification as to part of a trespass is not a good answer as to the whole.³ The plea must not deny the plaintiff's right of action argumentatively, but directly confess the plaintiff's right of action but for facts set up in the plea.⁴

forth the facts which show that the tax was lawful, but the presumption will be taken in favor of its legality. *Clemmons v. Lewis*, 36 Vt. 673.

In an action of trespass against a sheriff, for levying upon property, he must first show that the plaintiffs named in the execution were creditors, before he can defend by showing that he made the levy in accordance with an execution against other parties, supposed to be the owners of the property, and that the present plaintiff was a fraudulent purchaser. *Cook v. Miller*, 11 Ill. 610.

A party sued for acts done by him as a public officer, may, under 2 *New York Rev. Stat.* 353, §§ 28, 29, insist upon a former adjudication as conclusive without pleading it. *Doty v. Brown*, 4 N. Y. 71; 53 Am. Dec. 350.

In an action of trespass for taking twelve hogs, if defendant wishes to justify the taking by reason of his being an officer, he must allege and prove that fact. *Case v. Hall*, 21 Ill. 632.

Where, in an action of trespass, a county treasurer justified the taking of personal property for the non-payment of taxes, under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, he need not set out, with a copy of the warrant, the tax list nor a copy thereof. An averment in his answer of his readiness to produce the tax list, is all that is required. *Games v. Robb*, 8 Iowa 193.

In an action of trespass *qu. cl. fr., et de bonis asportatis*, brought against a justice for issuing an attachment against the goods of the plaintiff as an absent or absconding debtor, without legal proof of the fact of concealment, the restoration of the property attached to the plaintiff cannot be pleaded in bar of the action, nor *pais darrein* continuance; but it may be admitted as evidence, in mitigation of damages. *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175.

1. **Assault and Battery.**—In an action

for assault, battery, and imprisonment, if the plea to it professes to answer the assault, etc., and imprisonment, the, etc., will make the plea broad enough to answer the battery complained of. *Bryan v. Bates*, 15 Ill. 87.

In an action of trespass *qu. cl. fr.*, and for an assault, battery and wounding, the defendants pleaded that the plaintiff had felled a tree across a navigable stream, down which they were conducting a boat, and that to enable them to proceed it was necessary to remove the obstruction; and that the plaintiff stood upon it with an ax, threatening to resist the removal; and they therefore gently laid hands upon him, etc. It was held that the plea was insufficient, as it did not justify the wounding. The defendants also pleaded, that the public had a prescriptive right to navigate the stream; that the plaintiff obstructed it; that they attempted to remove the obstruction, and the plaintiff having assaulted them, they, in self-defense beat and wounded him "a little," using only such force as was necessary to remove the obstruction. To this plea the plaintiff demurred. It was held that the facts pleaded were *prima facie* a justification of the wounding, the demurrer admitting such an assault on the part of the plaintiff, as made it necessary. If the wounding by the defendants was not a necessary consequence of the assault by the plaintiff, there should have been a replication to that effect. *Brubaker v. Paul*, 7 Dana (Ky.) 428; 32 Am. Dec. 111.

2. **Separate Acts of Trespass in Declaration Must Be Answered by Plea.**—*Curlewis v. Laurie*, 12 Q. B. 640; 64 E. C. L. 638; *Grout v. Knapp*, 40 Vt. 163.

3. **Justification of Part of Trespass Is No Justification as to Whole.**—*Rogers v. Spence*, 12 C. & F. 700; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Monprivatt v. Smith*, 2 Camp. 175.

4. **Must Not Be Argumentative.**—*Simpson v. Coe*, 3 N. H. 12; *Dorman v. Long*, 2 Barb. (N. Y.) 214; *Nevins*

d. **UNNECESSARY AVERMENTS IN PLEA.**—Any unnecessary averments in the declaration, as matters of aggravation, need not be answered in plea.¹

e. **DEMURRER TO PLEA.**—The plea may be shown to be bad on demurrer,² which, if there is more than one defendant, may sometimes go to the benefit of all.³

3. **Replication.**—The replication need only answer the material averments of the plea.⁴ It is a general rule of pleading that

v. Keeler, 6 Johns. (N. Y.) 63; *Dutton v. Holden*, 4 Wend. (N. Y.) 643.

1. Matter stated in the declaration as matter of aggravation of damages need not be answered in plea. *Law v. Hempstead*, 10 Conn. 22; *Grout v. Knapp*, 40 Vt. 163; *Bracegirdle v. Orford*, 2 M. & S. 77; *Donohue v. Dyer*, 23 Ind. 521.

Under a complaint for breaking and carrying away goods, a plea justifying breaking is sufficient. *Herndon v. Bartlett*, 4 Port (Ala.) 481; *Pratt v. Pratt*, 6 D. & L. 20.

2. **Plea Bad on Demurrer.**—In trespass for an assault and imprisonment, B pleaded that he was a constable; that a felony had been committed; that a reasonable suspicion and belief existed that the plaintiff was guilty of said felony; that one A, and others, informed him, the defendant, that the plaintiff was guilty of said felony, and that, for the purpose of carrying the plaintiff before some justice of the peace to be dealt with, he had gently arrested him. It was held on general demurrer, that the plea was bad, for not showing that his informant stated the facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts. *Wasson v. Canfield*, 6 Blackf. (Ind.) 406.

If, in an action of trespass on the person, matters are pleaded specially which do not constitute in law a justification of the trespass, an objection to such pleading may properly be sustained. *McGehee v. Shafer*, 9 Tex. 20.

Where, in an action of trespass before the court for the trial of small causes, the defendant pleads title to land, and the plaintiff brings suit in the supreme court, to which defendant interposes other pleas besides that of title, the question of legality thereof cannot be raised on demurrer, but on motion to strike them out. *Cross v. Kemp*, 45 N. J. L. 51.

3. In trespass against two defendants, they severed in their pleas. To the plea

of one, the plaintiff demurred generally, and judgment was given against the demurrer. The other defendant pleaded that judgment in bar, averring that the action against him was for the same trespass. It was held that the demurrer did not estop the plaintiff from replying to the other plea and the defendant from going to trial, and recovering judgment. *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382.

Foote v. Cincinnati, 9 Ohio 31; 34 Am. Dec. 420, holds that general demurrer, in an action of trespass *vi et armis*, must, if sustained, inure to the advantage of all the defendants, when the act complained of could not, either in point of fact or of law, be joint.

4. *Austin v. Waddell*, 10 Mo. 705; *M'Gee v. Givan*, 4 Blackf. (Ind.) 16. Where defendant pleads his improvements by way of set-off to plaintiff's claim for the wrongful use and occupation of his land, plaintiff may reply by setting up an occupation before the six years to which his recovery otherwise would be limited by statute. *Hyatt v. Cochran*, 85 Ind. 231.

Where, in trespass against one for assault and battery and false imprisonment, the defendant, an officer, pleaded the general issue to all except the false imprisonment, and as to that a special plea, setting forth that the arrest was made under a warrant, it was held that a replication protesting the warrant, and its delivery to the defendant to be executed, and then replying *de injuria sua absque residuo causæ* was good. *Stickle v. Richmond*, 1 Hill (N. Y.) 77.

In trespass for breaking and entering the plaintiff's close and stable, and taking away two horses, the plea was, that an execution of *fi. fa.* against a third person, was delivered to the sheriff, etc.; that the horses belonged to the execution debtor and were subject to the execution; that the sheriff by virtue of the execution, and the defendants by his command, broke and entered into the close and stable, and took

the issue raised by the replication must be a material one;¹

the horses, etc. The replication was, that the horses did not belong to the execution debtor, but to the plaintiff. It was held on general demurrer, that the replication was sufficient. *M'Gee v. Givan*, 4 Blackf. (Ind.) 16.

In trespass against an overseer of roads for entering land of the plaintiff, and cutting and carrying away timber, the defendant pleaded that he took the timber to repair bridges, "it being the nearest unimproved land to said bridges," etc. The plaintiff replied that it was not the nearest unimproved land, etc. It was held that the plea asserted two facts, and that the replication traversed both, and was sufficient. *Austin v. Waddell*, 10 Mo. 705.

Where, in trespass, the defendant pleads title, and the plaintiff replies facts which show that he was in possession at the time, and that the right of possession was out of the defendant, or those under whom he entered, though the title set up is not legally ousted in the plaintiff, the replication is good. *Phillips v. Kent*, 23 N. J. L. 155.

In an action of trespass *qu. cl. fr.*, if the defendant excuses the entry, by alleging that he entered to remove a dam which flowed the land of which he was lawfully in possession, the plaintiff cannot, in avoidance of the defense, set up a title to the land flowed, which was acquired by him subsequently to the removal of the dam. *Great Falls Co. v. Worster*, 15 N. H. 412.

1. **Materiality of Issue.**—In trespass for breaking the plaintiff's close, and carrying away his lumber, the defendant pleaded soil and freehold in himself and others, and that his co-tenants had assigned the premises to him to pile his lumber in and justified the moving the lumber. The plaintiff replied that it was assigned to another of the co-tenants, and justified putting the lumber on the close, under him. A rejoinder, admitting that such person had been co-tenant, but alleging a conveyance by him before the trespass, was held to be a departure. *Keay v. Goodwin*, 16 Mass. 1.

To a plea in trespass *de bonis asportatis* of property in a stranger, and not in the plaintiff, and a justification as a deputy sheriff, a replication *de injuria sua*, traversing the property in the stranger, was held to present an imma-

terial issue. *Gerrish v. Train*, 3 Pick. (Mass.) 124.

In trespass for an assault and battery, a replication to a plea that the plaintiff made the first assault, that the defendant broke open the dwelling house of the plaintiff and beat him, and that the plaintiff, in defending himself, gently laid his hand on the defendant, which was the same assault in the plea mentioned, with a verification, was held bad for uncertainty. *Sampson v. Henry*, 11 Pick. (Mass.) 379.

In trespass for destroying a milldam, the defendants pleaded that said dam was unlawfully erected, whereby a public road and ford were obstructed, to the damage and nuisance of the citizens of the commonwealth, and that the defendants, in order to abate the nuisance, peaceably cut down and removed the dam. The plaintiff replied that said dam did not entirely obstruct said public road and ford, and that the citizens of the commonwealth were not altogether prevented from passing the same. Upon issue joined, verdict was for the plaintiff. It was held that the issue was immaterial, and that a replender should be awarded. *Dimmett v. Eskridge*, 6 Munf. (Va.) 308.

In trespass *qu. cl.*, the defendant pleaded a license; upon which the plaintiff took issue. It was held that, under such issue, the plaintiff might prove that the license was obtained by fraud, without specially replying fraud, a license so obtained being not voidable only, but void. *Anthony v. Wilson*, 14 Pick. (Mass.) 303.

In trespass *qu. cl. fr.*, if the defendant pleads in bar, that the *locus in quo* is parcel of a close called A, and that A is the soil and freehold of the defendant, the plea is merely a plea of soil and freehold, and the plaintiff may reply, that the *locus in quo* is the soil and freehold of the plaintiff, and not of the defendant, and conclude to the country. *Simpson v. Coe*, 3 N. H. 12.

To a plea in trespass *qu. cl.*, that the close is part of a highway, and that the plaintiff wrongfully incumbered it with a gate, the plaintiff may reply a prescription to maintain a gate to be shut by persons passing through, without traversing the highway, or the wrongful incumbering by the gate. *Spear v. Bicknell*, 5 Mass. 125.

If a plea in trespass justifies the

if not, a repleader¹ may be awarded, or advantage taken by demurrer.² Care must be taken that the replication be free from ambiguity, duplicity, or uncertainty.³ Where there is a plea of

gist of the action, and the plaintiff wishes to prove that the defendant exceeded the right or authority alleged in his justification, the excess must be pleaded specially. *West v. Blake*, 4 Blackf. (Ind.) 234.

1. **Repleader.**—Where a defendant, in an action of trespass for cutting down a dam, alleged in his plea that he was possessed of an undivided moiety of a certain tract of land, flowed by means of the dam, and the plaintiffs replied that they were seised in fee and in mortgage, and had the rights of possession, and issue was taken upon the rejoinder, that they had not the right of possession, it was held that the issue was immaterial, and a repleader was awarded. *Great Falls Co. v. Worster*, 15 N. H. 412.

If to a plea of "justification" only, in trespass, the plaintiff replies generally, no issue is joined in the cause, and, therefore, after verdict for the defendant, a repleader will be avoided. *Kerr v. Dixon*, 2 Call (Va.) 379.

2. **Demurrer.**—Where in trespass *q. cl. fr.*, the declaration was general, describing no particular close, and the defendant, in his plea, described a large close, in which he alleged that the act complained of was committed, and to which he pleaded title, and the plaintiff replied, newly assigning a small close, parcel of the large one, as the place where the trespass was done, which he alleged was his own soil and freehold, and traversed the title of the defendant to the whole of the large close; to which the defendant rejoined, that he was not guilty of any trespass in the small close, and concluded to the country, it was held, on demurrer, that the plaintiff's traverse of the defendant's title to the whole cause was an immaterial traverse, which the defendant might well pass by; and that the rejoinder was good. *Low v. Ross*, 3 Me. 256; *Dyson v. Wood*, 3 B. & C. 449; *Woods v. Durrant*, 16 M. & W. 149.

In trespass for entering on plaintiff's premises, the complaint alleged, by way of aggravation, an attempt by defendant to seduce plaintiff's wife. The reply admitted defendant's plea of license to enter, but alleged that such license was obtained by defendant's fraudulently representing that he

wanted to use a certain implement theretofore borrowed by plaintiff, whereas he did not want to use the implement at all, but intended from the beginning to seduce and debauch plaintiff's wife. It was held that a demurrer to the reply was properly sustained. *Bennett v. McIntire*, 121 Ind. 231.

3. **Ambiguity, Duplicity, and Uncertainty.** **Repleader.** *Replication Bad.*—*Loweth v. Smith*, 12 M. & W. 582. Where, in an action of trespass for driving a wagon, on the highway, against a carriage in which the plaintiff was riding, by means of which she was thrown out and injured, defendant pleaded that, at the time of the collision, the defendant was on the right side, and the plaintiff on the wrong side, of the highway, and the plaintiff, in her replication, averred that the traveled part of the highway was fifty feet wide, that the plaintiff was proceeding easterly at the rate of a mile in twelve minutes, and the defendant westerly at the rate of a mile in four minutes; that the plaintiff's wagon was within one foot of the side of the traveled part of the highway on her left hand; that there was a space of traveled road fifteen feet wide between the plaintiff's wagon and the center, over which the defendant might have passed without interference or interruption; and that defendant, just before the wagons came in contact, drove his wagon across such last mentioned space, and unnecessarily ran against plaintiff's carriage, and that the collision happened without any carelessness on the part of plaintiff, or on the part of her driver; but the replication did not aver any valid excuse for the plaintiff's being on the wrong side of the road, or that the defendant intentionally inflicted the injury, it was held that the replication was defective. *Burdick v. Worral*, 4 Barb. (N. Y.) 596.

In *Great Falls Co. v. Worster*, 15 N. H. 412, it was held that where the defendant, in an action of trespass *q. cl. fr.*, pleads or insists upon a right, title, or interest in the close in question, the general replication *de injuria* is bad; but if the title alleged is to something else, and is only stated as inducement to an excuse for entering, the general replication is proper and sufficient.

liberum tenementum, and justification of removal of goods which are the subject of the trespass, a replication to the latter is sufficient.¹ Care must be taken that the plaintiff in the replication does not admit the defense.²

4. Rejoinder.—The pleadings in trespass admit of further answers

Where, to an action of trespass for entering the plaintiff's close and tearing down a dam there erected, the defendant pleads that the dam caused an injury to the land of third persons, and that he entered as their servant, for the purpose of abating it, the plea insists upon no right, title or interest, within the meaning of this rule, but sets up the title in the other lands as matter of excuse for making an entry upon the land of the plaintiff. The title of the person under whom the defendant entered is set forth as matter of inducement to excuse or justify the entry, and the replication *de injuria* is sufficient. If, to such action of trespass, the defendant pleads that he was possessed of an undivided moiety of certain land which was flowed by the plaintiff's dam, and that therefore he entered and took it down, a replication that the plaintiffs were seised of the whole tract in fee and in mortgage, and had the right of possession, and therefore, by means of the dam, caused the water to overflow it, is insufficient.

1. *Darlington v. Pritchard*, 5 Scott N. R. 10.

Libera Tenementum.—In trespass *qu. cl. fr.*, where the defendant pleaded not guilty, and a justification "that the land in question was his freehold," it was held that the plaintiff ought to reply to the justification, as well as join issue upon the plea of not guilty. *Mangum v. Flowers*, 2 Munf. (Va.) 205.

A replication of a possession in virtue of a parol purchase, is good to the plea of *liberum tenementum*. *Hope v. Cason*, 3 B. Mon. (Ky.) 544.

In trespass *qu. cl.*, to a plea of *liberum tenementum*, the plaintiff must reply, either by traversing the title set up, or by admitting the source of the derivative title and stating a title in himself paramount to that of the defendant. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; 4 Am. Dec. 258.

Replication de Injuria.—In trespass, *de bonis asportatis*, a replication of *de injuria*, etc., to a plea, stating that the goods were seized as forfeited to the *United States*, and were condemned in the district court, is bad.

Such replication is good only where

the matter alleged in the plea is by way of excuse, and not where it is insisted on as giving a right. *Plumb v. M'Crea*, 12 Johns. (N. Y.) 491.

Where the defendant in an action of trespass, pleads, under the *New York* act (1 Rev. Laws 155), that the trespass was done by authority of a statute of this state, without expressing any other matter or circumstance contained in such statute, the plaintiff must reply, *de injuria sua propria*, concluding to the country. A general replication, concluding with an averment, is bad. *Comly v. Lockwood*, 15 Johns. (N. Y.) 188.

Where the defendant, in an action of trespass, denies the trespass, for that the close broken and the goods taken were the property of himself, or of another, by whose authority he acted, there the plaintiff cannot reply *de injuria*, etc., but must in his replication, traverse the right or interest set up in the plea. *Berry v. Cahanan*, 7 N. J. L. 77.

In an action of trespass *qu. cl. fr.*, the plea was justification under a writ of possession. It was held that a replication to this plea, alleging that a *supersedeas* was issued and served, was defective, without a direct averment that a *certiorari* had been issued; and that the mere statement, by way of recital, in the *supersedeas* of a *certiorari* would not cure the defect, as no issue could be taken on such recital. *McWilliams v. King*, 32 N. J. L. 21.

2. Admission of Plea by Replication.—

In an action of trespass *qu. cl. fr.*, where the declaration alleged the cutting down of the plaintiff's trees, the defendant set up in justification that the acts complained of were done lawfully by him, as an overseer of the highways. The plaintiff, without traversing this plea, made a new assignment, setting forth that he brought his action, not only for the trespasses so attempted to be justified, but also for entering and cutting down trees on other occasions, etc. It was held that the plaintiff thereby admitted the truth of the justification, and could not recover for the trespasses to which it applied. *Davidson v. Schenck*, 31 N. J. L. 174.

by the plaintiff or defendant, as in other causes of action, and it sometimes happens that a rejoinder is necessary.¹

5. New Assignment.—This is a restatement of the cause of action by the plaintiff with more particularity and certainty, but consistently with the statement in the declaration.² In trespass, where the defendant has justified the trespass complained of, it alleges that the plaintiff has brought the action, not for the cause supposed by the defendant, but for some other cause, to which the plea has no application.³ There may be several new assignments.⁴ In effect it is of the nature of a new declaration.⁵ The sufficiency or insufficiency of a new assignment will depend on the circumstances, the manner in which it is framed, and mode in which applied.⁶ Objection to insufficiency should be made

1. Rejoinder.—Cases under this head arise, where the defendant neglects to rejoin, when the state of the pleadings renders it necessary, or where there is some alleged defect in the rejoinder. To a plea of *liberum tenementum* and leave and license, the plaintiff denied the license and replied to the other plea a demise from year to year. The defense (which was sought to be proved by the admissions of the plaintiff), was, that at the time of the letting, the plaintiff had agreed to give up the possession whenever the defendant required the land. It was held that the stipulation to give up possession should have been made the subject of a rejoinder, and that it could not be gone into under the plea of leave and license. *Waterman on Trespass*, vol. 2, § 1037.

A declaration by S. in trespass, charged W., the defendant, with entering a dwelling house at eleven o'clock at night and seizing and carrying away certain liquors. W. pleaded the acts to be under command of A., a lawful constable, serving a warrant, etc. S. replied that A. was not a lawful constable, because he had not given the statutory bond. W. rejoined that, though A. had not given such bond, he had been lawfully elected a constable, had exercised the office, and so was an officer *de facto*, and that therefore W. might lawfully submit to A.'s command. On demurrer to the rejoinder, it was held that the service was at an unlawful hour, and was not in issue. *Soudant v. Wadhams*, 46 Conn. 218.

In trespass *qu. cl.*, the defendant pleaded that he was put into possession of the land by a writ of *hab. fa.*; the plaintiff replied, *de injuria sua*, etc., to which the defendant rejoined, that he entered by virtue of the writ of

hab. fa., and concluded to the country. On demurrer to the rejoinder, judgment was given for the plaintiff. *Lewis v. Cooke*, 1 Har. & M. (Md.) 159.

2. Definition.—*Bouv. Law Dict.*, vol. 2.

3. *Black's Law Dict.*, p. 813; *Wm. Saunders*, 299 b, note 6.

4. 1 Chitty Pl. 614; *Bacon Abr.* "Trespass" (1 4, 2).

5. Effect.—When the declaration in trespass *qu. cl.*, only counts upon a single act of trespass, which the defendant justifies by matter set forth in his plea, the plaintiff cannot in replication traverse the matter of such justification, and also newly assign the same or different acts of trespass. A traverse with *de injuria* should conclude to the country. *Spencer v. Bemis*, 46 Vt. 29.

The traverse of a justification of a single act of trespass, together with a new assignment, is defective for duplicity. *Stults v. Buckelew*, 28 N. J. L. 150.

The general issue in trespass *qu. cl.*, notwithstanding a subsequent new assignment, continues to be an answer to the whole cause of action. *Stewart v. Henry*, 5 Blackf. (Ind.) 445.

Where a plaintiff newly assigns, without denying the special plea in an action of trespass, he confines the issue to such trespasses as are alleged in the new assignment. *Bragg v. Wetzel*, 5 Blackf. (Ind.) 95.

A new assignment is a waiver of the cause of action justified by the plea. *Bartlett v. Prescott*, 41 N. H. 493.

6. Sufficiency.—*Waterman on Trespass*, vol. 2, § 1032. In *Harvey v. Lankerster*, 14 Jur. 982, the declaration alleged that defendant broke and entered a certain shop, rooms, and apart-

by demurrer.¹ A new assignment usually becomes necessary where some special plea has been filed.² It is unnecessary if it adds nothing to the allegations made in the declaration.³

ments, part and parcel of plaintiff's house; to this defendant by plea justified the entry under license of plaintiff, that he broke and entered "the said shop, rooms, and apartments in the declaration mentioned, being one and the same, and not different apartments," and stayed there for a reasonable time only. To this the plaintiff replied, that the defendant of his own wrong, etc., committed the trespass in the plea mentioned, and newly assigned that the plaintiff brought her action, not only for the trespasses in the plea mentioned, but also for that the defendant continued in the shop a much longer time than in the plea mentioned, and also at the time when, etc., broke and entered two other rooms and apartments behind the said shop, to wit, etc., being other rooms and apartments than in the declaration mentioned, and other and different from the said shop, and stayed, etc., which were of her and different trespasses from those in the plea. To this new assignment there was a special demurrer, on the ground that it charged a further trespass, and was a departure. The demurrer was overruled.

The necessity and effect of a new assignment in pleading in actions of trespass, has been determined, in cases depending upon peculiar circumstances in *Perry v. Carr*, 42 Vt. 50; *Warner v. Hoisington*, 42 Vt. 94.

1. *Lethbridge v. Winter*, 8 Moore 326. In an action of trespass *qu. cl. fr.*, where there is a novel assignment, the plea, professing to answer the whole of the new assignment, must answer the whole, or it will be bad, on general demurrer. *Price v. Perry*, 1 Mo. 543.

2. *When Necessary*.—In trespass, on plea of *son assault demesne*, and replication *de injuria*, plaintiff may show the assault unnecessary in self-defense; but if he would justify his own assault, he must newly assign the matter of justification. *Elliott v. Kilburn*, 2 Vt. 470.

Where a defendant, instead of pleading *liberum tenementum* to a general court in trespass, pleads the general issue with notice, under which he proves his freehold, the plaintiff may newly assign by testimony proving the *locus in quo* and his own title or possession. *Williams v. Holmes*, 2 Wis. 129.

In trespass *qu. cl. fr.*, if a portion of the declaration sets forth injuries which admit of being construed as a matter of aggravation merely, the defendant is at liberty to adopt his construction, and make such a plea as will be a good defense to the gist of the action only; and if the plaintiff wishes to avail himself of such a construction of his declaration as makes the injuries first mentioned part of the gist of his action, he must bring the matter forward by new assignment. *Grout v. Knapp*, 40 Vt. 163.

Where a statute forbids the special plea of *liberum tenementum*, to an action of trespass *qu. cl. fr.*, and requires that defense to be made by evidence, such a defense, if raised by the evidence, should be met by a new assignment of the abutments of the plaintiff's close, which can only be done by evidence. *Emerson v. Sturgeon*, 18 Mo. 170.

The defendants pleaded *liberum tenementum*, and the plaintiffs replied by way of new assignment, as follows: That the piece of land in the declaration mentioned, was and is a certain close, situated etc., and bounded as follows, etc.; that said close now is, and at said time when, etc., was in the lawful and peaceable possession of the plaintiff; which said close now is, and at said time when, etc., was, another and different close from the said close in the said plea mentioned, and therein alleged to be the soil and freehold of the defendant. It was held that the new assignment was sufficient. *Halsey v. Matthews*, 3 Ind. 404.

If an officer justifies in trespass, under a legal warrant, an act relied on to make him a trespasser *ab initio* should be newly assigned. *Jarratt v. Gwathmey*, 5 Blackf. (Ind.) 238.

An averment of time under a *vide licet* is not traversable; and where, in an action of trespass, the plea justifies the whole time thus averred, the plaintiff must newly assign, if he desires to go for the unreasonable continuance in his premises. *Straight v. Hanchett*, 23 Ill. App. 584.

3. *When Unnecessary*.—The plaintiff brought an action of trespass for breaking and entering his close, which was particularly described in the declaration, and for cutting certain trees

IX. EVIDENCE—1. Admissibility.—Evidence can usually be admitted relative to any material fact stated in pleading.¹

a. UNDER THE GENERAL ISSUE.—Under the general issue, the plaintiff may show possession, that the possession is legal, and that he has title.² The defendant may give any matter which contradicts the allegations that the plaintiff is bound to prove.³

there. The defendant pleaded not guilty as to all except a certain portion of said close, which he described by specific boundaries, tendering an issue to the country; and as to that portion he justified, averring that it was his soil and freehold. The plaintiff traversed the justification, concluding to the country, and then newly assigned the trespass. It was held that the pleas covered the whole matter alleged in the declaration; that it was duly in issue for trial without the new assignment; and that the latter was therefore bad. Leave to withdraw the new assignment was ordered. *Smith v. Powers*, 13 N. H. 216.

If, in an action of trespass, the defendant pleads the general issue, accompanied with a notice of special matter in the defense by way of justification under process of law, the whole merits of the question are thereby opened, and a new assignment is not necessary to enable the plaintiff to recover on the matter alleged in the declaration by way of aggravation, as for a distinct and substantive cause of action. *Fullan v. Stearns*, 30 Vt. 443.

In an action of assault and battery, the declaration alleged generally that the defendants assaulted the plaintiff, "and then and there, with great force and violence, most wantonly and shamefully pushed, shoved, and dragged at, on, and pinched the said plaintiff," etc. The defendants pleaded their lawful possession of the premises on which the supposed trespass was committed, and that the plaintiff, being requested to leave, refused to do so, and that they used no more force than was necessary to expel her. The plaintiff replied *de injuria*, etc. It was held that the replication was sufficient to entitle the plaintiff to recover for the excess of force, if any was proven, and that no new assignment was necessary or proper. *Thomas v. Black* (Del. 1889), 18 Atl. Rep. 771.

A new assignment in an action for a trespass, setting forth more particularly the cause of action relied upon,

is not necessary, nor allowable under the code. *Stewart v. Wallis*, 30 Barb. (N. Y.) 344.

In trespass *qu. cl. fr.*, if the defendant pleads not guilty to the whole trespass alleged, with or without a brief statement, the plaintiff has no occasion to make a new assignment. *Palmer v. Dougherty*, 33 Me. 502; 54 Am. Dec. 636.

1. *Cowlshaw v. Cheslyn*, 1 C. & J. 48; *Knapp v. Slocomb*, 9 Gray (Mass.) 73; *Fry v. Monckton*, 2 M. & R. 303; *Shelton v. Alcox*, 11 Conn. 240.

2. *Hunter v. Hatton*, 4 Gill (Md.) 115; 45 Am. Dec. 117; *Stone v. Hubbard*, 17 Pick. (Mass.) 217; *Printz v. Cheeney*, 11 Iowa 469; *Altmore v. Hufsmith*, 45 Pa. St. 121. If the defendant, in an action of trespass, gives a special notice of his matter of justification under the general issue, in pursuance of the statute, in *Vermont*, the plaintiff, on trial, may avail himself of every matter which he might have successfully newly assigned, if the defendant had pleaded his defense specially. *Keyes v. Howe*, 18 Vt. 411.

In trespass *qu. cl.*, originally commenced before a justice of the peace, the defendant cannot, in the court of common pleas, under the general issue, object that the plaintiff has not proved his possession. *Stone v. Hubbard*, 17 Pick. (Mass.) 217.

Where in trespass *qu. cl.* before a justice of the peace, the general issue only is pleaded, and the action carried up by appeal, the defendant cannot bring the title in issue either by brief statement or any evidence. *Fillebrown v. Webster*, 14 Me. 441.

If a defendant in trespass, having pleaded not guilty, introduces evidence of facts which go to confess and avoid the plaintiff's right of action, the plaintiff may introduce rebutting evidence. *Hunt v. Turner*, 9 Tex. 385; 60 Am. Dec. 167.

Plaintiff cannot show charter in mitigation of damages. *Russell v. Shuster*, 8 W. & S. (Pa.) 308.

3. *Rawson v. Morse*, 4 Pick. (Mass.) 27; *Murray v. Webster*, 5 N. H. 391.

Defendant May Prove Any Acts Denying Materially Allegations of Plaintiff.—In trespass, all the circumstances of the transaction may be shown, under the general issue, although no notice was given. *Sutherland v. Ingalls*, 63 Mich. 620.

Where, in an action of trespass *qu. cl. fr.*, brought before a justice of the peace, the defendant pleads only the general issue, evidence, in the court of common pleas, that the plaintiff was not possessed of the land, is precluded by the *Massachusetts Act of 1783*, ch. 42, § 2. *Lynch v. Rosseter*, 6 Pick. (Mass.) 419.

In an action of trespass, where the general issue is pleaded, all the acts and circumstances directly connected with and attendant upon the transaction complained of, are competent for either party to prove as tending to favor or rebut the presumption of malice; but that is the extent of the rule under this plea. *Perkins v. Towle*, 43 N. H. 220; 80 Am. Dec. 149.

A defendant, under the general issue, cannot prove title in a stranger under whom he does not justify. *Todd v. Jackson*, 26 N. J. L. 525; *Beach v. Livergood*, 15 Ind. 496.

If an action against a railroad company, for the alleged unlawful taking of land, is brought by a subsequent owner of the premises, the company may prove, under the general issue, that they obtained the consent of the person who owned the land at the time of their taking possession. *Central R. Co. v. Hetfield*, 29 N. J. L. 206.

The owner of a sleigh conveyed it in mortgage to S., and afterwards delivered it in pledge to F., and R., by the authority and direction of S., took possession of the sleigh. In an action of trespass by F. against R., it was held, that evidence of said mortgage and authority was admissible, under the general issue, as an answer to the action. *Fuller v. Rounceville*, 29 N. H. 554.

A complaint, in an action appealed from a justice of the peace, stated that plaintiff was in possession of a farm through which the waters of the inlet to a lake were allowed to pass; that defendant raised the upper dam of the outlet of the lake, so that the waters of the lake and inlet backed up and overflowed plaintiff's farm, damaging his crops. Defendant attempted to oust the justice of jurisdiction by raising the issue of title to real estate, filing bond for removal, etc., and, in addition,

pleaded the general issue. It was held that even if under the steps taken by defendant an issue as to title could not be tried on appeal to the county court, defendant was entitled, under his general issue, to show that the legislature had appropriated the dam for the use of the Erie Canal, and authorized the canal commissioners to increase its height, and to appropriate lands and water-rights necessary for the purpose, and that his actions with respect thereto were under authority of the state superintendent of public works, and that consequently plaintiff's remedy, if any, was against the state. *Shaver v. Eldred* (Supreme Ct.), 15 N. Y. Supp. 930.

In trespass against a constable for arresting a plaintiff and imprisoning him, the declaration stated that it was done without reasonable or probable cause. It was held that the defendant might, under the general issue, give evidence of the contents of the plaintiff's trunk, for the purpose of showing that he was addicted to burglary. *Russell v. Shuster*, 8 W. & S. (Pa.) 308.

In an action of trespass for taking goods, the defendant may, under the general issue, prove that the goods were taken as a distress for rent. *Reed v. Stoney*, 2 Rich. (S. Car.) 401.

In trespass *qu. cl.*, a right of way over the close may be shown by the defendant under the general issue. *Stropt v. Berry*, 7 Mass. 385.

In trespass *qu. cl.*, the defendant may under the general issue, show soil and freehold in himself. *Monumoi v. Rogers*, 1 Mass. 159.

In trespass *qu. cl.*, the defendant may give in evidence, under the general issue, that the *locus in quo* was a private road belonging to himself. *Saunders v. Wilson*, 15 Wend. (N. Y.) 338.

In an action of trespass, in a plea of "not guilty," the defendant may prove a prior possession, in the place where, etc. *Baker v. Pearce*, 4 Har. & M. (Md.) 502.

Under the general issue in trespass *qu. cl. fr.*, where the plaintiff relies upon possession without title, the defendant may show that the close which he broke was not the plaintiff's close, but the close of a third party under whom he entered. *Reynolds v. Baker*, 4 Cranch (C. C.) 104.

In trespass on the case, anything is admissible in evidence, under the general issue, that shows that the defendant is not guilty of anything actionable

License to do the acts complained of cannot be given under the general issue, as such license should be specially pleaded.¹ Acts of justification should also be specially pleaded, and evidence as to such acts cannot be given under the general issue.²

b. AS TO ACTS DONE UNDER AUTHORITY OF LAW OR PROTECTION OF PROCESS.—An officer sued for trespass has the right to show by evidence the authority for his acts; that he was

in respect to the matters charged in the declaration. *Jerome v. Smith*, 48 Vt. 230; 21 Am. Rep. 125.

In an action of trespass, under the plea of not guilty the defendant cannot give in evidence matter in discharge. *Austin v. Norris*, 11 Vt. 38.

1. **License Must Be Specially Pleased.**—Evidence as to license cannot be given under the general issue. *Gambling v. Prince*, 2 Nott & M. (S. Car.) 138; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473; *Sawyer v. Newland*, 9 Vt. 383. But see *Cox v. Dove*, Mart. Dec. (N. Car.) 43; *Rasor v. Qualls*, 4 Blackf. (Ind.) 286; 30 Am. Dec. 658; *Rawson v. Morse*, 4 Pick. (Mass.) 127. To the contrary, *Ward v. Bartlett*, 12 Allen (Mass.) 419; *Gronour v. Daniels*, 7 Blackf. (Ind.) 108.

2. **Evidence as to Justification Cannot Be Given Under General Issue.**—*Wolf v. Holton*, 61 Mich. 550; *State v. Beckner* (Ind. 1891), 26 N. E. Rep. 553; *Butterworth v. Soper*, 13 Johns. (N. Y.) 443; *Drake v. Barrymore*, 14 Johns. (N. Y.) 166; *Collins v. Perkins*, 31 Vt. 624; *Briggs v. Mason*, 31 Vt. 433; *Ferris v. Brown*, 3 Barb. (N. Y.) 105; *Hunter v. Harris*, 4 Blackf. (Ind.) 126; *Strong v. Hobbs*, 20 Vt. 185; *Stow v. Scribner*, 6 N. H. 24; *Simpson v. Watrus*, 3 Hill (N. Y.) 619; *Demick v. Chapman*, 11 Johns. (N. Y.) 132.

Where, after an attachment of a boat, a bond was given for the discharge of the boat, and the court afterwards rendered judgment, ordering a sale of the boat, and she was accordingly sold on the execution, and the plaintiff received satisfaction under such execution, and the owner of the boat brought trespass against the plaintiff in the execution, who pleaded not guilty, it was held that the judgment ordering a sale was erroneous, but that the judgment and execution would have been a sufficient justification to the plaintiff in the execution, if properly pleaded to the trespass; that the action should have been *assumpsit* for money had and received, and not trespass; but that the justification

could not be set up under the plea of not guilty, and that the owner of the boat was therefore entitled to judgment. *St. Louis Perpetual Ins. Co. v. Ford*, 11 Mo. 295.

Where the defendant, in an action of trespass to try title, pleads a general denial, and "not guilty," and also a special defense, he may prove any fact in rebuttal of plaintiff's testimony, but cannot introduce evidence in confession and avoidance, except as specially pleaded. *Koenigheim v. Miles*, 67 Tex. 113.

In an action of trespass brought by a tenant against his landlord for distress wrongfully made, the defendant cannot justify the taking under the plea of the general issue, unless the goods were taken and seized upon the demised premises. *Oliver v. Phelps*, 20 N. J. L. 180.

In an action of trespass for breaking and entering the house of the plaintiff, the defendant cannot, under the plea of not guilty, give in evidence matter of justification or excuse, such as that the breaking and entry complained of were by virtue of an execution issued out of the court for the trial of small causes, in *New Jersey*, against a third person; but such matter must be pleaded specially. *Carson v. Wilson*, 11 N. J. L. 43; 19 Am. Dec. 368.

In an action of trespass for taking oysters from the river where the plaintiff had planted them, the defendant cannot show, under the general issue, that the river was a public river, and that it was lawful for all citizens to take them; but that matter must be pleaded specially. *Shreeves v. Liveson*, 2 N. J. L. 247.

In *ejectione firmæ*, which is an action of trespass against the defendant for ejecting the plaintiff from his farm, under the general issue of not guilty, if the parties were tenants in common, the plaintiff, in order to recover, must prove an ouster by the defendant. *Higbee v. Rice*, 5 Mass. 344; 4 Am. Dec. 63; *Chapman v. Gray*, 15 Mass. 439.

an officer,¹ that he was authorized under some process to commit the act complained of,² that such process was regular and valid;³ or, if the alleged trespasser has committed the supposed trespass

1. **Evidence as to Office.**—In an action of trespass against a sheriff, in which he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. *Poinsett v. Taylor*, 6 Cal. 78.

Where, in an action for tearing down and removing the plaintiff's house, the defendant justified as road supervisor, and that the house was an obstruction of the highway, it was held that the exclusion of evidence that the road was left in as bad a condition as before, etc., tending to show that the office was used as a cloak to injure the plaintiff, was error. *Wilding v. Hough*, 37 Iowa 446.

In trespass *qu. cl.*, where defendant, a deputy sheriff, justifies under a warrant commanding him to "search the premises occupied by J. M.," evidence that J. M. was commonly reputed to be the occupant of the premises is admissible, though they were in fact owned and occupied by his wife, the plaintiff. *Metcalf v. Weed* (N. H. 1890), 19 Atl. Rep. 1091.

In an action of trespass for killing a slave, the defendant pleaded the general issue, and, at the trial, gave in evidence, by way of justification, that he was acting as a patrolman, under section 44, of the *Georgia* Act of 1770. It was held that the defendant was not sued for putting in execution any of the powers contained in that act, and that so much of that act as was repugnant to the judiciary act of 1799, which required the defendant plainly, fully, and distinctly to set forth his defense in writing, was repealed by the latter act. *Brooks v. Ashburn*, 9 Ga. 297.

2. **Evidence as to Protection by Process.**—In an action, by an officer who has seized goods on execution, against a third person, for taking them away, evidence of the seizure under execution is sufficient without producing the judgment. *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32.

An officer who arrests a person without a warrant, pursuant to the *Massachusetts* Act of 1855, ch. 215, § 13, and restrains him in a proper place and manner, cannot be proved to have acted maliciously. *Kennedy v. Favor*, 14 Gray (Mass.) 200.

A constable, who is sued in trespass for taking property which he attached as constable, may give in evidence, in justification, the *mesne* process on which he made the attachment, notwithstanding the direction of the writ is not in the form prescribed by the Revised Statutes, but is according to the former statute. *Stewart v. Martin*, 16 Vt. 397.

A deed signed and sealed by A and wife only, releasing to E their claim to certain slaves, with a reservation that they should be held by B and J as trustees for specified uses, is not sufficient evidence of property or possession, in the persons named as trustees, to enable them to maintain trespass for an injury done to such slaves. *Kennedy v. Waller*, 2 Hen. & M. (Va.) 415.

A constable sued for trespass has a right to show the circumstances under which he was on the premises, and for that purpose to introduce in evidence a distress warrant placed in his hands, even though the same was not levied. *Forloun v. Bowlin*, 29 Ill. App. 471.

Declarations of a defendant in an action of trespass for the removal of personal property, made during the removal, that he was acting under an execution against the owner, are no proof of that fact. To make such execution a justification, it must be set up in the pleadings and legally proved at the trial. *Schultz v. Frank*, 1 Wis. 352.

3. **Regularity and Validity of Process.**—In an action of trespass for carrying away personal property, if the defendant seeks to justify under a writ of replevin, he must show a valid writ, issued by a court of competent jurisdiction, attested in the usual form, particularly describing the property taken with sufficient certainty to identify it; or, in case the writ is lost or destroyed, its contents must be proved. 1874, *Taylor v. Morrison*, 73 Ill. 565.

Where the sheriff justifies under a *fi. fa.*, it is not necessary in *New York*, that he show that it is returned; nor will the want of an indorsement, on the execution, of the time it was received by the sheriff, render it inadmissible in evidence; for the statute is merely directory to the sheriff on this point, and the time of receiving it may be shown by parol proof, or otherwise.

without the protection of process, he may have some other protection, such as a judgment.¹

c. AS TO MOTIVE.—Evidence as to motive is sometimes admissible for the purpose of showing the character of the trespass,² or enhancing the damages,³ or showing that it is probable that the

Beals v. Guernsey, 8 Johns. (N. Y.) 52; 5 Am. Dec. 348.

Where a sheriff is sued by a stranger for taking his goods in execution, the former must give in evidence both the record of the judgment and the *fi. fa.* High v. Wilson, 2 Johns. (N. Y.) 46.

In an action of trespass, the plaintiff called one of the defendants, who testified to the taking and that it was done by virtue of a road warrant. It was held that this statement made no justification, for from it it did not appear that the warrant was in due and legal form, but the warrant itself should have been produced. Mericle v. Mulks, 1 Wis. 366.

1. Protection of Judgment.—In an action of trespass upon the real estate of the plaintiff, the pleadings, entries, and judgment in a former action of the plaintiff against one of the defendants, to recover possession of the real estate, where the judgment was for the defendant, but the entry of judgment contained a statement that the ground upon which the judgment was rendered was, that the defendant was the tenant of the plaintiff, and had received no notice to quit, were inadmissible as evidence for the plaintiff to show that he was the owner of the real estate. Sharkey v. Evans, 46 Ind. 472.

In an action for a trespass committed by defendant while erecting a fence on disputed ground, a judgment for defendant, in an action by plaintiff's father against defendant for tearing down a fence erected on the ground in question, is not admissible in evidence as showing the title of defendant to the ground and a right in him to erect the fence thereon. Fahey v. Crotty, 63 Mich. 383.

In an action of trespass for forcibly invading a plantation, carrying off some of the slaves, and frightening others away, after the defendant has offered in evidence in mitigation of damages, a judgment recovered in another state against the plaintiff as principal, and himself as surety, and a receipt for the payment of the judgment by himself, and that the plaintiff then resided with said slaves in that state, and promised not to remove

his slaves therefrom until the judgment should be paid; the plaintiff in rebuttal may introduce evidence of two judgments held by himself against the defendant, and of the defendant's agreement to make an arrangement with the bank, holding the judgment against the plaintiff and defendant, to give time for the payment thereof, and to credit thereon the judgments against the defendant; and also the record of certain proceedings against the bank to prevent them from collecting debts, on which an injunction is issued. McAfee v. Crofford, 13 How. (U. S.) 447.

Declaration Under Oath.—A declaration, not upon oath, by a person not a party to the cause, that he committed the trespass for which the suit is brought, cannot be given in evidence to exculpate the defendant. Penner v. Cooper, 4 Munf. (Va.) 458.

2. Character of Trespass.—In trespass, the whole circumstances accompanying the act, and which were a part of the *res gesta*, may be proved, in order to show the temper and purposes with which the trespass was committed, and the extent of the injury. Ogden v. Gibbons, 5 N. J. L. 536.

In trespass, for the arrest of the plaintiff, on a charge of violating the Connecticut statute for the due observance of the Sabbath, it was held that the conduct of the plaintiff immediately preceding his arrest, was admissible to show with what intent the plaintiff was riding at the time of the arrest, the act being lawful or unlawful, according to the object or motive of the party. Ward v. Green, 11 Conn. 455.

Where, in an action to recover damages for an assault and battery committed on the person of the plaintiff, it appears from the evidence that the plaintiff cursed the defendant, and at the time he was stricken was in the act of rising from the chair in which he was sitting, with a stick in his hand, proof of the threats made by him against the defendant, within the preceding week or ten days, is admissible as tending to show the motive of the defendant's act. Watkins v. Gaston, 17 Ala. 664.

3. Evidence Enhancing Damages.—In

act was committed by a certain person.¹ Irritating and abusive language may be shown in order to overcome a plea of justification.² When the action for trespass is a criminal action, evidence

an action of trespass for entering on plaintiff's premises and carrying away her grain, where defendants justify under the authority of plaintiff's husband, the fact that one of defendants had been present at the trial of the husband for removing other grain, where plaintiff's right of ownership was fully discussed, is competent to prove defendants' knowledge and willfulness, and warrants an instruction on exemplary damages. *Heartz v. Klinkhammer*, 39 Minn. 488; *Conlon v. McGraw*, 66 Mich. 194; *Fisher v. Dowling*, 66 Mich. 370.

In an action of trespass against an overseer of the highway for cutting down a tree therein, evidence of improper motives, or that the act was done maliciously, is admissible. In order to show such *mala fides*, the state of feeling between the parties at the time is alone material, and not the cause or history of the quarrel. And in such an action a deed of the plaintiff's farm is admissible, in order to show its boundaries. *Winter v. Peterson*, 24 N. J. L. 524; 61 Am. Dec. 678.

In an action brought under the *Illinois* "act to prevent trespassing by cutting timber," it is necessary to show that the act has been willfully violated, by proof that the defendant, in his own person, cut the trees, or induced another person to do so, by his command or authority. It is not sufficient to show that the trees were cut by persons employed by him to cut timber on his own land, and appropriated by them. *Cushing v. Dill*, 3 Ill. 460.

Where plaintiff's wife, in attempting to stop defendant's trespass, was treated with derision, some of the testimony showing that she was roughly pushed about, and she testified that the fright and excitement caused by such treatment brought on a sickness continuing three months, evidence that she had a child only six or seven months old, which she was then nursing, is admissible to show that she was in a condition where fright might have affected her as she testified it did. *Razzo v. Varni*, 81 Cal. 289.

In an action of trespass, it is competent for the plaintiff to give evidence of the conduct of the defendant when committing the trespass, and of such acts and circumstances as may give

character to the trespass. If the wife of the plaintiff was insulted or harmed, that may be shown, but the jury cannot give damages for any injury to her, for she may, joining with her husband, bring a separate suit for that. *Cook v. De La Garza*, 9 Tex. 358.

1. As Circumstantial Evidence.—

Where a privity is shown between several defendants in trespass, the words or acts of any one of them may be given in evidence of the trespass, against them jointly. *Broughton v. Ward*, 1 Tyler (Vt.) 137.

In an action of trespass for pulling down a house which had been rented by the defendant to the plaintiff, testimony of a threat, that if the plaintiff's daughter did not yield to the defendant's unchaste solicitations, he would pull down the house, is competent evidence to show the malicious feelings of the person committing the act; and a threat to kill the daughter, if she did not yield, is also evidence to prove the malice of the defendant. *Chapman v. Kincaid*, 8 Humph. (Tenn.) 150.

Threats made by defendant a few months prior to the time the plaintiff's house was burned, that he would tear the house down, that he would blow it up with powder, accompanied with expressions of hostility towards the plaintiff and his family, who occupied the house, is evidence competent for the consideration of the jury in an action of trespass brought by the plaintiff for the burning of the house. *Morrow v. Moses*, 28 N. H. 95.

2. To Overcome Plea of Justification.—

A plea of justification, on the ground of defense of possession, is overcome by evidence of irritating and abusive language, by the defendant, for the purpose of exciting an affray. *Watrous v. Steel*, 4 Vt. 629; 24 Am. Dec. 648.

In an action of trespass for injuring property, if the plaintiff introduces witnesses to prove that the defendants are his enemies, and had threatened to injure his property, the defendants may introduce repellant testimony, to show that the plaintiff had other enemies who had made similar threats. *Logan v. Steele*, 3 Bibb (Ky.) 230.

In an action of trespass for assault and battery, at the trial the court permitted the defendant to put in oral

of the motive which actuated the defendant and induced his conduct may be given.¹

d. AS TO CUSTOM.—Custom, when specially pleaded, may be put in evidence; and sometimes when not specially pleaded.²

e. AS TO ACTS AFTER BEGINNING OF SUIT.—Evidence cannot usually be given as to acts committed subsequent to those on account of which suit was entered.³

evidence of the contents of a letter which he had sent to the plaintiff, informing him that he should carry weapons for his defense, it having been shown that the letter itself had been destroyed. The court instructed the jury that this evidence was only admitted to show that the defendant had forewarned the plaintiff that he should arm himself, etc. It was held that, thus qualified, the evidence was not improper. *McMasters v. Cohen*, 5 Ind. 174.

1. To Make Out a Crime or Misdemeanor.—In an action for trespass on plaintiff's land, where the affidavit in attachment alleges that the injuries complained of arose from the commission of some felony or misdemeanor, evidence that defendant, representing himself to be the agent of a third person, from whom he had no authority, sold timber on the land, and collected the proceeds, that the timber was cut and carried away under such sale, and that defendant indorsed the trespass, is admissible under *Missouri Rev. St.* (1879), § 1359, which makes it a misdemeanor for one to cut down or carry away any trees on land not his own. *Chouteau v. Boughton*, 100 Mo. 406.

In an action of trespass against a magistrate for false imprisonment, evidence of malice and want of probable cause is irrelevant and inadmissible, and he is not liable in such an action if he had jurisdiction. *Bailey v. Wiggins*, 1 Houst. (Del.) 299; *Chambers v. Porter*, 5 Coldw. (Tenn.) 273.

2. As to Custom—Evidence of Custom.—In an action of trespass for cutting and carrying away his grain, a lessee for years may give evidence that by the custom of the country he is entitled to the way-going crop, though he does not specially plead such custom, and though he held under a written lease making no reference to such right. *Stultz v. Dickey*, 5 Binn. (Pa.) 285.

In an action for breaking and entering a close, the title to which is disputed, a witness, who has testified that he was in the habit of going upon the

premises, cannot be asked "what he used to go there for," for the purpose of showing that he and all the neighbors were in the habit of using the land as common property. *Niles v. Patch*, 13 Gray (Mass.) 254.

On the trial of an action for an assault and battery, committed in attempting to remove the plaintiff from a passage-way of which the defendant had the lawful custody, the plaintiff proved that at the time of the assault he was about entering a house to which was annexed a right of way through a passage, and gave evidence from which he contended that a license to him from the owner of the house might be inferred. It was held that to rebut such inference of a license, the defendant might prove that the plaintiff, in company with certain other persons, had been in the habit of frequenting said house, and that the owner of the house had fastened it up for the purpose of excluding them; but that evidence that some of those persons were of bad character, and had been in the state prison, was irrelevant and inadmissible. *Brown v. Gordon*, 1 Gray (Mass.) 182.

In an action of trespass *qu. cl.*, where the plaintiff claimed to have taken possession of certain unappropriated land, by staking it out and erecting buildings thereon, upon which land the defendant entered, it was held that evidence was admissible to show that this was the usual mode of taking possession of such land in the town where it lay, and that it was acquiesced in by the town. *Cook v. Rider*, 16 Pick. (Mass.) 186.

3. Acts Subsequent to Filing Declaration.—In an action of trespass *qu. cl. fr.*, evidence is admissible on the part of the plaintiff for the purpose of showing that he had acquired the land from the government, that he had filed his declaratory statement giving notice of his intention to preempt the premises, and the register and receiver had rendered a decision in favor of his right, accepted of him the government price

f. AS TO MITIGATION OF DAMAGES.—Circumstances in mitigation of damages may be shown, unless they amount to a justification, when they should be specially pleaded.¹

g. UNDER A REPLICATION TO A JUSTIFICATION DE INJURIA.—Under a replication to a plea of justification *de injuria*, the plaintiff may show that more force was used than necessary.²

for the same and given the ordinary receipt therefor, although the payment was made after the trespass. *Courchaine v. Bullion, etc., Co.*, 4 Nev. 369.

In trespass *qu. cl.*, evidence that the *locus in quo* was within the bounds of an old improvement of which the defendant was, at the time of the trespass, in actual possession, is irrelevant, the trespass being committed after a decision by the board of property on a *caveat*, in favor of the plaintiff, and after a subsequent ejectment brought by the defendant within six months, on which he became nonsuit. *King v. Baker*, 29 Pa. St. 200.

In a prosecution for trespass under *Alabama Code* (1886), § 3874, declaring the offense to be an entry on the premises of another without legal cause, or good excuse, after having been warned within six months next preceding, the state, having proved warning and an entry a month or two afterward, cannot show that the defendant entered a second time after the prosecution was commenced, and an instruction based on such evidence is erroneous. *Chappell v. State*, 86 Ala. 54.

1. **Mitigation of Damages.**—In an action by a reversioner for an injury done to the freehold, the duration of the term of the tenant in possession is evidence admissible on behalf of the defendant, as affecting the measure of damages. *Uttendorffer v. Saegars*, 50 Cal. 496.

Under the plea of not guilty, in an action of trespass for taking and carrying away personal property, the defendant cannot be allowed to prove, in mitigation of damages, or for any other purpose, that the act complained of was done under legal process. *Womack v. Bird*, 51 Ala. 504.

In an action of trespass *de bonis asportatis*, the facts that the property has been taken out of the possession of the trespasser, after the trespass, by virtue of valid legal process against the plaintiff, and that it has gone to his use, and the amount for which the process issued, may be shown in mitigation of damages. *Wehle v. Haviland*, 42 How. Pr. (N. Y.) 399.

What matters in mitigation of damages are admissible in trespass as showing the animus with which the defendant acted, are considered in *Farwell v. Warren*, 51 Ill. 467.

Upon a joint plea of "not guilty," in trespass *vi et armis* against two defendants for breaking the plaintiff's close and beating his slaves, they cannot give in evidence, in mitigation of damages, a license from the plaintiff, to one of them, to visit his negro quarters, and "chastise any of his slaves found acting improperly," the battery being committed by the other defendant, and no proof appearing that the slaves beaten had acted improperly. *Brown v. May*, 1 Munf. (Va.) 288.

2. In an action of trespass, where the defendant justifies under authority from the plaintiff or arising from the laws, the plaintiff cannot, under the general replication of *de injuria*, etc., give in evidence any excess of authority. *Parish v. Rigdon*, 12 Ohio 191.

In an action of trespass for assault and battery, where the defendant pleads *son assault demesne*, and the plaintiff replies *de injuria suo propria*, the plaintiff may prove that defendant used more force than was necessary, and that an excessive battery was committed. *Bartlett v. Churchill*, 24 Vt. 218; *Curtis v. Carson*, 2 N. H. 539.

In enforcing articles of agreement authorizing the forcible taking possession of premises, in case of the non-payment of the purchase-money, if more force is used than is necessary, the plaintiff should reply the excess, or give evidence of it under the general replication *de injuria*. *Ambrose v. Root*, 11 Ill. 497; 52 Am. Dec. 479.

If, to a declaration in trespass for an assault containing but one count, a justification is pleaded, and the plaintiff replies *de injuria*, he cannot introduce testimony relating to any other assault; such testimony being admissible when there is only one count, the plaintiff, instead of traversing the plea, should newly assign. *Carpenter v. Crane*, 5 Blackf. (Ind.) 119.

Under a replication *de injuria* to a

h. AS TO WRITTEN INSTRUMENT.—A deed or other written instrument under which one of the parties holds is admissible.¹

justification of a beating, as master of a ship, the plaintiff may show that the punishment was excessive. *Hannen v. Edes*, 15 Mass. 347.

Under a replication *de injuria* to a justification as an officer acting under a writ, the plaintiff cannot show that, by breaking an outer door, the defendant became a trespasser *ab initio*. *Oystead v. Shed*, 12 Mass. 506. See *Sampson v. Henry*, 11 Pick. (Mass.) 379.

1. Plaintiff introduced a deed to him describing 1.8 of an acre of land conveyed by T. to plaintiff by deed of given date, and introduced also a deed from T., conveying to him "all that certain 1.8 acres of land in lot No. 5, in the H. survey, situated about 1¾ miles north-westerly from the courthouse, and more fully described in a certain deed of trust made by T. to use of 'plaintiff,' as will appear of record," etc. The trust deed was not produced, nor was there any evidence identifying the land described in the deeds with that described in the petition as lot No. 5, of the H. survey, giving the metes and bounds. It was held that plaintiff failed to show title to the land described in the petition. *Devine v. Keller*, 73 Tex. 364.

In trespass *qu. cl. fr.*, the testimony of the sheriff, that he did not levy on the land in dispute, will not be received to contradict the terms of his own deed and the entry of his levy. *Sawyer v. Leard*, 8 Rich. (S. Car.) 267.

In an action of trespass by a person claiming under a void reservation in a deed, the deed had no tendency to establish plaintiff's right, and was, with other deeds and leases showing the character of defendant's possession, properly excluded. *Herbert v. Pue*, 72 Md. 307.

Proof of a conveyance to any person, and facts of ownership thereunder, is inadmissible without evidence of privity of title between such person and some grantor or ancestor of the party seeking to establish the same. *Doane v. Willcutt*, 16 Gray (Mass.) 368.

If an heir sued in trespass justifies as being a tenant in common with the plaintiff of the *locus in quo*, and avers that there has never been any partition of the estate, the plaintiff may introduce in rebuttal the record of proceedings for a partition, although it be defective in failing to show that the

report of the petition had been approved; and he may prove *aliunde* that possession had been taken by the several parties in interest of the parts assigned to each, and the same acquiesced in for many years. *Grimes v. Butts*, 65 Ill. 347.

Defendant agreed to waive the filing and notice by plaintiff of certified copies "as a predicate to show a common source of title." *Texas Rev. St. art. 4802*, provides that plaintiff in the action may prove a common source of title by certified copies of deeds, etc., without requiring proof of the inability to produce the originals. It was held that a certified copy of a recorded patent offered by plaintiff to show title in himself, there being no evidence of such common source, was not admissible, over defendant's objection, without accounting for the absence of the original, as provided by *Rev. St., art. 2257*. *Rio Grande, etc., R. Co. v. Milmo Nat. Bank*, 72 Tex. 467.

A written agreement by which all the heirs but two assign their interest in the ancestor's estate, without describing it, to another heir, is admissible on behalf of the latter in an action against persons not claiming under ancestor or the one heir, who is not a party to it, to show the extent of plaintiff's interest in the land; as plaintiff, being a tenant in common with the heir whose interest he had not acquired, could recover the possession of the land as against any one but said heir. *Wright v. Dunn*, 73 Tex. 293.

Though the consideration of a contract of sale of lands is defective, as where it is confederate money, yet the contract may be proved to show that the purchaser's entry under it was not an actionable trespass. *Woods v. Toombs*, 36 Tex. 85.

Tax deeds and leases, shown by the evidence to be void, may be treated as color of title; and if the defendant in an action of trespass for entering lands, etc., took possession under them, they are admissible in evidence, as tending to show what, and how much, land he claimed. *Hoffman v. Harrington*, 28 Mich. 90.

Plaintiff, to obviate the apparent bar of the Statute of Limitations, offered in evidence a marshal's deed to the *United States* under a void execution,

i. AS TO TITLE.—The plaintiff need not prove title where it is admitted by the defendant's pleading,¹ but otherwise it is usually necessary.² Title sufficient to maintain the action may be shown by deed, or sometimes by acts, as of possession.³

together with a judgment in favor of the *United States* against plaintiff's ancestor, on which the execution and sale were based, and a deed from the *United States* to plaintiff, in consideration of the payment of the judgment. It was held that its exclusion was not error, as it showed no title in the *United States*, nor any obstacle to a suit for the recovery of the land by plaintiff or his ancestor. *Moody v. Moeller*, 72 Tex. 635. See also *Garner v. Larker*, 71 Tex. 431; *Parker v. Fort Worth, etc., R. Co.*, 71 Tex. 132; *Harrison v. McMurray*, 71 Tex. 122; *Jenkins v. Adams*, 71 Tex. 1; *Am. Dig.* 1888, p. 1313, §§ 26-29.

In an action by the heirs of a patentee of a head-right certificate and his wife, claiming the land as community property, against the grantees of the patentee alone, the defendants may, to show an outstanding superior title, introduce a deed from the patentee to a *bona fide* purchaser, executed before the patent was issued, without connecting themselves with such grantee. The effect, however, of such deed, would be to only defeat plaintiff's right to one-half of the tract as against those claiming under that title, but would not affect their rights to the whole, as against those not connecting themselves with it. *Daniel v. Bridges*, 73 Tex. 149.

In an action of trespass for seizing plaintiff's goods on an execution against another, mortgages of the property by the execution debtor to other parties are not admissible. *Robinson v. Edwards*, 70 Me. 158.

1. Title.—In an action of trespass *qu. cl. fr.*, the defendant, by his pleading, admitted the plaintiff's possession, but claimed the title. It was held that the plaintiff need not, in order to recover, prove his title or actual possession of the *locus in quo*. *Tison v. Broward*, 17 Fla. 465.

2. In an action for cutting trees, the plaintiff must prove that he was the owner of the land on which the trespass was committed. *Clay v. Boyer*, 10 Ill. 506.

In an action for cutting timber, under the timber act of *Illinois*, brought by husband and wife, to support the alle-

gation that the husband and wife were owners of the land trespassed upon, an estate in fee simple must be shown in the wife. *Whiteside v. Divers*, 5 Ill. 336.

In trespass *qu. cl.*, the plaintiff may show an equitable title, where the holder of the legal title has disclaimed. *Arnold v. Pfoutz*, 117 Pa. St. 103.

A defendant, in trespass for a fishery, under a plea of *liberum tenementum*, showed a title in common with G; but the plaintiff proved an elder title. The testimony of G was then offered, to prove the defendant's right by prescription to fish. This was objected to on the ground of his interest, as tenant in common, but was held competent. *Jackson v. Lewis, Cheves* (S. Car.) 259.

In trespass *qu. cl. fr.*, the plea of *liberum tenementum*, and issue thereon, in evidence of paramount title in either party, is admissible, as are also records, plots and papers, bearing upon the question of possession. *Wilsons v. Bibb*, 1 Dana (Ky.) 7; 25 Am. Dec. 118.

3. Title Shown By Possession.—In an action of trespass to realty, parol evidence that the property was occupied by the plaintiff and his tenants, is sufficient *prima facie* proof of title. *Pacific Express Co. v. Dunn*, 81 Tex. 85.

Evidence of frequently cutting wood and timber on a tract of woodland for more than twenty years, under a claim of title, will support an action of trespass against one who shows no title. *Kilborn v. Rewee*, 8 Gray (Mass.) 415.

In an action of trespass *qu. cl. fr.*, a party has a right to show such evidence of title as he possesses, in order to obtain a decision upon the proper construction of the deed under which he claims a right by license from the grantees to enter upon the land and do the acts complained of. *Louk v. Woods*, 15 Ill. 256.

If the plaintiff in an action of tort in the nature of trespass *qu. cl.*, has testified that he was in the occupation of the premises, without being inquired of or testifying as to any title thereto, proof of a recent deed to his wife, to her sole and separate use, is not sufficient of itself to authorize the court to instruct the jury that the plaintiff had not such a title as to enable him to

j. AS TO POSSESSION.—Evidence clearly showing legal seisin is *prima facie* proof of possession.¹ Both possession and title need not be shown² to give the plaintiff a right of action against an intruder;³ mere possession is sufficient.⁴ Possession is a fact for

maintain his action. *Brown v. Benjamin*, 8 Allen (Mass.) 197.

In an action for obstructing an alley way, through which plaintiff in his complaint alleges that he has had the right of passage for a time sufficient to give him an easement, evidence of his title thereto is inadmissible. *Faulk v. Thornton*, 108 N. Car. 314.

In an action of trespass for taking away goods under a plea of property in a third person, evidence of such ownership at the time of the taking, is admissible. *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348.

In an action of trespass for taking logs, etc., the defendant may prove that the logs were his, cut on his lands, and lying on his lands when he took them. *Wilson v. Clark*, 4 N. J. L. 379.

In an action of trespass for taking away muskrat traps, the defendant may show that he was the owner of the soil, and removed the traps to a place where the plaintiff could get them. *Crane v. Mason*, *Wright* (Ohio) 333.

1. *Kennebec Purchase v. Call*, 1 Mass. 483; *Printz v. Cheeney*, 11 Iowa 469.

In trespass to real estate, the deed to the plaintiff is competent evidence, as tending to prove title in plaintiff, and show what right he claims by his possession of the property; and if no effort is made by the defense to show title in any one else, proof of title other than of possession is not necessary. *Chicago v. McGraw*, 75 Ill. 566.

2. **Possession and Title.**—Plaintiff in trespass *qu. cl. fr.* need not show title as well as possession. *Shoup v. Shields*, 116 Ill. 488.

3. **Possession Gives Right Against Intruder.**—A trespasser has no standing to dispute the allegation, in a declaration in trespass by a husband and wife, that the wife is the sole owner of the property. *Dexter v. Billings*, 110 Pa. St. 135.

As against a mere wrongdoer, the plaintiff in possession of land need not show a perfect title. *Field v. Apple River Log Driving Co.*, 67 Wis. 569.

4. In an action of trespass *qu. cl. fr.* by A against B, C's acts of possession in A's behalf are admissible to show

A's possession. *Merrill v. Hilliard*, 59 N. H. 481.

The defendant, in an action of trespass *qu. cl.*, having made out no title, possession by the plaintiff will justify a verdict in his favor. *Brandon v. Grimke*, 1 Nott & M. (S. Car.) 356; *Dewey v. Bordwell*, 9 Wend. (N. Y.) 65.

In an action for a wrongful trespass by a stranger, on the premises held by the plaintiff as a lessee, the plaintiff need not produce the lease. Evidence of possession of his part, under a claim of right by written instrument, is enough, against a wrongdoer. *Walker v. Wilson*, 8 Bosw. (N. Y.) 586. *Todd v. Jackson*, 26 N. J. L. 525; *Lawson v. Campbell*, 4 Greene (Iowa) 413; *Mason v. Park*, 4 Ill. 532. The admission by the defendant, in such case, that he has cut timber on the plaintiff's land, unless made for the purposes of the trial, is not admissible as evidence of title of the plaintiff. *Robie v. Sedgwick*, 4 Abb. App. Dec. (N. Y.) 73.

In an action of trespass by an executor, the petition alleged that the plaintiff's testator was the owner of the land at the time of the trespass. The evidence showed ownership, as alleged, and that no one else had actual possession at the time of the acts complained of. It was held that possession by testator was sufficiently pleaded and proved. *Bell v. Clark*, 30 Mo. App. 224.

In an action for the negligent burning of plaintiff's timber, it was held that proof that at the time of the injury, and for many years previous, plaintiff was in possession of the premises, was sufficient *prima facie* evidence of title. *Burlington, etc., R. Co. v. Beebe*, 14 Neb. 463. *McCormick v. Chicago, etc., R. Co.*, 47 Iowa 345; *Parker v. Hotchkiss*, 25 Conn. 321; *Boyington v. Squires*, 71 Wis. 276. In an action for *mesne* profits, the record of the judgment in ejectment is admissible to show that defendant was in possession at the time, and for the title, but not for the length of time defendant's possession continued. *Bailey v. Fairplay*, 6 Binn. (Pa.) 450; 6 Am. Dec. 486.

the jury.¹ Where the only question is as to the possession, evidence as to the extent of the occupancy of prior tenants is immaterial.² Possession will be presumed to continue unless the contrary appear.³ A right to possession may arise by operation of law.⁴

2. Declarations.—Declarations in disparagement of the title of the declarant are admissible as original evidence.⁵

1. Question for Jury.—The question as to the possession of land is a question of fact for the jury. *Firth v. Veeder*, 58 Hun (N. Y.) 605.

Under *Alabama Code*, § 3296, providing that the owner may recover damages for trees cut upon his premises without his consent, it is immaterial whether he is in possession or not; but where, in an action for such penalty by the trustees of a church upon whose land trees had been cut, the defendant pleads that the trustees were not in possession, and were not trustees at the time of the trespass, and these issues are accepted and evidence introduced thereon, the court must submit them to the jury, although immaterial. *Allison v. Little* (Ala. 1891), 9 So. Rep. 388.

2. The defendant occupied a store adjoining the plaintiff's land, and alleged that he owned three feet beyond the store. The plaintiff claimed to occupy up to the store. The defendant did not perfect his plea of title by giving the undertaking required by *Code Civil Proc.*, § 2952. It was held that the question was simply one of possession, and that evidence as to the extent of the occupancy by prior occupants of defendant's store was immaterial. *Smith v. Bingham* (Supreme Ct.), 9 N. Y. Supp. 97.

In a suit for trespass on land, the plaintiffs showed their possession and actual occupancy; the defendants offered deeds to show themselves tenants in common with the plaintiffs. It was held that these were inadmissible, since no deraignment of title was made from them as a common source of title, nor was there any proof connecting the holding of the parties with them, or to show that possession was taken or claimed under them. *Woodbeck v. Wilders*, 18 Cal. 131.

3. The verdict in one action of trespass is evidence in another between the same parties, but is conclusive only of the fact and date of the trespass, and of the plaintiff's possession at that time; and

his possession will be presumed to continue unless the contrary appears. *Stean v. Anderson*, 4 Harr. (Del.) 209.

4. H. made a deed of land naming no grantee, one-third thereof "for the use of a schoolhouse, if the neighboring inhabitants see cause to build a schoolhouse thereon." A schoolhouse was built thereon by a school district, and afterwards A., as agent of a school district *de facto*, that acted as successor of the former district, leased a part of said tract to B. for ten years. B. held over after the expiration of the ten years, and a school district which had been duly constituted after said lease was made, authorized K. to enter on said tract and take possession thereof for said district. K. entered accordingly, and B. brought an action of trespass against him. It was held that though no legal estate passed by the deed of H., yet that a trust was thereby created, which the court would be authorized and bound, as a court of equity, to protect, and would appoint a trustee to take the legal estate from H.'s heirs, who would be bound to convey it to him; and that the said lease to B. was admissible in evidence against him, and that he was estopped to deny that A. was duly appointed agent of the school district *de facto*, or that said district had a good title to the said tract. *Bailey v. Kilburn*, 10 Met. (Mass.) 176; 43 Am. Dec. 423.

5. Declarations.—*Greenleaf on Evidence*, vol. 1, § 109, and cases cited. A mere statement of a surveyor as to what land is included in a patent is not enough to show title to the land out of the plaintiff and in another, unless such patent was located by actual survey, made in accordance with law, upon legal proof of the starting-points of the survey. *Parker v. Wallis*, 60 Md. 15; 45 Am. Rep. 703.

Denials of a defendant in ejectment that he was in possession, do not conclude him in an action of trespass; but declarations made in bad faith to the prejudice of an adversary, have their

3. Admissions. — Admissions against the interest of the party making them are admissible.¹

effect on a motion for restitution. *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530; 17 Am. Dec. 98.

A husband owned land in his right, and his wife owned land adjoining in her own right. The parties to the suit were their children; and after the death of the parents the plaintiff became the owner of the land of the husband, and the defendant became the owner of that of the wife. In an action of trespass *qu. cl. fr.*, it was held, that the declarations of the wife, before and after the death of her husband, showing where the boundary was between the lands, were admissible in evidence against the defendant. *Pike v. Hayes*, 14 N. H. 19; 40 Am. Dec. 171.

The declaration of one under whom a party claims as bailee, are inadmissible to prove the bailment, unless they constituted the bailment, or were a part of the *res gestæ*. *Jones v. M'Neil*, 2 Bailey (S. Car.) 466.

In an action of trespass to real property, the defendant, under a general plea of title, without allegations that title is claimed by adverse possession, may give in evidence the declarations of a former occupant under whom defendant claims, to characterize his possession as adverse to any title of the plaintiff. *Morss v. Salisbury*, 48 N. Y. 636.

A having contracted to purchase lands of B, paid a part of the purchase-money, but titles were never made. A gave the land to his son, C, who went into possession. It was held that this possession was adverse both as to A and B, and that declarations by A, subsequent to the gift to C, that he did not hold adversely to B, were inadmissible in an action of trespass by B against C. *Hunter v. Parsons*, 2 Bailey (S. Car.) 59.

1. Admissions. — The defendant claimed under a sale on foreclosure of a vendor's lien. The original vendee testified that after an appeal had been taken in the proceedings to foreclose the lien, he paid the judgment to an attorney, who had since died; that the attorney's partners were absent; that he had lost his receipt; and that of the other persons present two were dead. The payment was alleged to have been made about twenty-five years ago; and the third person alleged to have been

present, a man seventy-seven years old, testified that he had no recollection of any such occurrence. It was held that testimony of the attorney's partner relative to the attorney's mode of doing business, showing that the payment was improbable, and also that after the reversal of the case, the attorney had filed an amended petition, and had been engaged in this suit, but had never mentioned the payment, was admissible, as also evidence of an admission made by the vendee to a subsequent owner of the premises, that the lien was still in force. *Dwyer v. Rippetoe*, 72 Tex. 520.

In an action of trespass by a father against a sheriff, for seizing and selling his mare as the property of his son, it is competent for the plaintiff, after his own declarations that the mare was the property of his son, have been given in evidence by the defendants, to prove in rebuttal, that before the execution against the son, the father had turned out to the sheriff, in the presence of the son, the same mare, in order to answer an execution against himself. *Roberts v. Young*, 42 Pa. St. 439.

In an action of trespass *de bonis asportatis*, in a justice's court, it was proved that the defendant admitted that he had levied on property, at the same time exhibiting the execution, and stating whom it was against, and when asked whether he would disclaim the levy, he refused to do so; but it was not proved that he was an officer and had lawful authority to take the property. It was held that the evidence was sufficient to charge him as a trespasser, and that no justification under the process was shown by the admission. *Copley v. Rose*, 2 N. Y. 115.

In an action of tort for breaking and entering a close, under an answer setting up the defendant's possession for more than twenty years previously, and also soil and freehold in the defendant, the defendant may give in evidence admissions of his title by the plaintiff and those under whom the plaintiff claims. *Gilbert v. Felton*, 5 Gray (Mass.) 406.

In a suit for trespass, evidence of a previous conversation between plaintiff and a third person, about splitting rails to fence the land, was held admissible, as tending to show acts of ownership. *Gordon v. Cook*, 47 Mich. 248.

4. Presumptions.—Presumptions, disputable and indisputable, may arise from circumstances of the case.¹

5. Relevancy of Testimony.—The general rule as to the relevancy of testimony applies in the action of trespass.²

An acknowledgment in writing of the demandant's title, made by the tenant in a writ of entry, is sufficient evidence of the demandant's title to be submitted to the jury in a subsequent action of trespass brought by him against the tenant for an entry on the land described in the writ of entry. *Kellenberger v. Sturtevant*, 7 Cush. (Mass.) 465.

1. Presumptions.—In an action for trespass, a witness testified that the defendant said that he tore down the plaintiff's fence. The plaintiff testified that the fence looked as if the defendant had hitched his team to it, and torn it down. The defendant testified that he told the plaintiff that the fence would have to be removed, and that he tore it down to repair a highway. It was held that it would be presumed after verdict that the defendant properly removed the fence to repair the highway. *Rightmire v. Shepard* (Supreme Ct.), 12 N. Y. Supp. 800.

The fact that a person, or his ancestor, had cattle wandering over a grant of land fifty leagues in extent, affords no presumption that he owned or claimed the land. *Lerma v. Stevenson*, 40 Fed. Rep. 356.

In trespass *qu. cl.* brought by the heirs of A, the defendant demurred to the plaintiff's evidence. By the demurrer it appeared, that A died seised, that there was no positive proof that the plaintiff's heirs ever entered after his death, but there was proof that the defendant's possession did not commence till a year after A's death. It was held that on this evidence in a demurrer to evidence, it might be fairly inferred, that A's heirs entered into possession immediately upon their ancestor's death, and that, therefore, they were entitled to recover. *Mars-teller v. Coryell*, 4 Leigh. (Va.) 325.

In trespass *qu. cl. fr.*, the possession is presumed to be in the owner of the legal title, in the absence of any showing to the contrary. *Griffin v. Creppin*, 60 Me. 270.

The plea of property in a third person, in an action of replevin, does not involve the question of such person's title; and therefore, in an action of trespass upon the same property,

brought by such third person against the parties who were plaintiffs in the replevin in which the verdict was for the defendant, the record of the replevin is not conclusive evidence of the plaintiff's right of property. *Warfield v. Walter*, 11 Gill & J. (Md.) 80.

Where one is charged with the commission of trespass in such a manner as requires a denial or refutation, which he refuses to make, but requires proof of the fact, it is presumptive evidence of the truth of the charge. *Wheat v. Croom*, 7 Ala. 349.

A defendant in trespass, claimed as tenant of S., and adduced evidence of his tenancy and of the title of S.; but he was proved to have entered as the plaintiff's tenant, and was therefore evicted. It was held that this did not conclude him, after having regained possession, from holding under the title of S. *Jones v. Muldrow, Cheves* (S. Car.) 254.

2. Relevancy—Illustrations.—Where the defendant in an action of trespass offered to prove the right of property in a third person, but was not permitted to, and the bill of exceptions did not set out the evidence of a plain or possessory right in the plaintiff, it was held that the evidence offered was irrelevant, and that a new trial would not be granted. *Crawford v. Bynum*, 7 Yerg. (Tenn.) 381.

In an action of trespass on the case for wrongfully and injuriously building an embankment on defendant's own land, so as to cause an obstruction and reflow of water on plaintiff's land, it is not error to refuse introduction of testimony on the part of the defendant, that the drain constructed by the defendant, to carry the water from the land of the plaintiff, was such a drain as is usual and customary to be constructed at such embankments on railroads generally, and have been found sufficient for the purposes of carrying off the water at like places. *Beaty v. Baltimore, etc., R. Co.*, 6 W. Va. 388.

Where the plaintiff claimed damages for the cutting and carrying away from his land of pine logs marked A, it was not error to admit evidence of the cutting of other logs, when such evidence tended to show how many of

the kind claimed were taken, and when an instruction was given that damages could only be recovered for that kind. *Lee v. Lord*, 76 Wis. 582.

In an action of trespass to recover the value of timber cut and carried away, the court properly refused to allow the plaintiff to testify as to how much of the land was damaged by the cutting off of the timber. *Coody v. Gress Lumber Co.*, 82 Ga. 793.

In an action for trespass by cutting trees on a church lot, the records of the church imputing the cutting to defendant, and appointing a committee to compromise with him, are irrelevant. *Allison v. Little*, 85 Ala. 512.

Where the plaintiffs, in an action of trespass *qu. cl. fr.* against B, claiming title to a larger tract of land, which included the *locus in quo*, offered in evidence the record of a judgment in their favor, against C, in an action of ejectment for such larger tract, for the purpose of showing an act of ownership by the plaintiffs, in relation to the *locus in quo*, it was held, that such judgment being between different parties, and in relation to a different subject-matter, was inadmissible. *Southington, etc., Soc. v. Gridley*, 20 Conn. 200.

In an action of trespass against a railroad company on account of the negligence of an engineer, it was held that it was error to admit testimony to prove habitual negligence of employes upon other trains of the company. *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Southern R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332.

Where the defense to an action of trespass *de bonis asportatis*, was a mortgage of the property to a third person, by whose directions the defendant took the same, and the note secured by the mortgage was not produced on the trial with the mortgage, nor called for by the plaintiff, but the mortgagee, on cross-examination by the plaintiff, stated that he still held the note, and the jury, under the instructions of the court, found that the note was unpaid, and the mortgage uncanceled, it was held that, under these circumstances, it was no objection to the introduction of the mortgage, that the note was not produced. *Fuller v. Rounceville*, 31 N. H. 512.

Where the plaintiff, in an action of trespass *qu. cl. fr.*, claimed title to the *locus in quo* by adverse possession, and, in support of his claim, introduced evidence of his acts of dominion over the

locus in quo, which was part of a highway, and especially of his cutting wood thereon for his fires; and the defendant, for the purpose of showing the character of the possession claimed by the plaintiff and that the acts done by him did not constitute an adverse possession, offered a witness to prove that, at the time when the plaintiff so cut wood on the *locus in quo*, it was, and long had been, customary for any person who chose, although not owning the fee of the highway, or of the adjacent land, to cut wood for his fires from said highway; but no evidence was offered of claim made, that any such acts were done on the *locus in quo*, it was held, that such evidence offered by the defendant, was not relevant to the issue, and was therefore inadmissible. *Evans v. Bidwell*, 20 Conn. 209.

In an action of trespass for an injury to land, evidence of threats and intimidation on the part of the defendant towards the plaintiff's witnesses, if they should testify, is inadmissible. *Larkin v. Taylor*, 5 Kan. 433.

In an action of trespass for goods attached by defendants, it is proper for the plaintiffs to show that the defendants approved of the seizure, and received the proceeds. *Gillett v. Phelps*, 5 Wis. 429.

Under the former system or practice, the fact that a slaughter-house was a nuisance, and had injured the value of the defendant's property, could not be admitted in evidence, in an action of trespass for diverting water from the plaintiff's slaughter-house. *Chenoweth v. Hicks*, 5 Ind. 224.

Evidence that after breaking the plaintiff's close, the defendant constructed valuable buildings on the land so entered upon, is admissible in an action of trespass, in answer to the action. *Haynes v. Thomas*, 7 Ind. 38.

The plaintiff, in an action of trespass for breaking into her house and taking personal property, cannot introduce evidence of the taking of property of which she had neither possession nor the right of possession. *Gracie v. Morris*, 22 Ark. 415.

What Is Hearsay.—In an action of trespass for carrying away plaintiff's grain, where defendants justify under authority from plaintiff's husband, receipts given by a third person to said husband for such grain, whose proceeds he volunteered to use in part to pay debts connected with the expenses of the farm, are incompetent and immaterial,

6. **Prima Facie Evidence of Title.**—There are some kinds of evidence that make out a *prima facie* case of title in trespass.¹

7. **Weight and Sufficiency.**—Questions as to weight and sufficiency of evidence, are determined upon the face of the individual case. In some cases certain facts, if proven, have such weight as the jury may give them;² in others, they make out a *prima*

since his offer would be no defense to the action, and the receipts as to plaintiff are mere hearsay. *Heartz v. Klinkhammer*, 39 Minn. 488.

1. **Prima Facie Evidence of Title.**—Proof, by plaintiff, of thirty years' possession under a claim of title under a deed, establishes his title *prima facie*. *Baier v. Ziegelbauer*, 66 Wis. 524.

A duplicate receipt or certificate from the land office, is, by the statute of Iowa, *prima facie* evidence of title, in trespass, etc. *Burlerson v. Teeple*, 2 Greene (Iowa) 542.

In an action of trespass to lands, where the plaintiff is not in actual possession, but bases his right upon his holding the legal title, and on the constructive possession claimed to be drawn therefrom, evidence of tax titles held by third persons, is admissible; for such titles, being *prima facie* paramount, show, unless overcome, that plaintiff had no title, thus defeating his right of action. *Tolles v. Duncombe*, 34 Mich. 101.

In an action of trespass against the defendants for attaching wrongfully certain property of the plaintiff, he offered evidence to prove the making of the attachment, whereupon the defendants offered in evidence the original papers, notes, and accounts, in the suit in which the attachment was made. It was held that the papers were *prima facie* evidence of the claim sued on, and properly admissible in evidence notwithstanding that judgment, in the attachment suit, was rendered against defendant on default. *Edinger v. Henchler*, 8 Iowa 513.

Where the plaintiff proves a *prima facie* trespass, in the taking of his property by the defendant's order, the defendant, to justify, must show that the taking was lawfully authorized. *Woodbridge v. Conner*, 49 Me. 353.

In a suit by the trustees of the Wabash and Erie Canal, for a trespass upon certain lands alleged to belong to them, the only evidence of title introduced was a list of lands, selected by the state for the completion of the canal, embracing the lands trespassed

upon. It was held that this evidence was *prima facie* sufficient to establish title in the trustees. *Evans v. Wabash, etc., Canal*, 15 Ind. 319.

Where defendant in an action of trespass justifies his acts by a tax deed *prima facie* valid, plaintiff may, in rebuttal, introduce testimony *aliunde* the deed to show that, though apparently good, it is in fact invalid, by reason of some fatal defect in the prior tax proceedings. *Douglass v. Dickson*, 31 Kan. 310.

Where the plaintiff in trespass claims title under a tax deed, the defendant is not estopped to deny that such deed conveyed any title, though he himself claims title under a subsequent tax deed. *Wadleigh v. Marathon Co. Bank*, 58 Wis. 546.

The equity of redemption in a slave was sold under *fi. fa.* and the sheriff delivered the slave to the purchaser, but the agent of the mortgagees seized, removed, and retained the slave. In an action against the agent by the purchaser for the alleged trespass, it was held that, in the absence of proof of a right of possession, by agreement, in the mortgagor, the defendant might justify under the authority derived from the mortgagees. *Swigert v. Thomas*, 7 Dana (Ky.) 220.

Possession of, and title to the land from which the personal property (rails and logs) was asported, is *prima facie* evidence of title to the personalty. *Dorcey v. Patterson*, 7 Iowa 420.

2. **Illustration of Evidence Proper to Go to Jury, to Be Weighed by Them.**—In an action of trespass *qu. cl.*, where both parties rely merely on a possessory title, without any proof of a legal claim to the land, a contract by one of the parties to purchase the land of the owner, is admissible in evidence for the purpose of showing the character of the possession. *Moore v. Moore*, 21 Me. 350.

A deed conveying part of a tract of land cannot be given in evidence in an action of trespass *qu. cl.*, where defense is taken on the plats returned in the case, unless such deed is located on the

plats. *Pottinger v. Hall*, 4 Har. & M. (Md.) 349.

Where one rents land for the purpose of making a crop, upon the condition that he is to give up possession in case the owner sells to a third person before the crop is made, it is not competent for the tenant, in case a sale is made, to object that the contract of sale is not evidenced by a deed conveying a perfect title. *Dean v. Fail*, 8 Port. (Ala.) 491.

In an action of trespass to land lying adjacent to a railroad, for acts alleged to have been committed by the contractor while building the road, the contract between the railroad corporation and the defendant for building the same is admissible in evidence for the plaintiff. *Bigelow v. Dawson*, 6 Cush. (Mass.) 97.

Plaintiff in trespass gave in evidence a survey and location of lands in B county, held by A at his death, which included the *locus in quo*, and offered in evidence A's will, containing a power of sale of all his lands in B county. It was held that an objection to the will on the ground that it "was not located upon the plats," should not be sustained. *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; 43 Am. Rep. 560.

In *Maryland*, in an action of trespass *qu. cl.*, it is unnecessary to produce the plats in evidence where the defendant has notice of the execution of the warrant of resurvey; the plaintiff may prove the trespass noted upon the plats by witnesses. *Trammell v. Hook*, 1 Har. & M. (Md.) 259.

Though an instrument not under seal cannot survey the legal title to land, yet in an action of trespass, it may be competent evidence to show a license or authority from the owner of the land to the defendant to enter thereon. *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374.

Where appraisers, chosen by the parties, certified the damages in trespass, it was held that such certificate might be given in evidence in an action for such trespass, the appraisers themselves having been both first examined. *Crane v. Sayre*, 6 N. J. L. 110.

In an action of trespass *qu. cl.*, it is not sufficient to show that, by the removal of a fence by the defendant, stock damaged the plaintiff's crop, without proof as to when, where, and by whom it was erected, or any agreement respecting it, nor any evidence that any

cattle of defendant ever trespassed on the plaintiff's close. *Richardson v. Milburn*, 11 Md. 340.

An execution creditor having levied on the real estate of a debtor, with a house and shop standing thereon, caused the same to be appraised. Afterward, being dissatisfied with the appraisal of the shop, he ordered the officer to proceed no farther with his levy upon the real estate, but to levy upon the personal property, which he accordingly did, and sold it to the amount of the price of the shop. The creditor then resorted again to the real estate, procured from the appraisers a certificate of the sum at which they had appraised the house and land, and then caused the whole of the land, with the house and shop situated thereon, to be set off to him, without any mention being made of the shop. It was held that parol evidence of these proceedings might be admitted in an action of trespass brought by the debtor against the creditor, for taking the personal property. *Leavenworth v. Baldwin*, 2 Day (Conn.) 317.

In an action for trespass on vacant lands, where the trial court has found that there was no possession on the part of the plaintiff, whose only acts in relation thereto were to look over them occasionally and request neighboring residents to look after trespassers, the reviewing court cannot say there was no evidence to support the finding and it must stand. *Hecock v. Van Dusen*, 80 Mich. 358.

In an action of trespass *qu. cl.*, a plat returned in a former action, in which the defendant was the same, and which plat was located on the plats returned in this action, was admitted as evidence to show the admissions of the defendants in the former action. *Reeves v. Middleton*, 2 Har. & M. (Md.) 414.

When the defendant in an action of trespass *qu. cl. fr.*, justifies under an alleged right of way across the plaintiff's close, acquired by more than twenty years' use, evidence that the plaintiff's grantor conveyed the close to him, after the way was used, without excepting any way, and with covenants of warranty, and against incumbrances, has some tendency, though slight, to show that the defendant's use of the way was permissive, and not adverse. *Hewins v. Smith*, 11 Met. (Mass.) 241.

Where, on the trial of an action for assault and battery, the plaintiff called

facie case, and if the jury fail to mould their verdict accordingly, the verdict will be set aside.¹

two witnesses, one of whom testified to the assault without stating any matter to justify it, and the other also proved the same assault, but stated circumstances of justification, it was held that the court could not be required to order a nonsuit. *Labar v. Koplin*, 4 N. Y. 546.

In an action of trespass for shooting the plaintiff's horse on parade, evidence of the defendant's disorderly conduct at the time, is admissible. *Tomlinson v. Booth*, 2 Root (Conn.) 32.

In an action of tort against a city for breaking and entering the plaintiff's close, the defendant, under an answer alleging that the city council voted to lay out and did lay out a sewer, according to law, through the close in question, on the petition of the owners of the close, with notice to the abutters, and before the plaintiff was owner of the close, may introduce as a justification the proceedings of the city council laying a sewer. *Hildreth v. Lowell*, 11 Gray (Mass.) 345.

Plaintiff claimed damages for logs, marked A, cut and carried away from his lands, in sections 13 and 14, by defendants; and his witness testified that 99,643 feet, in all, were cut thereon. A defendant testified that all the logging in that vicinity was done by himself; also that he cut about 25,000 feet of logs marked X on sections 24 and 14. Plaintiff testified that 10,800 feet so marked were not so cut on his lands. It was held proper to charge that there was evidence tending to show that 74,600 feet marked A were taken from plaintiff's lands. *Lee v. Lord*, 76 Wis. 582.

The plaintiff proved by a witness, that he was present when the land on which the trespass was alleged to have been committed was originally located or taken up, and that it was then located as it now is on the plats. It was held that the evidence was admissible to prove the original beginning and location of the tract. *Hogmire v. McCoy*, 2 Har. & J. (Md.) 351.

Where logs had been levied upon and left in the possession of the defendant in execution, evidence that a purchaser at a private sale had notice of the levy before his purchase, and was therefore not deceived by the continuance of the logs in their usual range, may well be considered by the

jury, in an action of trespass by him against a subsequent purchaser at the execution sale. *Tucker v. Bond*, 23 Ark. 268.

The plea to an action of trespass *quod* alleged title, in the defendant, to a certain parcel of land particularly described, a part of which was a part only of the land described in the plaintiff's declaration, and averred that the land thus described in the plea was the same land upon which the trespasses complained of were committed. The plaintiff traversed the allegation of the plea; and on the trial of this issue, without a new assignment, offered evidence of acts of trespass committed by the defendant on other parts of the land described in the declaration. It was held that such evidence was admissible, both to disprove the allegations in the defendant's plea, and to show the damages sustained by the plaintiff. *Lamb v. Beebe*, 10 Conn. 322.

1. While the Weight of the Testimony Is Usually a Question for the Jury, the Facts May Show Such a Case as Make a Certain Finding Necessary—Illustrations.—In an action for damages for willfully driving away plaintiff's bull from its usual range, it is necessary to prove that the driving away was willful, and the burden thereof is on plaintiff. When the plaintiff fails to prove such facts, and the only evidence bearing on the point comes from the defendant, from which it appears it is doubtful whether the animal actually left his range, and that defendant made strenuous efforts to cut him out of the herd and leave him where he was found, but he persistently returned, a verdict for plaintiff will be set aside. *Newell v. Giggey*, 13 Colo. 16. See also *State v. Stenner*, 50 N. J. L. 59; *Am. Dig.* (1887), p. 1245, § 20.

In an action of trespass for cutting timber on plaintiff's land, one witness testified that he had pointed out to plaintiff the place where he cut the timber, and another testified that he had pointed out to plaintiff the place whence he drew the timber. Plaintiff himself testified that the places so pointed out were on his land. The first witness also testified that in cutting the timber he did not cross the line separating defendant's land from plaintiff's, and the defendant testified that

8. Burden of Proof.—The burden of proof is sometimes said to rest on the plaintiff ;—on him who has the opening and conclusion.¹

after it was cut down, the timber was drawn to the plaintiff's land for more convenient removal. It was held that a verdict for the plaintiff was contrary to the evidence. *Wedge v. Spencer* (Supreme Ct.), 7 N. Y. Supp. 173.

In an action of trespass against commissioners of highways for entering on plaintiff's land and cutting down timber, where they allege that they did so supposing that it was a regularly laid out highway, but there is no evidence that they endeavored to ascertain the fact, and it is shown that they were warned by plaintiff not to do so, a judgment for defendants will be reversed. *Yowell v. Braden*, 29 Ill. App. 29.

In an action of trespass *qu. cl.*, the identity of the close and the possession may be established by any person who knows the lines and corners, or who can prove the plaintiff's possession; and the evidence necessary to proof of title is not requisite. *Ledbetter v. Fitzgerald*, 1 Ark. 448.

It appearing from the evidence that defendant entered on plaintiff's premises with his consent, a demurrer to the evidence was properly sustained. *Bennett v. McIntire*, 121 Ind. 231.

In an action for assault and battery, no evidence implicating one of the defendants was given by the plaintiff, but the defendants, in their cross-examination of a witness, proved that all the defendants had been indicted and convicted for the same offense. It was held that this was sufficient evidence to authorize a verdict against all the defendants. *Wolff v. Cohen*, 8 Rich. (S. Car.) 144.

In a suit to recover damages for cutting timber, the plaintiff put in evidence a deed to himself, and proved his possession of the land at a date subsequent to that of the deed, and until shortly before the alleged trespass, and his title appeared to be a matter of common notoriety, and the discontinuance of his possession was explained so as not to affect his title. It was held that the evidence was sufficient to enable the plaintiff to maintain the action. *Kolb v. Bankhead*, 18 Tex. 228.

In an action of trespass to recover the value of timber cut and carried away from plaintiff's premises, the only evidence to connect one of defendants with

the trespass was that he was the owner of a mill in which the timber was found. It was held that a verdict was properly directed in his favor. *Holliday v. Jackson*, 30 Mo. App. 263.

In an action of trespass for damages caused by defendant's cattle breaking into plaintiff's inclosure, the plaintiff need only show that his fence was a lawful fence at the place of breach. *Crane v. Ellis*, 31 Iowa 510.

In an action of trespass for throwing down a fence and leaving down bars on a private way which defendant had across plaintiff's premises, a verdict for defendant will not be disturbed where the evidenceshows the defendant's conduct was justified by plaintiff's interference with defendant's use of the way. *Keating v. Hayden*, 30 Ill. App. 433; appeal dismissed, 132 Ill. 308.

In an action of trespass *qu. cl.*, the defendant took defense for and located on the plats, a tract of land called A, including the tract called B, on which the trespass was alleged to have been committed, and which last tract the plaintiff located on the plats. He also located lot No. 3351, but did not counter-locate the location made by the defendant. The defendant read in evidence the grant A, "beginning at the end of the second line of lot No. 3351." It was held that it was not necessary for him to produce the grant of lot No. 3351, to prove its location, and the beginning of A. *Tomlinson v. Rizer*, 2 Har. & J. (Md.) 444.

1. On the Plaintiff.—In an action of trespass *qu. cl.*, the plaintiff must make out affirmatively, the burden of proof being upon him, where a monument named in his title-deed stands, and that it includes the place which defendant entered upon. *Robinson v. White*, 42 Me. 209.

In an action of trespass *qu. cl. fr.*, it is necessary to prove the abutments of the close, as stated in the declaration; but the abutments are not to be construed strictly. *Wheeler v. Rowell*, 6 N. H. 215; *Hogmire v. McCoy*, 2 Har. & J. (Md.) 351; *Hooker v. Hicock*, 2 Aik. (Vt.) 172.

In an action to recover for the cutting and taking away of certain timber, from a certain lot, the boundary line of which is in dispute, the burden of proof is upon the plaintiff to estab-

It may be stated that it rests on him who persists in remaining on land, or in possession wrongfully; ¹ where each is claiming the property by the pleadings, the burden is on the plaintiff, ² unless

lish the location of such line. *Downer v. Tarbell*, 61 Vt. 530.

In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against a third person, the burden of proving the ownership, seizure, conversion and value of the goods is on the plaintiff, as is also that of proving any circumstances of oppression or malice attending the levy, as a basis for exemplary damages. *Willis v. Hudson*, 72 Tex. 598.

In an action of trespass *qu. cl.*, if the plaintiff cannot prove the trespass in the *locus in quo*, he must at least show it to have been committed on some inclosed or cultivated ground belonging to himself. *Smith v. Wilson*, 1 Dev. & B. (N. Car.) 40.

A defendant in trespass, having planted a crop while in possession of the land, and having once left it, and afterwards entered upon it while in possession of the plaintiff, and carried away the produce, it was held that the plaintiff must show that he entered under a rightful authority, in order to support his action. *Myers v. Myers*, 1 Bailey (S. Car.) 306.

In an action of trespass to try title, where the question depended upon whether a registration of a judgment or the execution of a deed was prior in point of time, it was held that the burden of proof was on the plaintiff to show that the judgment was prior to the deed, and that there was no presumption to that effect. *Hillmann v. Meyer*, 35 Tex. 538.

1. On Him Wrongfully Maintaining Possession.—In an action of trespass for removing the plaintiff's house from his close, it appeared that the house was removed and found on the land of the defendant, and occupied by him. It was held that, under the plea of "not guilty," the presumption was, that the defendant removed the house, and that the burden was on him to show the contrary. *Finch v. Alston*, 2 Stew. & P. (Ala.) 83.

One who takes timber from the land of another, and justifies under a contract with a tenant, has the burden of proving the latter's authority. *Ladd v. Shattock*, 90 Ala. 134.

Where defendant in an action of trespass, admits his act of spoliation,

it devolves on him to show that it was not committed on plaintiff's property, and his failure to do so justifies the direction of a verdict for plaintiff. *Campbell v. King*, 32 Mo. App. 38. See also *Downer v. Tarbell*, 61 Vt. 530; Am. Dig. (1889), p. 3697, § 34.

Where the defendant claims title to a lot, as a part of a preemption claim to land located by him, he must prove an inclosure of, and marked and visible boundaries embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 164.

In an action of trespass, the plaintiff declared on a grant from the state of land described by metes and bounds with the exception of 250 acres previously granted. It was held that it was incumbent on the defendant to show that the trespass was committed on the part previously granted. *McCormick v. Monroe*, 1 Jones (N. Car.) 13.

In an action of trespass for cutting timber, the defendant gave in evidence the following letter from the plaintiff: "I will consent to your taking my timber upon the terms proposed in your letter, but restricting you to that which has been injured by fire, in the first place, and preferring that you should begin between B.'s lot and the creek," etc. It was held that this was a mere license, and revocable, and not an agreement; that, therefore, cutting timber after revocation would be trespass; and that, if the license was founded on any proposition of the defendant, so as to make it a contract, then it was incumbent on the defendant to show it. *Tillotson v. Preston*, 7 Johns. (N. Y.) 285.

2. Each Claiming Property by Pleadings.—In an action of trespass for breaking and entering the plaintiff's close, where each of the parties by his pleadings asserts that the land in question is his, the burden of proving title is on the plaintiff. *Tabor v. Judd*, 62 N. H. 288.

Where damage is done by a party in the exercise of his lawful rights, the plaintiff must prove that the loss he has sustained occurred without fault on his part, and in consequence of the neglect of the defendant. *Waldron v. Portland, etc., R. Co.*, 35 Me. 422.

In an action for trespass to realty, the plaintiff cannot recover without making proper proof of the damages

the plaintiff is in possession of the property, in which case the burden falls on the defendant.¹

9. Allegata and Probata.—While the plaintiff need not prove each and every allegation in the declaration, he must prove enough to give him a right of recovery.² The facts proven must enable him to recover in the form of action chosen.³ The plaintiff cannot select one of several causes of action set out in his decla-

sustained. *Pacific Express Co. v. Lasker Real Estate Assoc.*, 81 Tex. 81.

In an action for trespass in digging a ditch, etc., the burden of proof is on the plaintiff, relying on surveys of land as evidence of possession, to show that they were recorded within the time prescribed by the *Nevada Stat.* 1861, 267, and 1864, 344. *Rivers v. Burbank*, 13 Nev. 398.

1. On Defendant if Not in Possession.

—Where the plaintiff brings his action for an injury to land of which he is in possession, and on the trial each party sets up title to the land, the burden of proof is on the defendant to make out that the title is in himself. If each party shows an independent title of equal strength, the defendant fails. *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265; *Townsend v. Kerna*, 2 Watts (Pa.) 180. See *Caskey v. Lewis*, 15 B. Mon. (Ky.) 27.

If a party justifies a trespass by claiming title to the premises under a patent which is good in part and bad in part, the burden of proof is on him to show himself within the efficient call of the instrument under which he justifies. *Rondell v. Fay*, 32 Cal. 354.

In an action of trespass, by the purchaser of a chattel, under an execution, for the destruction of such chattel by the defendant, the chattel never having been in the possession of the plaintiff, he is bound to prove his property, not only by showing a purchase by himself, but also an authority in the officer to sell. *Carter v. Simpson*, 7 Johns. (N. Y.) 535.

In an action to recover a statutory penalty for the cutting of trees, the burden of showing mistake or reasonable care is upon defendant. *Keirn v. Warfield*, 60 Miss. 799.

2. Plaintiff Must Make Out Case.—In an action for trespass in entering and injuring plaintiff's building, when defendant attempts to justify his acts as having been necessary to protect plaintiff's premises from injury by excavations which defendant was making on his own land, evidence of the

effect on plaintiff's premises, of the digging on defendant's own land, is admissible in connection with the evidence of trespass on the plaintiff's premises. *Cozzens v. Higgins*, 1 Abb. App. Dec. (N. Y.) 451.

In a suit for damages to personal property, evidence is not admissible to prove damages done to property not designated in the petition. *Whitmore v. Bowman*, 4 Greene (Iowa) 148.

In trespass for entering plaintiff's close and carrying away goods, the plaintiff may give the value of the goods in evidence, though he has brought replevin for the same goods, if the defendant has pleaded property in that action, and it is still pending. *Krider v. Lafferty*, 1 Whart. (Pa.) 303.

In an action of trespass on land, the defendant cannot, after having set up in his answer a right to enter by license of a third person, the owner, change his ground on the trial, and show title in himself. *Coan v. Osgood*, 15 Barb. (N. Y.) 583.

In an action for an assault and battery, the plaintiff is not to be restricted in evidence to the mere act complained of, but is entitled to prove all the immediate consequences and natural results of which the act was the direct cause. *Hodges v. Nance*, 1 Swan (Tenn.) 57.

An allegation in trespass for double damages for injury done by dogs, that the defendants were "owners and keepers" of the dogs, is a matter of description, and must be proved as alleged. *Buddington v. Shearer*, 20 Pick. (Mass.) 477; *McFarlane v. Ray*, 14 Mich. 465; *Phillips v. Phillips*, 21 N. J. L. 42; *Ropps v. Barker*, 4 Pick. (Mass.) 239; *Eames v. Prentice*, 8 Cush. (Mass.) 337; *Anderson v. Thunder Bay River Boom Co.*, 61 Mich. 489.

3. Must Recover on Form of Action Chosen.—In an action of trespass against the owner of hogs for injuries done by them to the plaintiff's crops, he cannot be allowed to prove what amount of crops he would have made without the injury; but the damages

ration, as one of several lots on each of which the alleged trespass has been committed, for proof, but must prove trespass on all, if he seeks to recover on all.¹ He is not confined to proof that the

would be, perhaps, the value of the crops at the time of their destruction, so far as they were destroyed. *Gresham v. Taylor*, 51 Ala. 505.

In an action of trespass *qu. cl.*, the defendant offered the prayer "that from the pleadings and evidence in the cause the plaintiff was not entitled to recover." It was held that it could not, under this prayer, be argued in this court, that there was no evidence that the land was situated in the county where the suit was brought, because the record did not show that this point was raised and decided below. *Tyson v. Shuey*, 5 Md. 540.

In an action of trespass *qu. cl.*, a plea of soil and freehold is not supported by evidence that the defendant was a tenant in common with the plaintiff. *Roberts v. Dame*, 11 N. H. 226.

An allegation that defendant carried away and destroyed 150 bushels of plaintiff's potatoes, may be sustained by proof that defendant dug up, carried away, and destroyed that amount of potatoes, which, though fully matured, were still in the ground; since growing crops planted by a tenant constitute personal property. *Salimone Min., etc., Co. v. Wagner*, 2 Ind. App. 81.

A declaration for an injury to cattle is not supported by evidence of injury to mules. *Brown v. Bailey*, 4 Ala. 413.

Where the only cause of action stated in the petition was the breaking into the plaintiff's close and threshing and carrying away certain grain, evidence that the plaintiff's wife was injured and incapacitated from labor in forcibly resisting the trespass, was held to be inadmissible. *Fisher v. Conway*, 21 Kan. 18; 30 Am. Rep. 419; *Veeder v. Cooley*, 4 Thomp. & C. (N. Y.) 245.

1. **MUST PROVE EVERY CAUSE OF ACTION ON WHICH RECOVERY IS SOUGHT.**—On the trial of issues on general replication of *lib. ten.*, pleaded to two counts, the plaintiff cannot recover, unless he proves two closes, and a trespass on each, if the defendant is entitled to land in the county where the trespass is charged to have been committed. *Tribble v. Frame*, 7 T. B. Mon. (Ky.) 529.

In trespass *qu. cl.*, the plaintiff will not be restricted in his proof to any

less number of lots than is set forth in his declaration. *Gardner v. Gooch*, 48 Me. 487.

In trespass *qu. cl. fr.*, the defendant pleaded that the *locus in quo* was a public highway, and produced a town vote appropriating a part of certain common lands for highways. It was held that the plea was not supported without proof that the *locus in quo* was included in such part. *Emerson v. Wiley*, 7 Pick. (Mass.) 68.

Where a declaration in trespass *qu. cl. fr.*, alleges the trespass in entering the close and the dwelling house of the plaintiff, and the defendant pleads *lib. ten.*, he must confine his proof to the dwelling house of the plaintiff, and may not show title in another tenement at the time of the alleged trespass. *Hope v. Cason*, 3 B. Mon. (Ky.) 544.

Where the owner of several closes in the same town brings an action of trespass *qu. cl.*, and declares generally that the defendant broke and entered his close in that town, and thereon committed certain acts, he may prove such acts of trespass to have been committed on any one close of his in that town. But if he introduces and relies upon testimony to prove a trespass upon one close, he must be confined to the close thus selected, and cannot support his action by the introduction afterwards of testimony to prove acts of trespass upon a different close, whether such testimony is objected to or not. *Elliot v. Shepherd*, 25 Me. 371.

Under an averment of breaking and entering the plaintiff's close and of *alia enormia*, upon a plea of not guilty, the plaintiff may prove the pulling down of his house in the same town alleged, without a distinct averment thereof. *Snider v. Myers*, 3 W. Va. 195.

Under a plea of *lib. ten.* in trespass *qu. cl.*, the plaintiff who claimed title under a decree of sale, as purchaser thereunder, was allowed to prove the decree and sale which were prior to the trespass for which the action was brought, although ratification of the sale and the deed to the plaintiff, were subsequent to such trespass. *Hunter v. Hatton*, 4 Gill (Md.) 115; 45 Am. Dec. 117.

trespass was committed on a particular day alleged,¹ and where the trespass is laid with a *continuando*, he may waive the alleged time and prove a trespass committed before the action was brought.² Generally stated, boundaries need not be exactly proven;³ but particular places, accurately described as the place or thing of the trespass, must be.⁴ Under the allegation of a single trespass,

1. Not Confined to Particular Day.—The time of commission of a trespass need not be proved as laid; it is sufficient if it is within the Statute of Limitations. *Allen v. Archer*, 49 Me. 346.

In an action of trespass for acts alleged to be done between certain days, if the plaintiff proves an act done between those days, he cannot afterwards be permitted even to give in evidence an act before the first day. *Peirce v. Pickins*, 16 Mass. 470.

In trespass by the mortgagor against the mortgagee of personal property, for taking possession of the property after the law-day of the mortgage, the defendant justifying under a power in the mortgage, and the plaintiff contending that the mortgage was satisfied, the plaintiff may prove payments on the mortgage debt made by him after the law-day, before the alleged trespass. *Thornton v. Cochran*, 51 Ala. 415.

The rule that proofs of acts done on a day other than that alleged cannot be admitted when the complaint contains no *continuando*, nor any allegation of the trespass "on divers other days," is not consistent with the liberal rule required under the *Utah* practice act. *Burnham v. Call*, 2 Utah 433.

2. Trespass Laid with a Continuando.—Where, in trespass *qu. cl.*, with a *continuando*, the plaintiff failed to prove an entry within the period specified in the writ, he is at liberty to waive the time alleged in the declaration, and, having proved any single act of trespass at any time before action brought, may recover damages therefor. *Little v. Downing*, 37 N. H. 355; *Brown v. Manter*, 22 N. H. 468; *Fontleroy v. Aylmer*, 1 Ld. Raym. 239; *Hume v. Oldacre*, 1 Starkie 351. In an action of trespass for an encroachment by the defendant's wharf on the plaintiff's water lot, it was held that the plaintiff might go into evidence under a *continuando*, this being no disseisin. *Arden v. Kermit*, Anth. (N. Y.) 83.

In trespass *qu. cl.*, time is not material, and if the trespass is alleged to have been committed before the title

of the plaintiff accrued, it may be proved to have been afterward. *Cooper v. Taylor*, 15 N. J. L. 455.

3. Boundaries Need Not Be Exactly Proven.—In trespass *qu. cl.*, where the plaintiff declares, setting out the close with abutments, it is only necessary that he should show title to that part of the close in which the trespass was committed. *King v. Dunn*, 21 Wend. (N. Y.) 253; *Wheeler v. Rowell*, 7 N. H. 515; *Barden v. Smith*, 7 Wis. 439; *Colby v. Collins*, 41 N. H. 301.

Where the declaration in trespass described the plaintiff's close, as bounded north on the land of an adjoining owner, it is sufficient if the evidence shows that owner's land to be in any degree north. *Rollins v. Varney*, 22 N. H. 99.

A defendant who pleads *lib. ten.* to a declaration in trespass *qu. cl.*, setting out the close by abutments, sustains his defense, if he shows title to that portion of the close where the trespass is alleged by the plaintiff to have been committed. *Rich v. Rich*, 16 Wend. (N. Y.) 663; *Peaslee v. Wadleigh*, 5 N. H. 317; *Austin v. Morse*, 8 Wend. (N. Y.) 476; *Burton v. Lazell*, 16 Vt. 158.

In an action of trespass *qu. cl. fr.*, the plaintiff is not required to prove title to the whole of the close described, if he proves it to that part in which the trespass was committed. *Knowles v. Dow*, 20 N. H. 135.

An action for entering upon the plaintiff's close is sustained by proof of a trespass upon any part of the close described. *Porter v. Sullivan*, 7 Gray (Mass.) 441.

If there are partial discrepancies between the description of land in the petition for its recovery, and that in the deed or levy under which it is claimed, they do not raise the question of variance, but of identity. They are not material, if it is evident that the description in the petition and the written evidence of title point to the same land. *Smith v. Chatham*, 14 Tex. 322.

4. Where the plaintiff alleges a tres-

evidence as to distinct acts of trespass may be shown,¹ but proof cannot be given of a distinct substantive right of action.² Where

pass on a certain part of a tract of land, his proof is limited to that part. *Jennings v. Meldrum*, 15 Oregon 629.

In trespass *qu. cl. fr.*, the defendant pleaded a general right to enter the plaintiff's land to cleanse a water course, which was the trespass complained of. It was held that this plea was not supported by evidence of the particular right to use the water course, and cleanse it, so as to drain the defendant's meadows. *Darlington v. Painter*, 7 Pa. St. 473.

In an action of trespass for breaking a close and destroying a milldam, evidence of trespass committed on a part of the dam without the close was held to be inadmissible. *White v. Moseley*, 5 Pick. (Mass.) 230.

In an action of trespass *qu. cl. fr.*, where a particular place is assigned in the declaration, the trespass must be proved as laid; otherwise, the defendant might be surprised. *Manning v. McDonell*, 3 Brev. (S. Car.) 15.

The town of M., in a deed conveying a beach to B., reserved the right to enter thereon, and take away gravel and sand, for the purpose of making and repairing highways in the town. A., under authority of the town, entered on the beach and carried away, for the purpose of repairing highways in the town, stones of a considerable size, imbedded in and mixed with the beach gravel. It was held in an action of trespass brought by B. against A., that A. could not give evidence that, in the town of M., the material which he took from the beach was, at the time of the making of the deed, and since is, universally known and called gravel, and that it was not there generally known as and called by any other name; but he might give evidence that said material was the same that the town of M. had always used for making and repairing highways. *Brown v. Brown*, 8 Met. (Mass.) 573.

1. **Distinct Acts Under Single Allegation.**—In an action for trespass *qu. cl.*, and with teams and men treading down the plaintiff's grass upon a certain day, evidence may be properly admitted of several distinct acts or entries, each of which might alone technically constitute a breaking, when these several acts of trespass or entries are upon the same close, upon the same day, and in pur-

suance of the same general purpose. *Cheswell v. Chapman*, 42 N. H. 47.

The plaintiff, after introducing evidence tending to prove the five distinct acts of trespass counted upon in the declaration, proceeded, against objection, to prove other acts and words not alleged, some of which were so connected with the acts declared upon as to form a part of the transaction, and most of which were independent of these acts and occurred on other occasions, during the period and about the time during which the defendant was said to have committed the several trespasses with which he was charged. It was held that these other acts and words were legitimate subjects of consideration, either in settling the amount of damages or determining the right of the plaintiff to recover. *Devine v. Rand*, 38 Vt. 621.

In an action of trespass, the plaintiff, by alleging trespasses to have been committed on a certain day, and on divers other days between that day and another day, makes time a descriptive part of the trespass, and opens the door for proof as to any trespass committed within that time and closes it as to all others. *Payne v. Green*, 10 Smed. & M. (Miss.) 507.

2. **Proof Confined to Allegations.**—If the plaintiff, in an action of tort for breaking and entering his close, counts on a trespass committed on divers days between two dates, and gives evidence of a single act of trespass committed at another time, he cannot be permitted also to prove a trespass within the times alleged. *Powell v. Bagg*, 15 Gray (Mass.) 507; *Joralimon v. Pierpont*, Anth. (N. Y.) 42.

Under a declaration alleging that the defendant placed large quantities of wood, coal, bricks, and rubbish on the plaintiff's close, and kept and continued them there until the commencement of the suit, but not alleging that the trespass was committed on divers days, evidence of two independent trespasses is not admissible. *Kendall v. Bay State Brick Co.*, 125 Mass. 532.

Under a complaint alleging that, on a day named, and on divers other days and times between that day and the commencement of the suit, the defendant's cattle broke into and upon the

there is no denial of the plaintiff's title or possession, it is not necessary to show it.¹ Allegations against joint trespassers must be proved as laid.² A variance is fatal.³

farm and land of the plaintiff and destroyed the growing crops thereon, it was held that it was competent for the plaintiff to prove any number of trespasses committed by the defendant's cattle, between the day alleged and the bringing of the suit. *Richardson v. Northrup*, 66 Barb. (N. Y.) 85.

In an action of trespass to lands, the declaration alleged that the defendant broke and entered into the plaintiff's lands, and trod down and destroyed the herbage, and cut down the trees, and dug up the ground, to the plaintiff's damage; and the plaintiff introduced evidence to prove that the defendant not only cut down the trees, but removed the wood; the court charged the jury that in estimating damages they might take into consideration the cutting and removal of the wood, if the trespass was one continued act. It was held that the evidence was inadmissible, and the charge erroneous. *Johnson v. Gorham*, 38 Conn. 513. Compare *Barnes v. Burt*, 38 Conn. 541.

1. In an action of trespass on land, if the defendant claims title under the person through whom the plaintiff claims, the plaintiff need not prove title in such person. The defendant, by relying on him, admits he has title. *McBurney v. Cutler*, 18 Barb. (N. Y.) 203.

In an action of trespass, where the defendant has not set up title, it is error to permit him to offer evidence of title. *Fidler v. Smith*, 10 Iowa 587.

In an action for breaking and entering the plaintiff's close, under an answer denying that the close belonged to the plaintiff, or that the defendant entered it, the defendant may show that the plaintiff had only an easement in it. *Smith v. Slocumb*, 11 Gray (Mass.) 280.

Where the defendant, in an action of trespass on land, does not claim title, he may not set up technical objections to the plaintiff's right to sue. *Mallett v. White*, 52 Conn. 50.

In trespass, where the answer does not traverse the plaintiff's possession or title, he is not put to prove his title, although the land is wild and vacant. *O'Reilly v. Davies*, 4 Sandf. (N. Y.) 722.

2. **Joint Trespassers.**—When several defendants are declared against jointly

for a trespass, if a joint trespass is proved, the plaintiff cannot waive that and give evidence of another trespass against one only; but a trespass may be proved, and the plaintiff recover against one only. *McCarron v. O'Connell*, 7 Cal. 152.

In an action of trespass against several defendants, if the plaintiff proves a joint trespass against part of them only, he cannot afterwards give evidence of another trespass by all, even against such part alone. *Snodgrass v. Hunt*, 15 Ind. 274.

In an action of trespass to chattels, it appeared that the plaintiff was sole owner of a part of the property injured, and part owner of the remainder, the acts of trespass being the same to both parts. It was held that there was no error in refusing to exclude evidence of the trespass to the property of which the plaintiff was only part owner, the defendant not having raised the question of ownership by his answer. *Lefebvre v. Utter*, 22 Wis. 189.

3. **Variance.**—In a declaration for erecting a building on a triangular piece of land, "which ought forever to remain open," the plaintiff proved such an easement in a piece of land in the shape of a parallelogram, which appeared to have been substituted by the parties for a right to pass over the triangular piece for the purpose of making repairs. It was held a variance, there being no allegation that the right to pass over had been obstructed. *Hill v. Haskins*, 8 Pick. (Mass.) 83.

In an action of trespass for taking goods, the defendant justified, as collector of a school tax, by virtue of a rate bill and warrant, and, in his plea, averred that he was appointed such collector on February 3d, 1838, "as by the record his appointment would appear." It was held that, although it might not have been necessary to refer to the record, yet, having done so, the variance was fatal. *McDaniels v. Bucklin*, 13 Vt. 279.

In an action of trespass against assessors, they justified, in a brief statement, as assessors of A.; but the evidence was of a parish of another corporate name. It was held a material variance. *Bangs v. Snow*, 1 Mass. 181.

In trespass to lands, under the code, the plaintiff may prove acts both within

X. DAMAGES—1. What Evidence Admissible.—In proving damages it is not necessary to show special damages to sustain the suit.¹ Evidence may be introduced showing the circumstances attending the perpetration of the alleged trespass.² The cases

and before the time alleged, if the court sees that the defendant has not been misled and is not prejudiced in his defense by the variance. *Relyea v. Beaver*, 34 Barb. (N. Y.) 547; *Debois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326; *Terpenning v. Gallup*, 8 Iowa 74.

Where a declaration in trespass avers the *locus in quo* to belong to the plaintiff, but the proof shows it to belong to the defendant, it is fatal. *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Jewett v. Foster*, 14 Gray (Mass.) 495; *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525; *Benton v. Beattie*, 63 Vt. 186; *Murray v. Webster*, 5 N. H. 391; *Pike v. Elliott*, 36 Ala. 69; *Marsh v. Berry*, 7 Cow. (N. Y.) 344.

Illustrations as to Allegata and Probata.—Where a declaration alleged a wrongful entry of a close, with other personal injuries by way of aggravation only, it was held that the plaintiff could not recover damages for the personal injuries, if he failed to establish the wrongful entry alleged, they being merely incident thereto. *Reed v. Peoria, etc., R. Co.*, 18 Ill. 403.

In trespass, where the unlawful breaking into the plaintiff's close is proved, it is not material to his right to recover, whether the matter of aggravation alleged is proved or not. *Halsey v. Matthews*, 3 Ind. 404.

The *Alabama* Code preserves the distinction between an action on the case and an action of trespass. Accordingly, under a count in trespass, evidence of an injury resulting from the negligence of the defendant will not authorize a recovery. *Pruitt v. Ellington*, 59 Ala. 454.

In trespass for taking the plaintiff's goods, it is no defense, under the general issue, that the sale by which the plaintiff obtained title to the goods was fraudulent. *Harrison v. Davis*, 2 Stew. (Ala.) 350.

Where a declaration in trespass alleges that the defendant took 176 bushels of corn, and the defendant, by his pleas, admits that "he took the corn in the declaration mentioned," it is unnecessary to prove the quantity. *Wells v. Wilson*, 3 Bibb (Ky.) 264.

Where the defendant forcibly took possession of the plaintiff's wheat field,

driving the latter away, and harvested and sold the grain, it was held, in an action for such taking and conversion, that the defendant could not introduce evidence to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages. *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189.

In an action of trespass to recover the value of certain liquors, where the defendant offered to prove that they were kept for sale by the plaintiff in violation of the law, it was held that as their status was a matter essential to determining their value, it was open to the defendant to show these facts. *Lord v. Chadbourne*, 42 Me. 429; 66 Am. Dec. 290.

Under a plea of not guilty, evidence is admissible to prove that the property claimed under an execution sale was not subject to execution, because covered by the allowances and exemptions to which a surviving wife was entitled, from the community property. *Leatherwood v. Arnold*, 66 Tex. 414.

Where the defendant pleads justification in trespass *qu. cl. fr.*, the proof must be co-extensive with the plea; and if he fails in proof of his justification to any part of the trespass, the plaintiff is entitled to a verdict without newly assigning the excess. *Berry v. Vreeland*, 21 N. J. L. 183.

In trespass *qu. cl.*, proof of a lease will not support a justification under a license. *Johnson v. Carter*, 16 Mass. 443.

In trespass for breaking the plaintiff's close and cutting down his trees, if the plaintiff fails to prove the cutting of his trees, he may still recover for the breach of his close. *Mundell v. Perry*, 2 Gill & J. (Md.) 193.

1. Damages Need Not Be Shown.—In an action for a wrongful entry upon lands of the plaintiff, no actual damage need be proved. *Smethurst v. Journey*, 1 Houst. (Del.) 196.

Where one constructed a dam, so as to flow back water on the land of another, the law presumes that the act is a damage, and no special damage need be shown in order to sustain a suit. *Woodman v. Tufts*, 9 N. H. 88.

2. Attending Circumstances.—In an action of trespass for the illegal taking

showing what, under varying circumstances, may be received in evidence are numerous and illustrative.¹

of goods by way of distress, after the trespass is proved, evidence may be admitted of the attendant circumstances, in order to guide the court in the assessment of damages. *Roamine v. Norris*, 8 N. J. L. 80.

A's sheep, while trespassing on B's land, commingled with B's sheep, and communicated to them a dangerous disease, of which many of them died, and no sufficient justification was shown for the trespass, it was held in an action of trespass *qu. cl.*, that evidence of such communication of disease, was admissible to affect the damages, and that B was entitled, in such action, to recover damages for the loss of his sheep, as well as for the breach of his close. In order to recover such damages, it was not necessary for B to prove that A had knowledge of the diseased state of his sheep, at the time the disease was imparted, but it was competent for him to prove such knowledge, to enhance the damages, without any allegation to that effect in the declaration. *Barnum v. Vandusen*, 16 Conn. 200.

1. **Insulting Words.**—In an action of trespass for taking a slave out of the immediate possession of the plaintiff, evidence of abusive language to the plaintiff at the time of the trespass, is admissible to show *quo animo* the act was done, and to enhance the damages. *Ratliff v. Huntley*, 5 Ired. (N. Car.) 545.

In trespass *qu. cl.*, insulting words used by the defendant to the plaintiff's wife, at the time of the trespass complained of, are admissible in evidence to show the character of the transaction. *Golding v. Williams, Dudley* (S. Car.) 92.

In an action for breaking and entering the dwelling house of the plaintiff, and doing other enormities to him, he cannot give evidence of an assault upon himself. *Sampson v. Coy*, 15 Mass. 493.

Other Cases.—Defendants in trespass having marked their cause "not for the jury," the court ordered judgment for the plaintiffs, and that the damages should be assessed by a jury. It was held, first, that the judgment did not preclude the defendants from introducing any evidence relevant to the subject of damages; second, that a release of a co-trespasser was admissible as

evidence of some payment by the party to whom it was given; and that, if it purported to acknowledge full satisfaction, it would, unless rebutted, reduce the damages to a nominal sum. If rebutted so far as to show that there was no full satisfaction, the damages would be reduced to the extent that it was payment. *Chamberlin v. Murphy*, 41 Vt. 110.

It is not admissible, in an action of trespass for taking corn, for the plaintiff to prove, for the purpose of enhancing the damages, that, in consequence of the trespass, he was compelled to work as a day laborer to procure other corn. *Sims v. Glazener*, 14 Ala. 695; 48 Am. Dec. 120.

In trespass for taking away property, and depriving the plaintiff of the use of it, the plaintiff may prove the value of the use during the time he was deprived of the possession. *Warfield v. Walter*, 11 Gill & J. (Md.) 80.

In an action of trespass for seizing and detaining the plaintiff's goods, loss of credit cannot be proved, unless it appears to be intimately connected with the act complained of, and unless the act appears to have been done with an aggravating and malicious intention to injure the party complaining. *Thomas v. Isett*, 1 Greene (Iowa) 470.

In an action of trespass against a sheriff, for seizing and selling the plaintiff's goods under a judgment against another person, the amount paid out of the proceeds of sale, for rent of the premises, cannot be received in evidence to abate the damages. *Dallan v. Fittler*, 6 W. & S. (Pa.) 323.

In an action of trespass for taking and detaining a ship, it was held, that the plaintiff was entitled to give in evidence a process in replevin by C, a third person, a replevin bond by D and E, as sureties, and a judgment thereon in favor of the defendant, and to prove that he, the plaintiff, had indemnified those sureties, for the purpose of showing that he became liable to the defendant for the amount of his claim against C, and that this sum ought to be the rule of damages. *Bird v. Clark*, 3 Day (Conn.) 272; 3 Am. Dec. 269.

In trespass by A against B, for taking out of his possession goods sold to him by C, B cannot give in evidence a

2. Mitigation of Damages.—Any facts or circumstances which were the inducement to a transaction which is the occasion of the action, are admissible in mitigation of damages.¹ Under this head

judgment against D (with the execution thereon), entered by confession under the *New Jersey* Rev. Laws, 634, § 18, in an action instituted before a justice of the peace, and without such an affidavit as is required by the act. *Sheppard v. Sheppard*, 10 N. J. L. 250.

Such judgment, though valid between the parties, has no operation against third persons, not even in mitigation of damages. But even for that purpose it is not admissible to show that property, illegally taken, was subsequently applied, without the assent of the owner, in satisfaction of a valid execution against him. *Higgins v. Whitney*, 24 Wend. (N. Y.) 379.

In trespass for taking and selling goods on execution, the cost price of such goods may be given in evidence. *McElrath v. Kintzing*, 5 Pa. St. 336.

In an action of trespass for taking and carrying away property of the plaintiff, evidence of any circumstances which impart to the property a particular value to the owner, is admissible to enable the jury to determine the injury sustained by its loss, immediately resulting from the wrongful acts of the defendants. *Burr v. Woodrow*, 1 Bush (Ky.) 602.

In an action of trespass, the plaintiff may prove special damages, if they are strictly in consequence of the trespass committed, or if the act done by the defendant, causing such special damages, constitutes a part of an entire transaction, of which the principal trespass was the commencement. *Damron v. Roach*, 4 Humph. (Tenn.) 134.

In trespass for breaking the plaintiff's house, and beating his wife, the court would not admit evidence of the beating of his wife. *Lawrence v. Phelps*, 2 Root (Conn.) 334.

In trespass *qu. cl. fr.*, against the defendant, for passing over the plaintiff's grounds, and affixing a handbill to his door, the contents of the handbill are a proper subject for the consideration of the jury in the estimation of damages, and they may be therefore set out in the declaration and proved. *Ogden v. Gibbons*, 5 N. J. L. 518.

In trespass for unlawfully entering the plaintiff's house under pretense of

searching for money stolen, the plaintiff may give evidence of an injury to character thereby, and it is immaterial whether such injury is alleged or not. *Anonymous*, Minor (Ala.) 52; 12 Am. Dec. 31.

In an action for assault and battery, in estimating the damages, the jury are not confined to the proof of actual pecuniary loss, but may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but his person, his peace of mind, and his individual happiness. *Taber v. Hutson*, 5 Ind. 322; 61 Am. Dec. 96.

Where the immediate injury to the plaintiff is the breaking of a leg, for which he brings an action for damages, it is proper to show the then and probable future conditions of the limb, but not the consequences of a hypothetical second fracture. *Lincoln v. Saratoga, etc.*, R. Co., 23 Wend. (N. Y.) 425.

1. Mitigation of Damages.—Facts and circumstances are admissible in evidence, in an action of trespass *qu. cl.*, by way of mitigation, which were the inducements to a transaction, even though they may happen to involve character. *Rhodes v. Bunch*, 3 McCord (S. Car.) 66.

In an action of trespass for pulling down a building, evidence that the building was peaceably taken down, and its materials preserved, in conformity with the directions of the commissioners of the township, during a period of great public excitement and disorder, with a view of saving the neighborhood from threatened violence, is admissible in mitigation of damages. *Reed v. Bias*, 8 W. & S. (Pa.) 189.

A constable who has taken property out of his precinct, by virtue of *mesne* process, and who is sued in trespass for such taking, may show, in mitigation of damages, that, having taken the property to a place within his precinct, he attached it there on the same process, as the property of the same debtor, subsequent to the commencement of the action of trespass against him. And it makes no difference that the plaintiff, in the action of trespass, is one who claims by virtue of a sale from such debtor, which sale was fraudulent

evidence as to the motive of the party charged with the commission of the trespass in question is competent.¹

3. What Damages Recoverable—*a*. ACTUAL DAMAGES.—Usually, in actions of trespass, the measure of the damages is the actual value of the property destroyed; such damages are given as a compensation to the damaged party for the injury done.² If

as to creditors. *Stewart v. Martin*, 16 Vt. 397.

Cases in Point.—*Ballard v. Leavell*, 5 Call (Va.) 531; *Sherry v. Schuyler*, 2 Hill (N. Y.) 204; *Hawthorne v. Siegall*, 88 Cal. 15; *Boling v. Wright*, 16 Ala. 664; *Perry v. Chandler*, 2 Cush. (Mass.) 237; *Huftalin v. Misner*, 70 Ill. 55; *Sawyer v. Jarvis*, 13 Ired. (N. Car.) 179; *Loewenberg v. Rosenthal*, 18 Oregon 178; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Willis v. Forrest*, 2 Duer (N. Y.) 310; *Corning v. Corning*, 6 N. Y. 97; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *McDonald v. Lightfoot*, Morr. (Iowa) 450; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168; 15 Am. Dec. 347; *Loomis v. Green*, 7 Me. 386; *Barnard v. Haworth*, 9 Ind. 103; *Wasson v. Canfield*, 6 Blackf. (Ind.) 407; *Bird v. Womack*, 69 Ala. 390; *Johnson v. Farwell*, 7 Me. 370; 22 Am. Dec. 203; *Collins v. Todd*, 17 Mo. 537.

1. As to Motive.—The spirit which actuates the party committing the trespass, enters largely into the question of damages, and it is competent to show that he acted without malice or recklessness. If the party against whom this evidence is received desires to have it limited to this legitimate purpose, he should ask an instruction accordingly. *Roth v. Smith*, 41 Ill. 315.

An admission by plaintiff's counsel, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from recovering vindictive damages, and therefore evidence on the part of the defendant, in the nature of a justification of the act, is admissible in the way, by way of mitigation of damages. *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141, *reversed* in 13 Johns. (N. Y.) 561; *Machin v. Geortner*, 14 Wend. (N. Y.) 239; *Powers v. Florance*, 7 La. Ann. 524; *Simpson v. McCaffrey*, 13 Ohio 508; *Caston v. Perry*, 2 Bailey (S. Car.) 104.

2. Actual Damages Recoverable.—In trespass for taking and carrying away sheep, the measure of damages is the market value of the sheep, and not their value to the plaintiff. *Gardner v. Field*, 1 Gray (Mass.) 151.

The damages for the destruction of a house on the premises is the cost of replacing it, and its value while that is being done. *Marks v. Culmer* (Utah, 1890), 24 Pac. Rep. 528.

A trespasser who knowingly takes stone from the land of another, is liable for the value of the stone after it has been quarried. *Cheaney v. Nebraska, etc., Stone Co.*, 41 Fed Rep. 740.

In trespass for removing soil and grass from plaintiff's land, the measure of damages is the value of the material removed, and it is error to instruct the jury merely that they shall assess plaintiff's damages at whatever sum they believe him entitled to from the evidence. *Flynt v. Chicago, etc., R. Co.*, 38 Mo. App. 94.

Where, after sale on execution against the purchaser of goods sold on condition, part of the property is returned to the seller, his measure of damages is the value of the use of such property during the time it is kept, and compensation for any injury between the time of taking and the restoration. *Fields v. Williams* (Ala. 1891), 8 So. Rep. 808.

In such case, though the land consists of a tract of six or seven acres, and the excavations cover only about three-fourths of an acre thereof, the owner has the right to recover for the depreciation in the market value of the entire tract. *Chicago, etc., R. Co. v. Willets*, 45 Kan. 110.

Where one agreed to supply a railroad company with timber for the construction of its road, and subcontractors under him entered on the plaintiff's land without authority, and cut down trees, and converted them into cross ties, which were afterwards delivered to the railroad company by the contractor, it was held that the plaintiff could recover from the railroad company the value of the ties. *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387.

The measure of damages for the wrongful taking of stone from a quarry, is the value of the stone after being cut and removed to its destination. *Baker v. Hart*, 52 Hun (N. Y.) 363; *St. Louis*

there are no circumstances of aggravation to lay the ground for exemplary damages, only compensatory damages are allowed.¹ Where there are joint defendants, the damages may be assessed jointly or severally.² Counsel fees and expenses of litigation are not included in the damages,³ neither is interest,⁴ nor trouble

Manganese Co. v. Miller (Ark. 1889), 11 S. W. Rep. 958; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Hutchinson v. Parker*, 64 N. H. 89; *Reynolds v. Braithwaite*, 131 Pa. St. 416; 25 W. N. C. (Pa.) 269; *George v. Rook*, 7 Mo. 149; *Cooper v. Maupin*, 6 Mo. 624; *Reynolds v. Chandler River Co.*, 43 Me. 513; *Plumer v. Prescott*, 43 N. H. 277; *Jackson v. Todd*, 25 N. J. L. 121; *Moats v. Witmer*, 3 Gill & J. (Md.) 118; *Kaley v. Shedd*, 10 Met. (Mass.) 317; *Jackel v. Reiman*, 78 Tex. 588; *Paul v. Linscott*, 56 N. H. 347; *Weston v. Gravin*, 49 Vt. 507; *Chicago, etc., R. Co. v. Willets*, 45 Kan. 110; *Heiligmann v. Rose*, 81 Tex. 222; *Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434; *Cate v. Schaum*, 51 Md. 299; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625; *Delamater v. Folz*, 50 Hun (N. Y.) 528; *Lewis v. Morse*, 20 Conn. 211; *Goodrich v. Foster*, 20 N. H. 177; *Collins v. Perkins*, 31 Vt. 624; *Lafon v. Dufrocq*, 9 La. Ann. 350; *Johnson v. Packer*, 1 Nott & M. (S. Car.) 1; *Howard v. Black*, 42 Vt. 258; *Clark v. Bardman*, 42 Vt. 667; *Hance v. Burke*, 73 Tex. 62; *Arnold v. Gaylord*, 16 R. I. 573; *Gilbert v. Kennedy*, 22 Mich. 5; *Henderson v. Lyles*, 2 Hill (S. Car.) 504; *Russell v. Blake*, 2 Pick. (Mass.) 505; *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 18; *Weston v. Dorr*, 25 Me. 176; 43 Am. Dec. 259; *Hammatt v. Russ*, 16 Me. 171; *McGann v. Hamilton*, 58 Conn. 69.

1. In actions of trespass, the measure of damages is the value of the property destroyed, unless the trespass is wanton and malicious, which is a question entirely for the jury, who may give vindictive damages. *Wylie v. Smitherman*, 8 Ired. (N. Car.) 236.

In trespass *de bonis asportatis*, where there are no circumstances of aggravation giving ground for vindictive or exemplary damages, the measure of damages is compensation to the plaintiff for his loss. *Hopple v. Higbee*, 23 N. J. L. 342.

Where the court, in an action of trespass for the destruction of a building, instructed the jury that if the defendants acted *bona fide*, under a claim of

right, doing no unnecessary or wanton injury, the value of the property destroyed was the proper and legal rule of damages; but if the transaction was of a different character, and the defendants acted wantonly and maliciously, the value of the property merely was not, of course, the rule of damages, but the jury might, in the exercise of sound discretion, allow something more. It was held that this instruction was correct. *Curtiss v. Hoyt*, 19 Conn. 154; *Walker v. Borland*, 21 Mo. 289; *Ziebarth v. Mye*, 42 Minn. 541; *Moore v. Baylis* (Supreme Ct.), 10 N. Y. Supp. 62; *Advance Elevator, etc., Co. v. Eddy*, 23 Ill. App. 352; *Marks v. Culmer* (Utah, 1890), 24 Pac. Rep. 528.

2. *United Society, etc. v. Underwood*, 11 Bush (Ky.) 265; 21 Am. Rep. 214; *Berry v. Fletcher*, 1 Dill. (U. S.) 67.

3. *Young v. Tustin*, 4 Blackf. (Ind.) 277; *Falk v. Waterman*, 49 Cal. 225.

4. **Interest Not Included.**—Under *Wisconsin Rev. St.*, § 4269, providing for the recovery, in an action for wrongfully cutting timber on plaintiff's land, of "the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition the same shall have been, at any time before the trial, while in possession" of defendants, it is error, in estimating damages, to allow interest to the time of the rendition of the verdict on such "highest market value." *Smith v. Morgan*, 73 Wis. 375.

Interest on the damages assessed by the jury is not allowable, and a judgment based on a verdict thus erroneously rendered, will be corrected by the appellate court as a clerical error. *Jean v. Sandiford*, 39 Ala. 317.

The law does not recognize interest as the exact measure of damages for the detention of property taken in trespass, in addition to its value. *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525.

Per Contra.—Where the seller purchases part of the property at the execution sale for a less price than its value, his measure of damages for such property is the price paid by him,

incurred from the time of injury to the time of judgment.¹ The measure of damages for timber cut down or destroyed, in the absence of malice, is usually the actual value of the timber at the time cut.²

with interest. *Fields v. Williams* (Ala. 1891), 8 So. Rep. 808.

In trespass, for taking the goods of the plaintiff, as well as in trover, the jury, in their discretion, may allow, besides the value of the goods at the time of the trespass, interest on the amount from that time to the judgment, by way of damages. *Beals v. Guernsey*, 8 Johns. (N. Y.) 446; 5 Am. Dec. 348.

1. The trouble incurred by the plaintiff in looking after the trespassers is not a ground upon which the damages can be increased in an action of trespass *qu. cl.* *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525; *McWilliams v. Morgan*, 75 Ill. 473; *Berry v. San Francisco, etc., R. Co.*, 50 Cal. 435; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Stean v. Anderson*, 4 Harr. (Del.) 209; *Donnell v. Sandford*, 11 La. Ann. 645; *Collier v. Arrington*, Phil. (N. Car.) 356; *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373; *Edwards v. Ricks*, 30 La. Ann. 926.

2. **Timber.**—One cutting and removing timber from land in ignorance that it was another's, is liable for the actual value of the timber used or destroyed. The case is different where one willfully commits a trespass on private property. *Shepherd v. Young*, 2 La. Ann. 238.

In an action of trespass, for cutting down timber trees, the rule of damages is the value of the timber when it is first cut down, and becomes a chattel. *Bennett v. Thompson*, 13 Ired. (N. Car.) 146; *Yarborough v. Nettles*, 7 La. Ann. 116.

Where a handsome shade tree standing in front of a lot temporarily used for mixing tar and gravel, but available and valuable as a site for a high class of residence buildings, is unlawfully, but not maliciously, so cut as to destroy it as an ornamental or shade tree, but not so as to kill it, or materially injure its value for timber or firewood, the measure of damages is the amount which the presence of the tree added to the value of the lot for any purpose in connection with which an ornamental shade tree is desirable. *Hoyt v. Southern New England Tel. Co.*, 60 Conn. 385.

Where, in an action for cutting down

a shade tree, the court finds that, "As an ornamental shade tree (for which purpose it had been planted by the ancestor of the plaintiffs, and was by them cared for and valued) it was worth \$150, and added at least that amount to the value of the lot," a judgment for \$150 is proper, as being the actual damage, without reference to the sentimental value placed on the tree by the plaintiffs, because planted by their ancestor, and visible from their residences. *Hoyt v. Southern New England Tel. Co.*, 60 Conn. 385.

In an action of trespass for cutting timber on vacant land, when it is proved that the defendant, in good faith, believed it was his own land, the verdict, if for the plaintiff, ought to be for the actual damages only. *Yahoola, etc., Min. Co. v. Irby*, 40 Ga. 479; *McKeen v. Gammon*, 33 Me. 187; *Thompson v. Burdsall*, 4 N. J. L. 170; *Foot v. Merrill*, 54 N. H. 490.

In an action of trespass by a proprietor of land for cutting and carrying away growing trees, the plaintiff should recover for the value of the trees, and for the injury occasioned by cutting them prematurely, and for the injury done to the land, with damages at the rate of six per cent. per annum. *Longfellow v. Quimby*, 33 Me. 457; *Webber v. Quaw*, 46 Wis. 118; *St. Croix Land, etc., Co. v. Ritchie*, 78 Wis. 492; *Mhoon v. Greenfield*, 52 Miss. 434; *Coxe v. England*, 65 Pa. St. 212.

In an action of trespass for cutting timber on land claimed by plaintiff, defendant's evidence tended to show that some of the timber which he cut did no more than pay the expense of cutting and marketing, but it appeared that as to some of it a small profit was realized. It was held that the court erred in instructing the jury that "If you find that the value of the timber standing was less than the cost of cutting it and getting it to market, then, upon that element of damages, there is not any margin; if you find it was less or equal, then there would be no damages upon that element. If you find that the land was not decreased in value by the taking of timber off of it, then there is no damage arising from the diminishing of the value of the estate. So that, if you

b. CONSEQUENTIAL DAMAGES.—The wrongdoer is responsible for the consequences which flow immediately from his wrongful or negligent acts; and the responsibility is not relieved by the fact that the consequences of the injurious act could have been prevented by the care or skill of the injured party.¹

c. NOMINAL DAMAGES.—Sometimes only nominal damages are recovered where no substantial injury is shown, but a right of action exists in the plaintiff.²

should find that the value of the estate was not diminished by taking off the timber, and that the timber, after it was taken off, did not exceed in value the cost of taking it off and getting it where it would be available in the market, then your verdict would be for the defendant." *Miller v. Wellman*, 75 Mich. 353; *Nixon v. Stillwell*, 52 Hun (N. Y.) 353; *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 571.

1. *Phares v. Stewart*, 9 Port. (Ala.) 336; 33 Am. Dec. 317; *Welch v. Percy*, 7 Ired. (N. Car.) 365; *Hawthorne v. Siegel*, 88 Cal. 159; *Burson v. Cox*, 6 Baxt. (Tenn.) 360; *Kirby v. Douglas*, 75 Ill. 443.

But Not Where Too Remote.—Where W. is wrongfully in possession of a building, and is doing business therein, and M., who is rightfully entitled to the possession of the building, irregularly ousts W. therefrom, W. is not entitled to recover damages for the loss of the prospective profits which he might have made, had he been permitted to carry on his business in said building. *Mitchell v. Woods*, 17 Kan. 26.

In an action to recover damages for unlawfully breaking and entering the dwelling house of the plaintiff, and removing the roof therefrom, whereby the property and family of the plaintiff were exposed to the inclemency of the weather, and the plaintiff became sick, it was held that if the plaintiff fails to prove the trespass, no recovery can be had on account of any of the alleged consequential damages. *Brown v. Lake*, 29 Ohio St. 64.

In an action of trespass against a railway company for invading plaintiff's garden and laying its tracks within thirty feet of the house, its charter prohibiting it from taking any dwelling house, garden, etc., without the owner's consent, no recovery can be had for hazard to the house by the proximity of the tracks and the danger from fire. *Fore v. Western N. Car. R. Co.*, 101 N. Car. 526.

Damages for injury to one's farming operations, by seizing and carrying away his stock used in farming, are too remote and speculative to be recovered in trespass. *Nelms v. Hill*, 85 Ala. 583.

2. *Benson v. Waukesha*, 74 Wis. 31; *Williams v. Brown*, 76 Iowa 643; *Green v. Buckingham*, 26 Ill. App. 240; *Flynt v. Chicago, etc., R. Co.*, 38 Mo. App. 94; *Taylor v. Hayes*, 63 Vt. 475; *Murphy v. Fond du Lac*, 23 Wis. 365; 99 Am. Dec. 181; *Kidder v. Kennedy*, 43 Vt. 717.

Cases in Point.—In an action of trespass against an officer for taking goods from the plaintiff's possession, on execution against a third person, an authority to do so from the owner of the goods does not constitute justification to the officer. The plaintiff is entitled to nominal damages for the injury to his possession. *Rogers v. Fales*, 5 Pa. St. 154.

Where a defendant in trespass fails to support by proof a special plea in bar, a trespass or cause of action of the general nature set forth in the declaration is admitted, though not precisely as laid in all their particulars and variety. In such case, the plaintiff is entitled to recover nominal damages, unless he shows by proof, that more has been sustained. *Rich v. Rich*, 16 Wend. (N. Y.) 663.

In an action of trespass *de bonis asportatis*, a default is simply an admission on the part of the defendant that he is unable to make a complete defense, and entitles the plaintiff to nominal damages only, unless he proves a just claim for a larger sum. *Rose v. Gallup*, 33 Conn. 338.

The plea of *liberum tenendum*, admitting the possession and the trespass charged in the plaintiff's pleadings, the plaintiff is entitled to a verdict, though only for nominal damages. *Caruth v. Allen*, 2 McCord (S. Car.) 226.

In trespass *qu. cl.*, if a trespass is proved, the plaintiff is entitled to some

d. DOUBLE AND TREBLE DAMAGES.—Double and treble damages are, in special cases, frequently allowed by statute.¹ Such statutes are construed strictly,² and the facts must be so pleaded as to bring them within the statute.³

e. EXEMPLARY OR PUNITIVE DAMAGES.—Exemplary or punitive damages may be allowed by statute; in trespass these are usually for a wanton and malicious trespass, or for some oppressive act or wanton recklessness, and,⁴ sometimes, for an act done with-

damages, though nominal; and unless they are given, a new trial will be granted. *Norvell v. Thompson*, 2 Hill (S. Car.) 470.

Where in a suit for wrongfully destroying papers belonging to plaintiff, defendant alleges that the papers belong to him, and the jury find for the defendant, it is conclusive of the fact that plaintiff is not entitled even to nominal damages. *Lunsford v. Deitrick*, 85 Ala. 496.

In an action for the possession of land, where plaintiff's title is denied, and title and possession are shown to be in the plaintiff, he may recover nominal damages for simple trespass, though no issue involving the question of simple trespass is submitted, and the charge made by the complaint is forcible trespass accompanied by slander of title. *Harris v. Sneed*, 104 N. Car. 369.

1. Double Damages.—The *Missouri* act of 1825, "for preventing certain trespasses," provides that the offender "shall pay to the party injured, the sum of five dollars, and also double damages, together with costs." A verdict of "guilty," under the statute finding damages, authorizes the entry of judgment for five dollars, and double the damages found. *Withington v. Young*, 4 Mo. 564; *Tankersly v. Wedgworth*, 22 Ala. 677; *Bell v. Clark*, 30 Mo. App. 224.

Treble Damages. — *Loewenberg v. Rosenthal*, 18 Oregon 178; *Pierce v. Spring*, 15 Mass. 489; *Campbell v. Conover*, 26 Ill. 64; *Chicago, etc., R. Co. v. Watkins*, 43 Kan. 50; *Barnes v. Jones*, 51 Cal. 303; *Russell v. Myers*, 32 Mich. 522; *Wilson v. Gunning*, 80 Iowa 331; *Newcomb v. Butterfield*, 8 Johns. (N. Y.) 342; *Lowe v. Harrison*, 8 Mo. 350; *Welsh v. Anthony*, 16 Pa. St. 254.

2. Strictly Construed.—*Shiffer v. Broadhead*, 134 Pa. St. 539; *Lindell v. Hannibal, etc., R. Co.*, 25 Mo. 550; *La-beaume v. Woolfolk*, 18 Mo. 514; *Ew-*

ing v. Leaton, 17 Mo. 465; *Barnes v. Jones*, 51 Cal. 303; *McCloskey v. Powell*, 8 Pa. Co. Ct. Rep. 22; *Russell v. Myers*, 32 Mich. 522; *McCloskey v. Ryder* (Pa. 1891), 21 Atl. Rep. 150.

3. *Newcomb v. Butterfield*, 8 Johns. (N. Y.) 342; *Lowe v. Harrison*, 8 Mo. 350; *Welsh v. Anthony*, 16 Pa. St. 254; *Tankersly v. Wedgworth*, 22 Ala. 677.

4. For Malice or Oppression.—*Pruett v. Cheltenham Quarry Co.*, 33 Mo. App. 18. In an action of trespass the measure of damages is the value of the property destroyed, unless the trespass is wanton and malicious, which is a question entirely for the jury, who may give vindictive damages. *Wylie v. Smitherman*, 8 Ired. (N. Car.) 236.

In a civil action of assault and battery, the plaintiff may recover exemplary damages, notwithstanding the defendant has been convicted and fined in a criminal prosecution for the same offense. *Corwin v. Walton*, 18 Mo. 71; 59 Am. Dec. 285.

For a review of the American and English authorities for vindictive damages in trespass for injuries to the person, see *Towle v. Blake*, 48 N. H. 92.

Malicious Abuse of Process.—In an action of trespass for a malicious abuse of process and sale of the plaintiff's property, the plaintiff may recover exemplary damages, though the process was not intended for him. *McBride v. McLaughlin*, 5 Watts (Pa.) 375; *Mitchell v. Billingsley*, 17 Ala. 391; *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Duncan v. Stalcup*, 1 Dev. & B. (N. Car.) 440; *Reynolds v. Braithwaite*, 131 Pa. St. 416; 25 W. N. C. (Pa.) 269.

In an action of trespass for damages upon the execution of a distress warrant, the plaintiff may recover exemplary damages, and special damages, if stated in the declaration; and under such special damages evidence of the loss from the interruption of the business is proper; and if books of peculiar value, and files of papers indispensable

out malice, where the act constitutes a trespass under the statute or otherwise.¹

f. AGGRAVATION OF DAMAGES.—Evidence to show aggravation of damages is in the nature of that going to show exemplary or punitive damages.²

XI. INSTRUCTIONS.—Instructions to the jury in cases of trespass must conform to the rules of law governing the charge of the court in other forms of action.³

XII. VERDICT AND JUDGMENT—1. Generally.—A judgment for the plaintiff concerning property is not conclusive of the title of

to such business, but of little value in the market, are unnecessarily or maliciously taken, it may be shown in aggravation of damages. *Sherman v. Dutch*, 16 Ill. 283.

Where a fence belonging to a plaintiff was wrongfully included in land set off by the sheriff in executing a writ of possession, and the fence was torn down and carried away by defendant, the person in whose favor the decree was rendered, the fact that defendant was placed in possession under a lawful writ would shield him from liability for exemplary damages. *Jackel v. Reiman*, 78 Tex. 588.

Wounding Feelings.—In an action for damages for forcibly entering plaintiff's house, and removing therefrom certain property without his consent, it is proper to instruct that if the jury are satisfied that defendants removed the property as alleged, and their manner on making such removal was insulting and overbearing, so as to naturally wound plaintiff's feelings, they shall find for plaintiff for such an amount as they may deem proper; "such damages being called vindictive damages, or smart money." *Loftus v. Maxey*, 73 Tex. 242.

For Violation of Statute Without Malice.—For the landlord to go upon the rented premises before the lease has expired, break open a locked outhouse, and take therefrom the tenant's cotton, against his protest and remonstrance, is a trespass for which punitive damages may be awarded, though the cotton be bound for supplies which the landlord has furnished, and though such forcible seizure be made for the purpose of selling it, and though it be fairly sold, and the proceeds applied to the debt for supplies. *Shores v. Brooks*, 81 Ga. 468.

1. *Perkins v. Hackleman*, 26 Miss. 41; 59 Am. Dec. 243, holds that a party

intending to commit trespass on public lands, and by mistake committing trespass upon lands of private individuals, is liable for such trespass in penal damages.

A party supposing himself to be cutting timber on his land, but by mistake cutting on another's land, is liable for the casual damage done. *Perkins v. Hackleman*, 26 Miss. 41; 59 Am. Dec. 243.

2. *U. S. v. Magoon*, 3 McLean (U. S.) 171; *Druse v. Wheeler*, 22 Mich. 439; *Higby v. Williams*, 16 Johns. (N. Y.) 215; *Pendleton v. Davis*, 1 Jones (N. Car.) 98; *Curtiss v. Hoyt*, 19 Conn. 154; *Tift v. Culver*, 3 Hill (N. Y.) 180.

3. The question as to whether certain instructions are error or not, largely depends upon the particular facts of the case. In the following cases the question was whether the instructions were proper or not: *Spades v. Murray*, 2 Ind. App. 401; *Fischer v. Coons*, 26 Neb. 400; *South Baltimore Co. v. Muhlbach*, 69 Md. 395; *Willis v. Hudson*, 72 Tex. 598; *Garey v. Woodward*, 127 Pa. St. 251; 24 W. N. C. (Pa.) 314; *Goldsmith v. State*, 86 Ala. 55; *Parker v. Chancellor*, 73 Tex. 475; *Pickering v. Shearer*, 11 Gray (Mass.) 153; *Woodman v. Francis*, 14 Allen (Mass.) 198; *Phillips v. Kent*, 23 N. J. L. 155; *Turner v. Beatty*, 24 N. J. L. 644; *Lawton v. Cardell*, 22 Vt. 524; *Goodwin v. Jack*, 62 Me. 414; *Greening v. Keel*, 72 Tex. 207; *Roche v. Lovell*, 74 Tex. 191; *Brooke v. O'Boyle*, 27 Ill. App. 384; See also Am. Dig. (1889), p. 3698, § 43; *Olsen v. Upsahl*, 69 Ill. 273; *Ogden v. Jennings*, 62 N. Y. 526; *Roach v. Trottie*, 50 Ga. 251; *Jones v. Welch*, 15 Ala. 306; *New Haven Steam Boat, etc., Co. v. Vanderbilt*, 16 Conn. 420; *Wilderman v. Sandusky*, 15 Ill. 59; *Harding v. Fahey*, 1 Greene (Iowa) 377; *Lovier v. Gilpin*, 6 Dana (Ky.) 321; *Emanuel v. Cocke*, 6 Dana (Ky.) 212.

the plaintiff to the property.¹ In trespass to realty the verdict is conclusive as to the possession.² A judgment as to personalty transfers the property in the chattel to the trespasser, if the damages paid include their value.³ The verdict must be certain and definite, so that judgment may be entered correctly.⁴ A

1. Judgment Not Conclusive.—In an action of trespass *qu. cl. fr.*, the defendant pleaded the general issue, and filed a notice that he claimed and should give evidence of title to the *locus in quo*. The jury found the defendant guilty, assessed damages, and also found that the defendant had no title to the land described in the plaintiff's declaration; and judgment was rendered for the plaintiff. It was held that the judgment was not conclusive proof of the plaintiff's right of property in said land, nor of his title to maintain a writ of entry to recover the land from the defendant in that action. *Wade v. Lindsey*, 6 Met. (Mass.) 407.

If the record of a judgment in trespass *qu. cl.*, does not show the contrary, it will be presumed that the question of title was not raised. *Maxam v. Wood*, 4 Blackf. (Ind.) 297.

In a previous action of trespass for entering a large tract of land, described by metes and bounds, and cutting timber, the defendant pleaded that the place in which the timber was cut belonged to him, and there was a verdict and judgment for the plaintiff. In a subsequent action of ejectment, it was held that the record of the previous action of trespass was not evidence that the title to the entire tract was adjudged to be in the plaintiff; but it was evidence that the title to the place only where the trespass was committed was adjudged to be in the plaintiff, and what part that was must be proved *aliunde*. *Dunckel v. Wiles*, 11 N.Y. 420.

Judgment for plaintiff by agreement of the parties, for damages in trespass, wherein the defendant denied the trespass and set up a right of way, is evidence of a trespass upon some part of the land only, and not that he had not such a right of way. *Howard v. Albrow*, 100 Mass. 236.

2. Verdict Showing Possession.—*Owings v. Gibson*, 2 A. K. Marsh. (Ky.) 515; *Hale v. Monroe*, 28 Md. 98.

Upon disclaimer by a defendant in trespass to try title who was not in possession at the commencement of the action, judgment should be for plaintiff for the land, and for such defendant for

costs. *Johnson v. Schumacher*, 72 Tex. 334.

A judgment for the defendant in an action of trespass *qu. cl. fr.*, does not necessarily settle anything beyond the particular facts of the trespass sued for; the title to another part of the close or a subsequent right of possession may have been left undetermined. *Morse v. Marshall*, 97 Mass. 519.

3. For verdict as to chattels vesting title, see *Loomis v. Green*, 7 Me. 386.

If a trespasser takes a chattel into his own possession, and the owner sues, and recovers damages for the specific chattel so taken and detained, the recovery and execution will change the property by operation of law, so as to transfer it to the trespasser. *Curtis v. Groat*, 6 Johns. (N. Y.) 168.

Where the plaintiff, in trespass *qu. cl.*, for cutting down wood of the plaintiff, which the defendant burned into charcoal on the plaintiff's land, recovers judgment, this does not entitle the defendant to the coal, the recovery being for the trespass merely, and not for the specific article. *Curtis v. Groat*, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204.

Where one commits a trespass by seizing personal property, and then sells it to another, and the owner recovers judgment against the trespasser for the value of the property and for the tortious taking, such judgment changes the property, and the former owner cannot seize or claim it. *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

The defendant's title under satisfaction of a judgment in trespass for a conversion of chattels takes effect by relation from the time of the conversion. *Smith v. Smith*, 51 N. H. 571.

It is the satisfaction of a judgment in trespass only, that vests in the trespasser the title to goods seized under a void process, not the judgment *per se*. *Goldsmith v. Stetson*, 39 Ala. 183; *Schindel v. Schindel*, 12 Md. 108; *Jones v. McNeil*, 2 Bailey (S. Car.) 466.

4. Verdict Must Be Clear and Definite.—*Jones v. Owens*, 5 Strobb. (S. Car.) 134; *Hanly v. Levin*, 5 Ohio 227.

verdict is sometimes directed by the court.¹ The verdict may cure a deficiency in evidence.²

In an action of trespass, where it is admitted that defendants occupied the premises for a year, and the defense is a contract for a lease for that period, by which defendants agreed to pay \$400 rent, there is no error in giving judgment for plaintiff, though the verdict is in form for \$400 "for rent" and \$50 damages; the lease not, in fact, being a binding contract. *Johnson v. Park* (Ky. 1891), 17 S. W. Rep. 273.

A verdict was found in favor of the plaintiff "for two undivided thirds of the land in the declaration mentioned." It was held that the damages found were for the detention of the two-thirds, and not of the whole. *Hines v. Greenlee*, 3 Ala. 73.

In trespass *qu. cl.*, the defendants pleaded, first, leave and license for a special purpose; second, leave and license generally; and the verdict was found for the plaintiff on the issue raised by the first plea, and for the defendant on that raised by the second plea. Judgment was rendered for the defendant. It was held that the judgment was right. *Redman v. Taylor*, 3 Ind. 144.

A verdict in the alternative, in an action of trespass, is no ground for an arrest of judgment. *Johnson v. Packer*, 1 Nott & M. (S. Car.) 1.

1. If, in an action of trespass, the facts attempted to be proved do not, in law, amount to a trespass, the court should, on defendant's motion, so inform the jury. *Crookshank v. Kellogg*, 8 Blackf. (Ind.) 256.

In trespass to try title to lands held under a deed alleged to be a mortgage, prosecuted by an administrator for the benefit of his intestate's estate, it is proper for the court, upon adjudging the deed to be a mortgage, to award plaintiff a writ of restitution, and order the amount due defendants to be charged as a lien upon the land until paid in the ordinary course of administration of the estate. *Jackson v. Jones*, 74 Tex. 104. See also *Dodge v. Richardson*, 70 Tex. 209; *Jones v. Andrews*, 72 Tex. 5; *Stout v. Taul*, 71 Tex. 438; *Am. Dig.* (1888), p. 1314, §§ 36-39.

2. **Verdict Curing Evidence.**—In an action for damages for maliciously killing plaintiff's dog, a general verdict for the plaintiff is not inconsistent with a special finding that the dog

was in the habit of leaving plaintiff's premises, barking at travelers on the highway, and frightening horses. *Jacquay v. Hartzell*, 1 Ind. App. 500.

When a petition states a cause of action in damages to real estate, and also asks for an injunction to restrain the defendant from trespassing thereon, and the jury find that the defendant had trespassed on plaintiff's land as alleged in the petition, but that he had abandoned his trespasses before suit was begun, there was no error in rendering judgment for the plaintiff for nominal damages and costs, though refusing to perpetuate the injunction which had been allowed at the commencement of the action. *Curtis v. Paggett* (Kan. 1891), 27 Pac. Rep. 109.

So, where the evidence, in such case, tended to prove that the house, in which the trespass was alleged to have been committed, belonged to one C., and had been occupied by one P. until a short time before the alleged trespass, and that then P. had removed to another town, taking most of his household goods, but leaving a few, which were of less frequent use, and at the time P. left, the plaintiff moved his goods into the house and made the garden, but did not in fact commence residing in the house until some months after, and the jury were instructed, that they must be satisfied, that the plaintiff, at the time of the alleged trespass, had the exclusive possession of the house, and the jury returned a verdict for the plaintiff, it was held that the verdict could not be disturbed. *Lawton v. Cardell*, 22 Vt. 524.

A collector of a school district, who makes a levy previous to a demand of the tax, is a trespasser; but a judgment in his favor will not be reversed, merely because it does not appear from the justice's return that it was proved that such demand was made previous to the levy. *Oakley v. Van Horn*, 21 Wend. (N. Y.) 305.

Cases Concerning Verdict.—Where, in an action for trespass to real estate, defendants justify under a chattel mortgage, by virtue of which they entered to seize property without process, and the jury find specially that defendants entered peaceably, but did some damage, and that they did not believe their entry was lawful, but do not find

2. As to Joint Trespassers.—In making a verdict, the jury cannot discriminate in assessing damages against joint trespassers according to the relative enormity of the actual acts of each.¹ A general verdict for the plaintiff applies to all defendants.² All the persons engaged in trespass need not be joined;³ and of those joined, part may be found innocent, and part guilty;⁴ and of

whether the entry was authorized or not, and where the record does not contain the evidence, a verdict for plaintiff will not be set aside. If the property was in the peaceable possession of plaintiff, who denied defendants' right of seizure, it was the duty of the latter to desist, or, if their entry was lawful, but their subsequent conduct wrongful, plaintiff could recover. *Concanan v. Boynton*, 76 Iowa 543.

A court of equity will not compel an innocent plaintiff, whose right in a passage way has been encroached upon by the building of a wall therein to his substantial injury, to sell the right at a valuation; but will compel the wrongdoer to restore the premises, as nearly as may be, to their original condition, and to pay the damages sustained by the plaintiff pending the suit. *Tucker v. Howard*, 128 Mass. 361.

The issue on the *vi et armis* in trespass is only a matter of form, and in practice nothing is ever found on that issue. *Buntin v. Duchane*, 1 Blackf. (Ind.) 56.

In trespass for killing a slave, if the general issue is proved, and the trespass is proved, the jury should find a verdict for the plaintiff for nominal damages at least. *Bradley v. Flewitt*, 6 Rich. (S. Car.) 69.

In trespass for cutting timber trees, final judgment by default cannot be rendered for the amount of the penalty fixed by statute in *Alabama*; it not being allowable at common law, and not specially authorized by the statute. *Byrne v. Haines*, Minor (Ala.) 286.

A verdict of "guilty" and damages assessed, in an action of trespass, to which "not guilty" and pleas of justification are pleaded, is sufficient as to all the issues offered. *Goyne v. Howell*, Minor (Ala.) 62.

1. Jury Cannot Discriminate Against Joint Trespasser.—*Carney v. Reed*, 11 Ind. 417; *Layman v. Hendrix*, 1 Ala. 212; *Shultz v. Hunter*, 2 Browne (Pa.) 233; *Duane v. Mierkin*, 2 Browne (Pa.) 238. But see *Byrne v. Riddell*, 3 La. Ann. 670; *May v. Bliss*, 22 Vt. 477; *Crawford v. Morris*, 5 Gratt. (Va.) 90.

Where several defendants in trespass plead one plea, and a joint verdict and damages are found against all, judgment must be rendered jointly against all; and if the verdict is set aside as to part, no judgment can be rendered against the others. *Cunningham v. Dyer*, 2 T. B. Mon. (Ky.) 50.

A plea of justification, for several defendants, in an action of trespass, must be sustained as to the whole or none; a part cannot be convicted and a part acquitted under it. *Gleason v. Edmunds*, 3 Ill. 448.

In trespass against joint defendants, it is error to render separate judgments against two defendants found guilty. *Fields v. Williams* (Ala. 1891), 3 So. Rep. 808.

In trespass against two, the evidence authorized exemplary damages against one; the other, if he is shown to have acted in concert with him, is liable to the same extent. *Hair v. Little*, 28 Ala. 236.

Where there are separate verdicts, in joint trespass, against several defendants for one entire act, the plaintiff can have but one judgment against all, and must elect *de melioribus damnis*. *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Livingstone v. Bishop*, 1 Johns. (N. Y.) 290; 3 Am. Dec. 330.

In trespass against several jointly, it is error for the judge, after the issue is made up and a jury sworn, to order the jury, at the instance of the plaintiff, to find a verdict of acquittal as to one of the defendants. *Gearheart v. Smallwood*, 5 Mo. 452.

2. Cane v. Watson, Morr. (Iowa) 52; *Sutliff v. Gilbert*, 8 Ohio 405.

In trespass on judgment against several defendants, if one is arrested on a *ca. sa.*, and discharged by the plaintiff, or by his consent, the court will discharge the other defendants from custody, and order satisfaction to be entered of record, upon their stipulation to bring no action on account of their arrest and imprisonment. *Allen v. Craig*, 14 N. J. L. 102.

3. Mandlebaum v. Russell, 4 Nev. 551.

4. Part May Be Acquitted.—*Gillerson*

those guilty, it is allowable by statute sometimes to assess the damages due by them respectively.¹ If separate verdicts are found, judgments against one cannot be entered against another.² There can be but one satisfaction.³ The judgment must be supported by the verdict.⁴ One co-trespasser may be a competent witness for the other.⁵

v. Small, 15 Me. 17; *Drake v. Barrymore*, 14 Johns. (N. Y.) 166; *Blackburn v. Baker*, 7 Port. (Ala.) 284; *Sheldon v. Kibbe*, 3 Conn. 214; 8 Am. Dec. 176; *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Owens v. Derby*, 3 Ill. 26.

If in trespass against A, B, and C, there is a verdict for the defendants, which is right as to C, but which as to the other is unsupported by the evidence, a new trial should be granted to the plaintiff on condition that he enters a *noll pros.* as to C. *Truell v. Wrink*, 6 Blackf. (Ind.) 249.

1. *Henry v. Sennett*, 3 B. Mon. (Ky.) 311; *Beyersdorf v. Sump*, 39 Minn. 495; *Simpson v. Perry*, 9 Ga. 508.

In trespass against several defendants, where one of them was not served with process, and on trial before a justice of the peace, judgment was rendered against those who had been summoned, and upon an appeal taken by them to the circuit court, judgment was rendered, not only against them, but also against the defendant not summoned, it was held that, as to him, the judgment was a nullity. *Prichard v. Campbell*, 5 Ind. 494.

2. Where several defendants sever in their pleadings, and separate verdicts are found against them, if the plaintiff remits damages as to some of the defendants, judgment cannot be entered up against them for damages found against a co-defendant. *Goldring v. Hall*, 9 Port. (Ala.) 169.

In an action of trespass against several defendants, the law of *New Jersey* does not require the judge to allow them separate trials, or to direct the jury to assess the damages severally against each defendant. *Allen v. Craig*, 13 N. J. L. 294.

3. **But One Satisfaction.**—When two persons jointly commit a trespass, the injured party may sue them severally; yet he can have but one satisfaction, and when separate judgments are recovered he must elect on which recovery he will seek it. *Blann v. Crocheron*, 20 Ala. 320.

When the injured party has sever-

ally sued two or more joint trespassers, and recovered separate judgments against them, his right to elect *de melioribus damnis* is not determined until he sues out execution, or accepts satisfaction of one of the judgments. *Snider v. Croy*, 2 Johns. (N. Y.) 227; *Fields v. Law*, 2 Root (Conn.) 320.

4. **Judgment Supported by Verdict.**—In an action of trespass to try title, the defendants not only pleaded not guilty, but asserted title in themselves and prayed relief against the plaintiffs. The court below instructed the jury as to the form of a general verdict for either side, and moreover charged them, in case the plaintiffs had failed to make out their title and defendants had established theirs, to return as their verdict a finding "for the defendants on their plea in reconvention." The verdict was a mere general finding "for the defendants;" but the court not only rendered a general judgment that the plaintiffs take nothing, but decreed title to the defendants, and canceled the plaintiffs' claim as a cloud, etc. It was held that the judgment was not supported by the verdict. *Johnson v. Newman*, 35 Tex. 166.

5. **Co-Trespasser as Witness.**—A co-trespasser is a competent witness for a defendant in trespass. *West v. Bolton*, 4 Vt. 558.

In a joint action of trespass against several who sever in their defense, they cannot demand separate trials, for the purpose of using a co-defendant as a witness. *Dougherty v. Dorsey*, 4 Bibb (Ky.) 207.

Whether the case of a joint defendant in trespass shall be put severally to the jury, in order to enable him, if acquitted, to become a witness, is a question solely in the discretion of the judge presiding at the trial. *Dorrell v. Johnson*, 17 Pick. (Mass.) 263; *Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

A verdict in favor of the defendant, in an action against one of two joint trespassers, which would be conclusive evidence in a subsequent action against him by the same plaintiff, will not be conclusive in an action by such plain-

XIII. TRESPASS TO TRY TITLE—1. Nature of the Action.—Trespass *quare clausum fregit* was not at common law an action to try titles, but it may be so used when the ownership of the premises is in dispute. In some states, by statute, this action is expressly allowed for the purpose of trying title.¹

2. Grounds of the Action.—To sustain the action, it is necessary to prove some injury or trespass, however small, damage being the gist of the action.²

tiff against the co-trespasser. *Sprague v. Waite*, 19 Pick. (Mass.) 455.

1. *Waterman on Trespass*, vol. 2, § 1140 *et seq.* In *Texas*, trespass to try title is intended to serve the purposes of ejectment elsewhere. It lies against a railroad company asserting a claim to a right of way; and this, although there is a statutory summary mode of condemning lands for railroad purposes. *Hays v. Texas, etc., R. Co.*, 62 Tex. 397. It is the proper action in which to adjudicate conflicting claims to land. *Thomson v. Locke*, 66 Tex. 383.

2. **Injury Must Be Shown; When the Action Lies.**—*Cornneil v. Bickley*, 1 McCord (S. Car.) 466; *Underwood v. Sims*, 2 Bailey (S. Car.) 81. An action of trespass to try title may be sustained by showing that the defendant was a trespasser within the last ten years before suit brought. *Binda v. Benbow*, 9 Rich. (S. Car.) 15.

The gist of the action of trespass to try title and recover damages is the injury to the plaintiff's possession. The value of the use and occupation is to be set off against the value of the improvements made in good faith. The petition must allege that they were so made; the rightful owner is entitled to those made without his consent. *Bonner v. Wiggins*, 52 Tex. 125.

To sustain an action of trespass to try title to land, some injury, however small, must be proved. A bare threat to prevent the enjoyment of rights in land is a sufficient injury. *Massey v. Trantham*, 2 Bay (S. Car.) 421.

But in *Texas* it is not necessary to prove an actual trespass by the defendant except in cases where there is no contest as to the title but only as to the boundaries, and where plaintiff, having the superior title, charges defendant with trespassing on his land. *Viesca v. Wyche*, 3 Woods (U. S.) 336.

Commissioners of streets, appointed under an act of the legislature, cannot maintain trespass to try title for lands

alleged to have been dedicated to the use of the inhabitants as streets, and which have been inclosed by persons claiming under the supposed donor. The proper remedy for obstructing a highway is by indictment; and if a private way is claimed, the action should have been case. *Georgetown v. Taylor*, 1 Brev. (S. Car.) 129.

Under the federal act providing that the form and modes of proceeding in suits of common law in the courts of the *United States*, shall be the same as those used, at the time of the passage of the act, in the highest courts of those states respectively, an action of trespass *qu. cl. fr.*, with notice that it was brought "as well to try titles as to recover damages," may be maintained in the circuit court of the *United States*, in *Alabama*, to recover possession of lands, the *Alabama* statute having substituted that form of action for ejectment. *Sears v. Eastburn*, 10 How. (U. S.) 187.

The validity of a will under which the defendants claim cannot be contested in an action of trespass to try title to lands devised; a direct proceeding to set aside the will is necessary. *Acklin v. Paschal*, 48 Tex. 147.

Where persons in possession of land as tenants disown the relation, and claim adversely, trespass to try title will lie against them. *Hall v. Haywood*, 77 Tex. 4.

Trespass to try title will lie for the owner of the soil of a road, over which the defendant has a right of way; but the sheriff can only give possession subject to the easement or servitude. *Jerman v. Mathews*, 2 Bailey (S. Car.) 271.

Trespass does not lie to contest, not the defendant's right to the possession of land, but his right to cultivate it in the particular manner he has adopted. *Burnham v. Van Gilder*, 34 Mich. 246.

The possession of a purchaser, under a bond for title, or of his assignee with notice, is not adverse to the vendor,

3. Title to Maintain.—One in possession may bring trespass to try title for every entry on his land by another.¹ The action, therefore, may be brought by one who does not have the legal title.² To entitle the plaintiff to recover, even against a naked possessor, he must show that he is the absolute owner of the land in controversy, not only as against the defendant, but as against all other persons.³ The plaintiff must recover on the strength of

who, in default of payment of the price, may recover the land by action of trespass to try title. *Keys v. Mason*, 44 Tex. 140.

1. *Waterman on Trespass*, vol. 2, § 1141; *Watson v. Hill*, 1 Strobbh. (S. Car.) 78. Trespass to try title may be maintained without regard to who has actual possession of the land in dispute. *Thomson v. Locke*, 66 Tex. 383.

A record of probate proceedings showed a valid administration, an order to sell land at public or private sale, a return of sale—not, however, showing whether public or private—and an order of confirmation. It was held that the title *prima facie* vested in the purchaser, and was sufficient to enable him to maintain trespass to try title. *Erhart v. Bass*, 54 Tex. 97.

Prior occupancy will enable a party to maintain an action of trespass to try title against a wrongdoer without title. *Alexander v. Gilliam*, 39 Tex. 227.

Bare possession is sufficient to maintain an action of trespass to try title against a mere trespasser. *Caplen v. Drew*, 54 Tex. 493.

A remainder-man cannot, before the death of the life tenant, maintain trespass to try title, since he has not a possessory title. *Cooke v. Caswell*, 81 Tex. 678.

Under *Paschal's Texas Dig.*, art. 5303, one who, as pre-emptor, has procured and filed a survey of vacant land on which he has settled, may maintain an action of trespass to try title. *Buford v. Gray*, 51 Tex. 331.

2. By One Having Equitable Title.—*Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534. Not by mortgagee against mortgagor. *Martin v. Parker*, 26 Tex. 253. Not by an assignee by assignment not under seal. *Ansley v. Nolan*, 6 Port. (Ala.) 379; *Easterling v. Blythe*, 7 Tex. 210; 56 Am. Dec. 45; *Miller v. Alexander*, 8 Tex. 36; *Martin v. Parker*, 26 Tex. 253.

Evidence that an administrator was appointed for the estate of a former owner of the land; that he was ordered to sell the land; that he reported

having done so; that his report was confirmed; and that he received from the purchaser payment of the purchase-money, is sufficient to show an equitable title in the purchaser to enable him to sustain the action, though no administrator's deed is produced. *Butler v. Brown*, 77 Tex. 342.

A sale under a power of attorney to sell the county claims of the principal, "or any land that may be secured thereby," vests such equitable rights in the purchaser as, under *Paschal's Texas Dig.*, art. 5303, will enable him to maintain trespass to try title against a trespasser. *Hermann v. Reynolds*, 52 Tex. 391.

The doctrine that one whose land has been conveyed by the unauthorized act of an agent will be presumed, from his silence, to have ratified the sale, applies only to cases in which the owner asserts an equitable right, and has no application, when, in trespass to try title, he relies on his legal title. *Moss v. Berry*, 53 Tex. 632.

In trespass to try title, the defendant cannot show in defense an outstanding equity, unless a connection thereof with himself be established. *Fitch v. Boyer*, 51 Tex. 336.

8. *Hooper v. Hall*, 35 Tex. 82; *Tally v. Thorn*, 35 Tex. 727.

The assignee of a bond to convey land can recover against a mere trespasser, though the purchase-money recited in the bond as its consideration has not been paid, where it appears that the note given therefor has been transferred by the vendor, and cannot be found. *Wright v. Dunn*, 73 Tex. 293. See also *Goode v. Jasper*, 71 Tex. 48; *Clay Co. Land, etc., Co. v. Wood*, 71 Tex. 460.

It devolves on the plaintiff to show title in himself, and, until he makes a *prima facie* case, the defendant is not required to offer any evidence at all. *Brown v. Roberts*, 75 Tex. 103.

Defendant is not estopped to show better title than common origin, from which both trace title, but it is not sufficient merely to raise a doubt as to

his own title, and not on the weakness of that of his adversary.¹ A *prima facie* paper title is sufficient, if the defendant fails to prove title.² If the plaintiff relies on an adverse title, he must show that the full statutory time has run.³ Where the defendant shows title, then the plaintiff must, besides a *prima facie* case, prove every fact necessary to show an absolute title.⁴ The premises in dispute should be exactly described.⁵ The plaintiff need not go back of the source from which he and the defendant claim.⁶

4. Defenses.—Peaceable possession at the time the suit was brought is a sufficient defense unless the plaintiff shows a title.⁷ The defendant cannot show paramount title in another to defeat the purchaser of his own title at a sheriff's sale,⁸ nor may he

which is the paramount title. *Martin v. Ranlett*, 5 Rich. (S. Car.) 541; 57 Am. Dec. 770; *Riddle v. Bickerstaff*, 50 Tex. 155.

1. Plaintiff Recovers on Strength of His Own Title.—*Simpson v. McLemore*, 8 Tex. 448; *Dalby v. Booth*, 16 Tex. 563; *Kinney v. Vinson*, 32 Tex. 126; *Harlock v. Jackson*, 1 Treadw. Const. (S. Car.) 135; *Toomer v. Purkey*, Mill (S. Car.) 323; 12 Am. Dec. 634; *Gambling v. Prince*, 2 Nott & M. (S. Car.) 138; *Hughes v. Lane*, 6 Tex. 289; *Young v. Watson*, 1 McMull. (S. Car.) 449; *Sims v. Randal*, 1 Brev. (S. Car.) 85.

Where plaintiff shows a regular chain of title running back to the common source of both titles, and defendant fails to connect himself with the common source, judgment should be for plaintiff. *Tapp v. Corey*, 64 Tex. 594.

2. Prima Facie Paper Title Sufficient.—*Montgomery v. Carlton*, 56 Tex. 361. In an action of trespass to try title, it is not indispensable that the plaintiff should show a perfect indefeasible estate in fee simple, to authorize a recovery against one who can establish no legal right either of property or possession. *Lewis v. Goguette*, 3 Stew. & P. (Ala.) 184.

In an action of trespass to try title by a purchaser of land sold on execution, evidence having been given of possession of the land accompanied by acts of ownership by the defendant in execution, prior to the possession of the defendant in trespass, it was held, on error, not to have been an assumption of a fact, for the court to charge the jury that the possession and improvements of the defendant in execution vested in him such a legal title as to enable him to maintain trespass against one

ousting him. *Badger v. Lyon*, 7 Ala. 564.

In an action of trespass to try title, the plaintiff showing title to an undivided interest in the land, may recover as against a defendant who is a mere trespasser, although an intervenor shows title to the remaining interest. *Roosevelt v. Davis*, 49 Tex. 463. Compare *Guilford v. Love*, 49 Tex. 715.

In an action of trespass to try title, the petition need only state a *prima facie* case in favor of the plaintiff. So held, where claimants, as heirs of W. and wife, omitted to state whether W. died testate, or what estate they claimed in the land, or whether W. was ever married. *Ufford v. Wells*, 52 Tex. 612.

The fact that plaintiffs received a certificate for the land in controversy is sufficient to authorize a decree in their favor, in the absence of any showing that they had parted with the title, or that defendants had a better title. *Lemberg v. Cabaniss*, 75 Tex. 228.

3. Hood v. Palmer, 7 Rich. (S. Car.) 138.

4. Brown v. Roberts, 75 Tex. 103; *Leland v. Eckert*, 81 Tex. 226.

5. Bohny v. Petty, 81 Tex. 524; *Devine v. Keller*, 73 Tex. 364; *Roche v. Lovell*, 74 Tex. 191.

6. Martin v. Ranlett, 5 Rich. (S. Car.) 541; 57 Am. Dec. 770.

7. Linthicum v. March, 37 Tex. 349; *Dalby v. Booth*, 16 Tex. 563.

In trespass to recover possession, the plaintiff is entitled to recover, although the defendant is in possession of less than is declared for. *White v. Guirons*, Minor (Ala.) 331.

8. McElwee v. Beason, 2 Rich. (S. Car.) 26; *Sumner v. Palmer*, 10 Rich.

show an equitable title as against a legal title;¹ he may set up any claim, the effect of which is to defeat the title set up by plaintiffs.²

5. Parties.—The action should be brought in the name of the real parties, and against the party in possession.³ If brought against the tenant, the real owner may come in and defend.⁴ Those having similar interests in same property may bring the action,⁵ but one tenant in common cannot against a co-tenant,⁶ neither can those having separate and distinct rights of action to distinct lands join in one action.⁷ Anyone having an interest in the land with the defendant, can be made a party.⁸ A state

(S. Car.) 38; *Hallett v. Eslava*, 2 Stew. (Ala.) 115; *Jones v. Perkins*, 1 Stew. (Ala.) 512.

In an action of trespass to try title, a defendant who denies possession and claims title by a sale under execution against the plaintiff, will not be heard to object to the validity of the title prior to the plaintiff's possession. *Pearson v. Flanagan*, 52 Tex. 266.

1. *William v. Robertson*, 1 Brev. (S. Car.) 201. But see *Neill v. Keese*, 5 Tex. 23; 51 Am. Dec. 746; *Yellow Pine Lumber Co. v. Carroll*, 76 Tex. 135; *Lemberg v. Cabaniss*, 75 Tex. 228; *Johnson v. Timmons*, 50 Tex. 521; *Roberson v. DuBose*, 76 Tex. 1.

2. **Defenses.**—The defendant may show that the plaintiff claims under a deed obtained by fraud. *Price v. M'Geed*, 1 Brev. (S. Car.) 373; *McKamey v. Thorp*, 61 Tex. 648. He may show a superior title in a third party. *Hewitt v. Patrick*, 26 Tex. 326; *Adams v. House*, 61 Tex. 639. He may show that he has a title although the purchase-money has not been paid, *Hewitt v. Patrick*, 26 Tex. 326; *Pope v. Clarke*, 2 Strobb. (S. Car.) 361; also that he holds title by notorious, unmo- lested, or adverse possession. *Mazyck v. Birt*, 2 Brev. (S. Car.) 155; *Smoke v. Smoke*, 10 Rich. (S. Car.) 433.

3. *Bonner v. Greenlee*, 6 Ala. 411. Trespass may lie against a landlord for the entry of a tenant. *Binda v. Benbow*, 11 Rich. (S. Car.) 24.

4. *Crosby v. Floyd*, 2 Bailey (S. Car.) 116.

In *South Carolina*, in an action of trespass to try title, the landlord may, by leave of the court, be made a co-defendant with his tenant to defend his title; but the court has no authority to dismiss the original wrongdoer, and substitute a stranger in his stead, without the consent of the party in-

jured. *Evans v. Hinds*, 2 Hill (S. Car.) 527.

5. Who May Bring the Action.—The widow of an intestate may maintain an action of trespass to try title to lands of her intestate, without joining her co-heirs; and no advantage can be taken of her suing alone, except by plea in abatement. *McFadden v. Haley*, 1 Brev. (S. Car.) 96.

A purchaser from one of several co-heirs may maintain trespass to try title, without joining the other co-heirs; at least, the question as to the necessity of joining them cannot be raised by plea in abatement. *Perry v. Walker*, 1 Brev. (S. Car.) 103.

In trespass to try title by the sole heir of an intestate, the administrator is a proper party plaintiff. *Cassidy v. Kluge*, 73 Tex. 155; *Northcraft v. Oliver*, 74 Tex. 162.

An heir, in possession of land, may, without administration, maintain trespass for injury to crops growing thereon. *Houston, etc., R. Co. v. Knapp*, 51 Tex. 569.

Under the *Texas* probate laws of 1876, an administrator, suing alone as such may maintain an action of trespass to try title without making the heirs parties. *Bogges v. Brownson*, 59 Tex. 417; *Burdett v. Haley*, 51 Tex. 540; *Shannon v. Taylor*, 16 Tex. 413.

6. A tenant in common cannot maintain trespass to try titles, against a co-tenant, without showing an actual ouster. *Jones v. Perkins*, 1 Stew. (Ala.) 512; *Foster v. Foster*, 2 Stew. (Ala.) 356.

7. *Harris v. Preston*, 10 Ark. 201.

8. In an action of trespass to try title, instituted against a mortgagor in possession, the mortgagee, if entitled to the right of entry, may be admitted as a party defendant. *Noble v. Coleman*, 16 Ala. 77.

cannot maintain the action, for it is a rule of law that a state cannot be disseised.¹

6. Pleading—*a*. THE DECLARATION.—The declaration must describe the land with particularity.² It should set it out by abutments,³ but reference to surveys may be sufficient.⁴ Objections to the declaration should be taken advantage of before plea,⁵ unless the uncertainty be carried into the verdict.⁶ It will be presumed that plaintiff had possession at the time of the commencement of the suit, though that should be averred.⁷ The declaration is in

Although, in an action of trespass to try title, the plaintiff is not required to make any other party defendant than the one claiming and holding the land sued for; if, by amendment, he seeks to enforce a mortgage, he must make all the purchasers from the mortgagor after the mortgage parties defendant, so as to adjust the equities between them, and in the several tracts claimed by each. *Miller v. Rogers*, 49 Tex. 398.

Where, in trespass to try title, defendant asks that his vendor be made a party, the latter should be served with a copy of the defendant's answer and cross-bill. *Crain v. Wright*, 60 Tex. 515.

In trespass to try title, where the pretended real owner of the land is let in, under the rule of court, to defend the title of the defendant, as his tenant, and where the tenant himself could not, under the proof, dispute or resist the plaintiff's title, it is sufficient to entitle the plaintiff to a verdict, if he shows that the pretended landlord is not now the true owner of the land. *Goudelock v. Massey*, 2 Strobb. (S. Car.) 187.

1. *State v. Arledge*, 1 Bailey (S. Car.) 551. See also *State v. Stark*, 3 Brev. (S. Car.) 101.

2. **Declaration.**—*Sturdevant v. Murrell*, 8 Port. (Ala.) 317. A declaration in trespass to try title, describing the land as "the south half of the east half of the southwest quarter section," etc., is sufficiently certain as to boundary and quantity. *Sawyer v. Fitts*, 4 Stew. & P. (Ala.) 365.

A declaration for trespass *qu. cl.*, containing no averment of title or assertion that the action is to recover possession or try titles, may be allowed. *Trash v. Johnson*, 6 Port. (Ala.) 458.

In trespass to try title, the indorsement, "that the action is brought as well to try titles as to recover dam-

ages," is sufficient. *James v. Tait*, 8 Port. (Ala.) 476.

In an action of trespass to try title to land, the following is a sufficient description of the premises sued for, viz.: "The south half of section 11, township 15, range 9, with the exception of 80 acres at the west end, and a lot donated for a schoolhouse in Coosa land district." *Heifner v. Porter*, 12 Ala. 470.

3. *Broughton v. Broughton*, 4 Rich. (S. Car.) 491.

4. *Croft v. Rains*, 10 Tex. 520. Where the petition in trespass to try title first describes the land by metes and bounds, and alleges it to be a part of M. survey, a subsequent allegation that the controversy is whether the parcel of land above described is in the G. survey or the M. survey, may be treated as surplusage. *Boydston v. Sumpter*, 78 Tex. 402; *Goldman v. Douglass*, 81 Tex. 648.

5. In an action of trespass to try title to land, a demurrer to an allegation in the complaint claiming title by a nuncupative will was properly sustained. *Furrh v. Winston*, 66 Tex. 521.

Averments that plaintiff is the owner in fee simple of certain land, and that defendant is setting up a pretended claim thereto, authorize, on general demurrer, the intendment that plaintiff is entitled to the possession of the premises. *Rains v. Wheeler*, 76 Tex. 390.

6. *Ware v. Bradford*, 2 Ala. 676; 36 Am. Dec. 427. Where the wrong number of the lot was cured by verdict, see *Hanmer v. Eddins*, 3 Stew. (Ala.) 192.

7. *Whiteside v. Branch Bank*, 10 Ala. 249. In trespass to try title, an allegation that the plaintiff was in possession on the first of January, and that the defendant entered with force and arms on the second, was held to be a sufficient allegation of possession at the time of the ouster. *Parker v. Hag-*

form of trespass *qu. cl. fr.*¹ It must state one cause of action,² and should show how the title was obtained.³ The *allegata* and *probata* must correspond.⁴

b. THE PLEA OR ANSWER.—The defendant may make a full defense under the plea of the general issue;⁵ but if he claims some defense not involved in a denial of the plaintiff's title, he must plead it.⁶ The defendant may deny the trespass, and so admit the

gerty, 1 Ala. 632; *Rains v. Wheeler*, 76 Tex. 390.

1. *Carwile v. House*, 6 Ala. 710; *Wade v. Converse*, 18 Tex. 233.

2. In a suit to recover possession of lands, the plaintiff alleged that he was the owner in fee on April 1st, 1851, when he was ejected by the defendant, who still continued in possession. He then charged that the defendant, on or about the same day, and on divers other days, broke and entered the premises, dug up the soil, cut and carried away timber, and converted the same to his own use; wherefor he demanded judgment that the defendant be removed from and the plaintiff restored to the possession of the premises, and that he recover damages for the use and for the injuries so done thereto. A general answer was put in. On the trial, the plaintiff, on the motion of the defendant, was required to elect, on which of the claims he would proceed. It was held that no injustice was done by this decision, because there were two distinct causes of action and the proof necessary to sustain them would be inconsistent and incongruous. *Budd v. Bingham*, 18 Barb. (N. Y.) 494.

3. In an action of trespass to try title, a petition which states that the land was purchased by plaintiff from the state, and alleges that he had complied with the law in every respect, is not subject to the general demurrer, although it is defective, in that it fails to state specifically how plaintiff obtained his title, and to show with sufficient particularity that the requirements of law had been complied with, since such defects can only be reached by special exception. *Leigh v. DeGanahl* (Tex. 1891), 16 S. W. Rep. 1037.

4. *Turner v. Ferguson*, 39 Tex. 505; *Byler v. Johnson*, 45 Tex. 509.

5. *Ayres v. Duprey*, 27 Tex. 593. In trespass to try title, a general denial puts in issue the plaintiff's right to recover. *Harlan v. Haynie*, 9 Tex. 459.

In an action of trespass to try title, a plea of the Statute of Limitations does not deprive the defendant of any de-

fense available under the plea of not guilty. *Refugio v. Byrne*, 25 Tex. 193.

In trespass to try title, under a plea of "not guilty," the defendant is permitted to give in evidence, special matter of defense. *Punderson v. Love*, 3 Tex. 60.

6. *Affirmative Relief.*—Affirmative relief in an action of trespass to try title cannot be granted a defendant upon the plea of not guilty. *St. Louis, etc., R. Co. v. Prather*, 75 Tex. 53.

In trespass to try title by the grantee of a purchaser from the county of school lands against one who was a settler thereon at the time of the sale by the county, to recover possession of the land, the settler cannot depend on a plea of not guilty. He must plead specially that he was an actual settler when the lands were sold, that he desired to purchase, and must offer to purchase on the terms of the sale by the county. *Perego v. White*, 77 Tex. 196.

Where a defendant, in an action of trespass to try title, claimed in right of his wife as heir, and also as tenant, by prescription under the Statute of Limitations, it was held that the two pleas were not inconsistent. *Smith v. De La Garza*, 15 Tex. 150; 65 Am. Dec. 147.

In an action of trespass to try title, the plaintiff claiming as sole heir of S., the grantee of the land under the Mexican government, the defendant answered, claiming, as administratrix, a half interest in the land by donation of S., made in good faith and for a valuable consideration to T., her intestate, in 1882, and pleaded that S. cohabited with D., the plaintiff's mother, in 1818, and then separated, after which the plaintiff was born, and S. never again cohabited with D.; but that D. afterwards cohabited with V. and N. and others, and was generally profligate; that S. acquired the land after his separation from D., wherefor the land was subject to his donation in 1832. It was held that the answer was insufficient; that the matters pleaded had no

plaintiff's title,¹ or he may deny the title, or he may admit the trespass, disclaiming title and tendering damages.² If he desires to claim the value of improvements made, this must be set up in the pleadings.³

legal significance and could not in any way affect the rights of the parties in the suit. *Teal v. Sevier*, 26 Tex. 516.

In actions of trespass to try titles, the defendant is not required to put in any other plea than that of not guilty, but if he wishes to assert an independent, equitable right, not involved in the issue as to title directly in controversy, he must present the facts by proper averments, and bring the necessary parties before the court to enable it to grant the relief to which he may be entitled; this cannot be done merely by the answer "not guilty." *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657.

1. *McCarron v. O'Connell*, 7 Cal. 152.

2. *Harlan v. Haynie*, 9 Tex. 459. On defendant's answer by disclaimer, a judgment of recovery for plaintiff, but with costs to defendant, is correct. *Tate v. Wyatt*, 77 Tex. 492.

The establishment of a boundary line of the plaintiff's land is necessary in every action of trespass to try title, where he establishes his claim to only part of the land sued for, and is an issuable fact in such case without any special pleading for that purpose; but where by pleading to the action for the entire tract, and a failure to disclaim as to any part, the defendants set up in law a claim to the whole, this fact is not in issue under the pleadings. *Kœnigheim v. Miles*, 67 Tex. 113.

3. *Rogers v. Bracken*, 15 Tex. 564; *Stephens v. Westwood*, 25 Ala. 716.

Improvements.—Allowance is properly made for improvements by defendant where plaintiffs have for more than forty years failed to assert their title, and it does not appear that defendant knew that the possession of the one from whom he purchased was not adverse. *Boothe v. Best*, 75 Tex. 568.

The grantee of the husband under an invalid power of attorney from the wife, is entitled to compensation for improvements, where the husband, as executor of the wife, with power to sell and invest in other land, retains the land given in exchange during the minority of plaintiff. *Cardwell v. Rogers*, 76 Tex. 37.

To justify a charge on lands for improvements made in good faith, it is not

necessary that the purchaser show a complete chain of title. *Thompson v. Jones* (Tex. 1889), 12 S. W. Rep. 77.

In trespass to try title, a verdict giving to each defendant the same amount for improvements made is unwarranted, where a certain witness testifies that the improvements of the respective defendants were of different values, and the court finds that defendants proved the values as stated by such witness. *Johnson v. Schumacher*, 72 Tex. 334.

Upon the issue of improvements made in good faith, it was not error to permit defendants to show that they were ignorant of plaintiff's existence, and of her claim to the land. *Polk v. Chaison*, 72 Tex. 500.

A defendant in trespass to try title, or his assignee, making improvements after suit brought, does so at the risk of losing them if the suit is decided against him. This is so, though the premises have been sequestered by plaintiff, and subsequently replevied by defendant. *Henderson v. Ownby*, 56 Tex. 647; 42 Am. Rep. 691.

The operations of a statute fixing the rights, with reference to improvements, of the parties to an action of trespass to try title, are not to be extended beyond their letter. An unauthorized attempt to award damages to the defendant is void. *Van Valkenburg v. Ruby*, 68 Tex. 139.

In trespass to try title by the widow and daughter of a deceased owner, the jury found for the daughter and against the widow. They also found the value of the permanent improvements made in good faith to be \$1,800, and of defendants' use and occupation \$1,500. The court charged the daughter with the full value of the improvements, and gave her credit for the whole use and occupation, and rendered judgment against her for \$300. It was held that though error, the error was in defendant's favor. She should have been charged with only two-thirds of the improvements, \$1,200, and credited with two-thirds of the use and occupation, \$1,000; and the judgment against her should have been but \$200. *Nichols v. Nichols*, 79 Tex. 332.

7. Evidence—*a*. ADMISSIBILITY.—The admissibility of evidence in trespass to try title is governed by the usual rules of evidence. For a variety of cases illustrating what may be, and what may not be, admitted in evidence, see note 1.

1. Evidence Held Admissible.—Evidence has been held admissible in the following cases:—proceedings in bankruptcy as to the property owned by a bankrupt at the time of bankruptcy, *Hernndon v. Davenport*, 75 Tex. 462; *Carothers v. Alexander*, 74 Tex. 309; notice served by the defendant claiming title and rent, *Herbert v. Hanrick*, 16 Ala. 581; testimony of executor as to the purchase of land at a sheriff's sale in an action between the devisees and executor, *Bennett v. Kiber*, 76 Tex. 385; transcript of the probate court proceedings where the plaintiffs claim through an administrator's sale, *Snow v. Starr*, 75 Tex. 411; books of a surveyor showing that application to purchase has been made to him, *Taylor v. Burke*, 66 Tex. 643; a deed conveying land in controversy for the grantees therein named, *Lindsay v. Hoke*, 21 Ala. 542; an unconditional certificate issued by a county board of land commissioners in an action between those holding under such certificates and those holding under a conditional certificate, *Capp v. Terry*, 75 Tex. 391; a contract showing who owned land held by a patent, *Roberson v. Du Bose*, 76 Tex. 1; releases executed after the suit has been brought for the purpose of curing defects in the deeds, *Ballard v. Carmichael* (Tex. 1891), 17 S. W. Rep. 393; an authenticated copy of the judgment under which judgment was made, *Stevell v. Lowry*, 2 Brev. (S. Car.) 135; a plat made from a survey without notice to the adverse party upon the question of location and boundary if fortified by the oath of the surveyor, *Keenan v. Keenan*, 7 Rich. (S. Car.) 345; a deed to the defendant executed a few days before trial for the purpose of curing a defect in the title, *Walker v. Emerson*, 20 Tex. 706; 73 Am. Dec. 207; evidence showing that the conveyance was a mere sham to defraud creditors, *Darst v. Trammell*, 27 Tex. 129; an affidavit made before the commencement of the suit that he did not rely upon his landlord's title, *Powell v. Haley*, 28 Tex. 52; a patent as to the genuineness of the certificate on which it is issued: so also field notes to proving a survey made under the certificate, *Kimbrow v. Hamilton*, 28 Tex. 560; a deed of a foreign guardian of minor

heirs made under order of the court, though inoperative to pass title, to show the claim of title by those holding under it, *Burns v. Goff*, 79 Tex. 236; the record of probate proceedings, where land was sold in an action involving title to the land, *McCamant v. Roberts*, 80 Tex. 310; evidence showing the calling of a certain tract before the papers showing a tract were put in, *Boydston v. Sumpter*, 78 Tex. 402; a deed of partition between an executor and one of the plaintiffs when the defendants claim under a different source of title, *Snow v. Starr*, 75 Tex. 411; a deed executed by an attorney in fact, though the authority of the attorney is not shown, where it is the common source of title, *Glover v. Thomas*, 75 Tex. 506; the duplicate of an original certificate, *Ansaldue v. Schwing*, 81 Tex. 198; *Jobe v. Ollre*, 80 Tex. 185.

Where a decree of partition between heirs of one under whom the defendant claims, is in evidence, it is competent to prove a previous parol partition corresponding to the decree of partition. *Warren v. Fredericks*, 76 Tex. 647.

Evidence as to the actions or declarations of a tenant well in possession are incompetent to show want of title in another. *Warren v. Fredericks*, 76 Tex. 647.

Under the general issue, the defendant may give in evidence a lease from one, under whom the plaintiff claimed, executed prior to the conveyance to the plaintiff. *Anderson v. Harris*, 1 Bailey (S. Car.) 315.

Evidence Held Not Admissible.—Evidence of statements in regard to land by one in possession, while negotiating for its purchase, where the person making them did not sustain any relation to the plaintiff which would make the declarations binding on him. *Warren v. Fredericks*, 76 Tex. 647; *Bullock v. Wilson*, 3 Port. (Ala.) 338.

The sheriff's return to the execution cannot be received to contradict his deed by showing that there has been no sale; so evidence that the purchase-money has not been paid is inadmissible. *Hairston v. Hairston*, 1 Brev. (S. Car.) 305.

A bare assertion of ownership, unaccompanied by long possession. *Hern-*

b. BURDEN OF PROOF.—If the plaintiff makes out a *prima facie* case, the burden of showing title is then on the defendant.¹

c. WEIGHT AND SUFFICIENCY OF TESTIMONY.—In trespass to try title, the question may arise as to the value of conflicting surveys,

don v. Davenport, 75 Tex. 462; Bennett v. Kiber, 76 Tex. 385.

An unacknowledged instrument executed by an administrator after the close of administration to show intention. Utzfield v. Bodman, 76 Tex. 359.

Evidence that land included in the plaintiff's patent under which he claimed, was never served under the patentee's certificate, but that the surveyor's field notes were made under another certificate and transferred to the patentee, unaccompanied by proof that the defendant's location was anterior to the patentee's and that the field notes were not made upon and served under a certificate, is inadmissible. Styles v. Gray, 10 Tex. 503; Barth v. Green (Tex. 1890), 15 S. W. Rep. 112; Murrell v. Wright (Tex. 1890), 15 S. W. Rep. 156; Richardson v. Dallas (Tex. 1891), 16 S. W. Rep. 622; Capp v. Terry, 75 Tex. 391; Smith v. Gillum, 80 Tex. 120.

1. Where the plaintiff supports his title by a grant *prima facie* valid, the burden of proof is on the defendant to show that the instrument is valid. Smith v. Gillum, 80 Tex. 120.

In trespass to try title, a recital in a deed to the plaintiff, and introduced by him in evidence, that the title conveyed had passed through certain *mesne* conveyances, is *prima facie* evidence against a defendant claiming title from a common source; and where the defendant introduces no evidence on the question whether either of the recited conveyances was ever made, the plaintiff is entitled to recover. Burk v. Turner, 79 Tex. 276.

In an action of trespass to try title, a survey under a valid certificate will prevail against a patent granted on a subsequent survey, in the absence of any proof by the patentee of a prior location under his survey. Hollingsworth v. Holshausen, 25 Tex. 628.

The evidence of an unconditional land certificate issued by a county board of land commissioners to the assignee of a conditional certificate, and a report as to the person to whom the certificate was issued, cannot be overcome by the entry in the register required to be kept by the commissioner

of claims of all certificates presented to him by the commissioner of the general land office, which entry showed its issue to the assignor. Capp v. Terry, 75 Tex. 391.

In trespass to try title, where the plaintiff claims under a patent from the United States government to himself as the legal vendee of an Indian reservee under the treaty of March 24th, 1832, and the defendant claims under an older patent from the government, the plaintiff must prove the location of the Indian reservee, as well as that he succeeded to the rights of such reservee. Stephens v. Westwood, 20 Ala. 275.

In an action to try titles to land, it appeared that the plaintiff had possession a length of time sufficient to raise the presumption of a grant, prior to the peaceable possession of the defendant for a shorter period, under a peaceable entry. It was held that, in the absence of any paper title held by either party, the plaintiff must prevail. Hallett v. Eslava, 3 Stew. & P. (Ala.) 105.

A patent issued by the United States for land originally entered by the patentee, and not void on its face, cannot be collaterally impeached, in an action of trespass to try title, by the production of the certificate showing an assignment thereof to another before the issuing of the patent. Masters v. Eastis, 3 Port. (Ala.) 368.

Admissions.—Admissions by the defendant, the party in possession, that rent is owing are such admissions of the plaintiff's title as puts the burden on the defendant. Samuels v. Findley, 7 Ala. 635; Gourdin v. Davis, 2 Rich. (S. Car.) 481; 45 Am. Dec. 745.

Variance.—Where a probated will devised a tract of land described only by giving the name of the testator's grantor and the place where his deed was recorded, the identity of the land devised may be proved by a certified copy of the will, a recorded deed from the grantor named, and the testimony of a witness that he had examined the records at the place named, and found no other deed than the one given in evidence. Ikard v. Thompson, 81 Tex. 285; Houston, etc., R. Co. v. Blagge, 73 Tex. 24.

which is usually a question for the jury.¹ The weight and sufficiency of the evidence in the particular case will depend on the facts of that case.²

8. Measure of Damages.—The damage, in trespass to try title, is not measured by the profits acquired by the defendant, although the plaintiff may be entitled to such profits, as well as to the rents and improvements, but by the actual damage done.³

9. The Judgment and Its Effect.—The judgment carries title, but has no greater effect as a bar to a subsequent action than a judgment in ejectment.⁴ A disclaimer by one of several defendants, or an abandonment of the suit by one of two plaintiffs, does not affect the other co-defendants or co-plaintiffs.⁵

10. Instructions.—The instructions given by the court must conform to the ordinary rules of law.⁶

1. Conflicting Surveys.—A league of land granted to B. was located in a survey which conflicted with a prior one. The plaintiff, the heir of B., in 1839, conveyed to S. *Texas Special Laws* (1849-50), ch. 125, authorized S. to raise the survey, so far as it conflicted with the prior grant, and directed that a land certificate issue to him to the extent of the conflict. *Texas Special Laws* (1856), ch. 126, authorized the heirs of B. to raise the survey and directed that the certificate issue to them. In 1857, the plaintiffs acknowledged the deed made by her in 1839. S. then held the certificate issued under the act of 1856, and it was located on the land in controversy, and a patent issued to his grantee in 1860. The plaintiff asserted no claim until, in 1887, she brought this suit to recover the land. The court rejected the deed of 1839, for a supposed defect in the description, and directed a verdict for the plaintiff. It was held that the charge was erroneous, in that it did not submit to the jury the question whether the plaintiff had not sold the certificate to S. *Gresham v. Chambers*, 80 Tex. 544; *Keyser v. Meusbach*, 77 Tex. 64.

2. Cases illustrating weight and sufficiency of the testimony are: *Rodriguez v. Haynes*, 76 Tex. 225; *Howard v. Masterson*, 77 Tex. 41; *Sebastian v. Martin Brown Co.*, 75 Tex. 291; *Crain v. Huntington*, 81 Tex. 614; *Keller v. Hollingsworth* (Tex. 1890), 15 S. W. Rep. 110; *James v. Tait*, 8 Port. (Ala.) 476.

3. Measure of Damages.—In trespass to try title, the profits acquired by the defendant, by occupation of the premises, are not the measure of damages, *Bullock v. Wilson*, 3 Port. (Ala.) 338.

In *Alabama*, damages are recoverable

for the detention down to the time of trial. *Masters v. Eastis*, 3 Port. (Ala.) 368.

Damages to the value of the *mesne* profits are recoverable. *Avent v. Read*, 2 Port. (Ala.) 480; 27 Am. Dec. 663.

Where the plaintiff prevails, he is entitled to the rents and profits, and the improvements placed on the land by defendant. *Evetts v. Tendick*, 44 Tex. 570.

If a plaintiff, in trespass to try title, establishes his claim to the land, he is entitled to recover rent for the time the defendant has been in possession of it. A new trial will be granted if the jury find only nominal damages. *Duff v. Hutson*, 2 Bailey (S. Car.) 215; *Johns v. Hardin*, 81 Tex. 37; *Shumake v. Nelms*, 25 Ala. 126.

4. Camp v. Forrest, 13 Ala. 114.

In an action of trespass to try title, a verdict finding that "the land belongs to the plaintiff," will be held sufficient, on error, under the liberal rules of intendment, to support a judgment in favor of plaintiff for damages and costs, and the award of a writ of *hab. fa. poss.* *Stephens v. Westwood*, 25 Ala. 716; *Scott v. Rhea*, 5 Tex. 258.

5. Warnell v. Moore, 10 Tex. 235.

A discontinuance or abandonment of a suit by one of two plaintiffs, will not preclude a recovery by the other plaintiff. *Beincourt v. Parker*, 27 Tex. 558.

6. Instructions: Cases Illustrating.—*Van Sickle v. Catlett*, 75 Tex. 404; *Hickey v. Behrens*, 75 Tex. 488; *Kirby v. Estill*, 75 Tex. 484; *Barron v. Henry* (Tex. 1890), 15 S. W. Rep. 221; *Parker v. Chancellor* (Tex. 1890), 15 S. W. Rep. 157; *Ivey v. Williams* (Tex. 1890), 15 S. W. Rep. 168.

TRESPASS ON THE CASE.—(See ASSUMPSIT, vol. 1, p. 882; DECEIT, vol. 5, p. 318; LIBEL AND SLANDER, vol. 13, p. 292; MANDATE, vol. 14, p. 240; NEGLIGENCE, vol. 16, p. 386; PLEADING, vol. 18, p. 467; SEDUCTION, vol. 21, p. 1009; TORTS, vol. 26, p. 72; TRESPASS, vol. 26, p. 568; TROVER.)

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I. DEFINITION.—The term, "Trespass on the Case," is generally used as synonymous and convertible with "Action on the Case," but strictly it is one species, and presumably the earliest, of that form of action, and is distinct from, though analogous to, the action on the case in the nature of a writ of deceit, employed in cases of fraud, and the action on the case on promises, distinctively known as *assumpsit*.¹

The action on the case (also called simply "case") is a common-law form of action, originally including causes *ex contractu* as well as *ex delicto*, but now confined to the latter, which is employed where the right to sue results from the peculiar circumstances of the case, for which the older forms of action give no remedy.²

1. A wrong inflicted by deceit or fraud can "not logically be classed as a trespass, save in the sense in which that term includes every wrong for which men owe reparation or forgiveness. Near as the action of trespass on the case came to contract in some . . . instances, the lines did not meet, and the source of action on the case on promises, or *assumpsit*, must therefore presumably be sought in another offshoot from the Statute of Westminster II., which, though prompted by the desire to afford a remedy against an assignee for maintaining a nuisance, was yet broad enough to include numerous injuries that could not be adequately redressed by the methods in common use. Case might consequently be employed, not only to supplement trespass, but the common-law writs of covenant and deceit; or, in other words, as a remedy for injuries growing out of a fraud committed in the making or performance of an agreement, or resulting consequentially from its non-fulfillment, as well as those occasioned by an abuse of the authority which it conferred." Hare on Contracts 132.

2. " . . . Personal actions arising *ex delicto*, simply from tort or wrong, where no breach of any contract is suggested, and no forcible violence imputed to the defendant. This negative de-

scription is the only one that can easily be given of what are denominated actions of trespass on the case. It would, I believe, be impossible to recount all the occasions of bringing these anomalous suits. Every civil right affecting our persons or our property, may be attacked by injustice, and that injustice may again be multifariously diversified in acts of open malice or secret fraud." 3 Wooddeson's Lectures 167.

"The action of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply." Stephen on Pleading (9th Am. ed.) *17.

"This action of trespass, or transgression, on the case, is a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises

II. RISE OF THE ACTION.—Under the early common law, a plaintiff whose cause of action resembled one for which a form of original writ was provided in the Register of Writs,¹ but to whose case no writ was precisely applicable, was allowed to bring a special action on his own case, and a writ, called *magistratum breve*,² was framed accordingly;³ but the framing of such writs *in consimili casu* was first enjoined upon the clerks in chancery as a duty by the Statute of Westminster II.,⁴ which was apparently intended merely to prevent the use of the forms of action, applicable to the various kinds of wrong then recognized by the law, from being restricted to certain classes of persons only, as had formerly been done.⁵ In the reigns of Edward II. and Edward III., this statute began to be relied upon as authorizing, either directly or by analogy, the framing of writs for actions based upon various private wrongs not contemplated by the forms of action then in

which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the Statute of Westm. II., ch. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued." 3 Bl. Com. 122.

To say that the name of this form of action is due to the fact that the whole case is set forth in the writ, seems slightly inaccurate. The action was said to be "on the case" because of the peculiar circumstances of each case, and not in the "methods prescribed" or the "forms previously settled," were what entitled the plaintiff to bring an action of this character. This being so, the whole case was necessarily "set forth at length in the original writ," in order to show why the action must be brought in this form rather than in one of those "previously settled," but it is the character of this form of action which gave it its name, rather than the mere fact that the whole case appeared on the writ.

1. See WRITS.

2. A magisterial writ, *i. e.*, a writ framed by the masters or principal clerks of the chancery. Bract. 413 b; Crabb's Hist. Eng. Law (Am. ed.) 547-8.

3. 1 Chitty's Pleading (16th Am. ed.) 107; 2 Reeves' Hist. Eng. Law (Finl. ed.) 114.

4. 13 Edw. I., st. I. The twenty-fourth chapter of this statute provided for the

extension of several writs to cases where the circumstances were similar to those for which the writs were framed, but not precisely the same; and then followed this general clause: "And as often as it shall happen in the chancery that in one case a writ is found, and in a like case (*in consimili casu*), falling under the same right and needing a like remedy, it is not found; then the clerks of the chancery shall agree in making a writ, or adjourn the complainant to the next Parliament, and write the case in which they could not agree, and refer it to the Parliament, when a writ shall be made with the advice of persons learned in the law; lest it might happen that the king's court should for a long time fail in administering justice to suitors." See 2 Reeves' Hist. Eng. Law (Finl. ed.) 114.

5. While the object of the general clause of the statute was undoubtedly to prevent a failure of justice through a narrow application of the old precedents, its passage was probably not intended to so enlarge the scope of the writ of trespass or any other writ, practically to create a new form of action applicable to all cases of private wrong where a remedy could not be had under the forms previously in use. This is shown by the fact that the very next chapter of the statute extended the writ of novel disseisin to estovers of woods, toll, tronage, passage, pontage, etc., to be taken in places certain, the custody of parks, woods, forests, etc., common of turbary, piscary, whether appendant to freeholds or not; and also that it should issue against the feoffee of a tenant for years or in ward. Had these cases been considered to be *in*

use, which were framed for certain well-defined classes of action only.¹ The actions for which writs of trespass were framed, "according to the case," were at first regarded as a species of actions of trespass,² but came in the course of time to be recognized as distinct from them, and were therefore known, by Henry IV.'s

consimili casu, there would have been no need of providing for them specially. What was meant by a writ *in consimili casu* was, for instance, a writ of entry to a reversioner when a tenant by the curtesy had aliened in fee, the statute of Gloucester granting such a writ only in cases of alienation by a tenant in dower.

1. For some time this general clause of the Statute of Westm. II., seems to have been strictly construed, but the practical necessity of obtaining remedies for wrongs, which were none the less actual because Parliament had not concerned itself with them, led at length to the adoption of the writ of trespass, under the alleged authority of this general clause to every man's own case, and not merely to cases of undoubted trespass which chanced to be under circumstances not precisely provided for by existing forms of writs. This extension of the operation of the statute was a matter of practical necessity, and was warranted by the fundamental maxim, *Ubi jus ibi remedium*. See Brown's Legal Maxims (7th Am. ed.) 191.

An early instance of this new development of the law occurred in the twenty-second year of Edward III. (22 Ass. 41). An action was brought against a man who had undertaken to ferry the plaintiff's horse safely and well across the Humber, but had so overloaded his boat with other horses, that the plaintiff's horse perished, *à tort et à damages*, etc. It was objected that the defendant had committed no tort, and that if the plaintiff had any remedy at all, it was in covenant, that being the only form of action then in use, for breach of contract; but the court said that the defendant had committed a trespass in overloading the boat, and that the action would lie for the loss of the horse by reason of this trespass. From this time on, the application of a writ of trespass to any case of negligence, or other breach of duty, became more and more frequent. Thus, in Y. B. 42 Edw. III. 13, trespass was brought against an inn-keeper and his servant

for failure to take care of a guest's property, so that it was stolen from his room during his absence, whereupon the plaintiff was granted a writ upon the whole matter "according to his case."

Again, in Y. B. 46 Edw. III. 19, trespass was brought against a smith for driving a nail into the foot of a horse, and it was urged that the writ should state that he had done this *vi et armis*, or maliciously, and against the peace, there being no allegation that he had been employed to shoe the horse; but it was held that no such allegation was necessary, the writ being "according to his case." The peculiarity of this decision, as observed by a modern writer, is that, "The pleader did not aver malice, negligence, or contract, and relied on the single ground that, as the defendant's conduct was injurious and a cause of loss, he was liable in damages, unless he had a defense or justification; and this view was sustained by the court," although "The failure to set forth how the defendant obtained possession of the horse, and that he acted with the plaintiff's consent, gave color to the argument that for all that appeared the injury was forcible, and the action should have been trespass *vi et armis*." Hare on Contracts 125.

A somewhat similar action (Y. B. 48 Edw. III. 15) was brought against a surgeon who had undertaken to cure the plaintiff's hand, but had made it worse instead of better; and because the writ did not allege that the wrong was inflicted *vi et armis*, or against the peace, it was held not to be strictly an action of trespass, though of the same general nature.

2. The earliest cases (see last note) were founded either on a malfeasance or on such a neglect as might be considered equivalent to a malfeasance, and hence the requisite writ was regarded as a special writ of trespass, rather than as a new species of writ. There was at first considerable uncertainty as to when a general writ of trespass was the proper remedy, and when a special writ on the case, and also when such special writ should be

reign, as actions of trespass upon the case,¹ or simply, actions on the case, which term was also used to include actions where the writ was more in the nature of a writ of deceit.²

The action upon the case was by degrees adapted to almost all private wrongs, where the common law provided no remedy, or none that was practically adequate,³ including the breach of contracts not under seal (to which, therefore, the writ of covenant did not apply),⁴ and at length even to cases where the breach of contract consisted in non-performance only,⁵ as well as to cases

laid *vi et armis*, and when not. Thus, it was held that where a miller, who ought to have made no charge, took toll for grinding corn, the writ should be general, and not a special writ on the case, although it was argued that if the plaintiff had sustained an injury, he was entitled to a remedy applicable to his case. Y. B. 41 Edw. III. 24. It is observed by Reeves that the great motive for inserting *vi et armis* was that the plaintiff could have a *capias*, whereas otherwise he could only have a *distingas*, and the defendant might wage his law. Hence in many early cases special writs were laid *vi et armis*. Later on, however, the process was made the same as in an action of debt. See 2 Reeves' Hist. Eng. Law (Finl. ed.) 397, 508; 3 Id. 182.

1. The distinction was that trespass always involved violence, being stated in the writ to be *vi et armis*, whereas no such allegation properly appeared in a writ of trespass on the case, at least as regards the immediate cause of action. The ultimate cause of action, or *causa causans*, might indeed indicate force, and be properly laid *vi et armis*. Thus in Y. B. 12 Hen. IV. 3, an action on the case was brought for the flooding of land by the stopping of a sewer. Here the damage which made itself felt, the flooding, was the proper subject of an action on the case, but it resulted from the more remote malfeasance, the stopping of the sewer, which was regarded as a trespass *vi et armis*. 2 Reeves' Hist. Eng. Law (Finl. ed.) 508.

2. *E. g.*, against a sheriff for a false return of summons (26 Ass. 48), or for directing the wrong officer to summons a panel, so that it was quashed (38 Ass. 13). Actions upon the case for slander, formerly a matter of spiritual cognizance (38 Ass. 29), and selling stolen cattle upon a false representation of ownership (42 Ass. 8), were also allowed. 2 Reeves' Hist. Eng. Law (Finl. ed.) 395.

3. Theoretically the scope of trespass on the case might have been even greater than it was. Thus Blackstone, citing the remarks of Fairfax, J., in Y. B. 21 Edw. IV. 23, says: "Which provision [of Stat. Westm. II.], with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ, might have effectually answered all the purposes of a court of equity, except that of obtaining a discovery by the oath of the defendant." 3 Bl. Com. 51.

As a modern writer says: "It was never admitted that the virtue of the statute [of Westm II.] had been exhausted, and it was probably rather the timidity of pleaders than the unwillingness of the judges that prevented the development from being even greater than it was. It may be asked in this connection, why some form of action on the case was not devised to compete with the jurisdiction of the court of chancery in enforcing trusts. An action on the case analogous to the action of account, if not the action of account itself, might well have been held to lie against a feoffee to use at the suit of the *cestuis que use*. Probably the reason is to be sought in the inadequacy of the common-law remedies, which no expansion of pleading could have got over. The theory of equitable rights, wholly outside the common law and its process, and inhabiting a region of mysteries unlawful for a common lawyer to meddle with, was not the cause, but the consequence, of the court of chancery's final triumph." Pollock on Torts 430. See also 2 Reeves' Hist. Eng. Law (Finl. ed.) 605.

4. See ASSUMPSIT, vol. 1, p. 882.

5. In Y. B. 14 Hen. VII. 18, pl. 58, the purchaser of land sued his vendor in case for breach of a contract that a third person should execute a release. It was objected that the case was one of non-performance merely, and that if

of the negligent performance of a gratuitous undertaking,¹ and cases of the conversion of personal property to the use of another

the contract was by deed, the action should be covenant, but otherwise no action lay. This was denied by the court, "apparently because the grievance was not so much the non-fulfillment of the covenant, as that the plaintiff had been induced to make the purchase by an undertaking which the defendant had failed to keep." Hare on Contracts 133.

Similarly, in Y. B. 3 Hen. VII. 13, an action on the case was held maintainable against one who, for a consideration, had undertaken to procure a lease for the plaintiff, but procured it for himself, and in Y. B. 14 Hen. VIII. 25, it was held maintainable against the executors of one who had agreed by parol to pay for goods, if the purchaser did not, the goods being furnished in reliance on the promise. The reasons were: first, that there was no other remedy at law; and secondly, because the plaintiff had delivered the goods on the promise of the testator, and as there were sufficient assets, the testator's soul should not be put in jeopardy by the prejudice his promise had done the plaintiff. 3 Reeves' Hist. Eng. Law (Finl. ed.), 182, 403.

Judge Hare thus reviews the authorities: "The efficient cause of action . . . was not the promise, but what had been done in the belief that it would be performed. From this point the transition was easy to holding that compensation was due whenever the plaintiff was misled by an undertaking, made with a view of inducing him to act, and broken after he had complied with its terms. The declaration, as finally reduced to form and method, averred that the defendant promised to do or render something in consideration of an act to be done or payment made by the plaintiff; that the plaintiff, confiding in the promise, did as he was desired; but the defendant, fraudulently intending to deceive and injure the plaintiff, did not, nor would keep his promise. The action was not founded in contract, but in tort. It did not rely on the promise as obligatory, but on the deceit, through which the injured party had been deprived of his time or property without compensation; and the measure of damages seems, in the first instance, at least, to have been not what the de-

fendant promised to give, but the value of that which the plaintiff had parted with in reliance on the promise. The former is, however, necessarily persuasive evidence of the latter, and the *prima facies* soon became conclusive.

. . . Such was the origin of the action on the case on promises, now commonly known as the action of *assumpsit*. It had its source in the conceit of some one who, after inducing the plaintiff to act by promise of reward, refused to fulfill it on the plea that it was not authenticated by a seal. Under these circumstances, it was obviously equitable that he should make compensation for the loss occasioned by his breach of faith. The right grew out of the consideration, not the promise, and the latter was material only as the means by which the plaintiff had been induced to render his goods or services. As time wore on, this view yielded to a more liberal interpretation, and the action was regarded as being what it really is, *ex contractu*." Hare on Contracts 134.

1. The leading case is *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith Lead. Cas. (9th ed.) 354. The plaintiff declared, in an action on the case, that the defendant had undertaken to take up several casks of brandy safely from a certain cellar, and lay them down safely elsewhere, but did this so negligently that one of the casks staved, and the brandy lost. After a verdict for the plaintiff on the general issue, it was moved in arrest of judgment that it was not alleged that the defendant was a common porter, nor that he was to be paid. Lord Holt, in delivering judgment, held that while the defendant could not have been required to move the brandies, yet that having begun to do so, the task became a trust, and he was liable for any loss by his default. When the bailee promises to use due care, "neglect is a deceit to the bailor. For when he intrusts the bailee, upon his undertaking to be careful, he had put a fraud upon the plaintiff by being negligent, his pretense of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action." See further, as to this, MANDATE, vol. 14, p. 243.

than the owner.¹ In time, all cases founded upon a breach of the express or implied promise involved in a contract, rather than upon a violation of some trust reposed in the defendant, or some duty owed by him, were classed by themselves as actions of *assumpsit*,² and the action on the case was regarded as an action purely *ex delicto*. A similar differentiation occurred in the case of those actions for the recovery of chattels, known as actions of *trover*.³

III. WHERE IT LIES.—An action on the case⁴ (to use the broader term) lies in general where by anyone's act a legal injury is suffered, for which the common law has provided no other adequate remedy.⁵ Thus, as the application of the action of trespass is limited to injuries directly inflicted by acts of force,⁶ that of the action of covenant to the breach of a contract under seal,⁷ and that of the now obsolete writ of deceit to injuries due to forgery or other unlawful use of a person's name,⁸ actions on the case lie for consequential injuries⁹ to persons, property, or rights, whether

1. Reeves' Hist. Eng. Law (Finl. ed.) 405, 551. See *TROVER*, vol. 26.

2. Hare on Contracts, 135, 150. See *ASSUMPSIT*, vol. 1, p. 882.

3. See *TROVER*, vol. 26.

4. A complete review of the whole ground covered by actions on the case would involve the repetition of much that has been said in other articles. All that can properly be presented here is a brief statement of the principal kinds of tort to which this form of action is applicable, with the citation of a few leading cases.

5. As was said by Willes, C. J., in *Winsmore v. Greenbank*, Willes 577: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." See also *Ashby v. White*, 2 Ld. Raym. 938; 1 Smith Lead. Cas. (8th Am. ed.) 472; (9th Am. ed.) 464; *Chapman v. Pickersgill*, 2 Wils. 146; *Keeley v. McCaw*, 29 Ala. 227; *Hussey v. Peebles*, 53 Ala. 432; *Griffin v. Farwell*, 20 Vt. 151.

The broad range of actions on the case is necessarily limited to established principles of liability, for "Where cases are new in their principle . . . it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the prin-

ciple to any case which may arise two centuries hence, as it was two centuries ago." Ashhurst, J., in *Pasley v. Freeman*, 3 T. R. 51.

Where, moreover, a remedy for cases which are new in principle has been granted by statute, the scope of an action on the case is still limited by the terms of such statute. Thus, although a judgment, confessed by a corporation which has refused payment of its notes or other evidences of debt, is void in *New York* by statute, (1 Rev. Stats. N. Y., p. 603, § 4), yet the taking of such a judgment for a valid debt, and the issuing of execution upon it, do not constitute such a wrongful act as to give rise to an action on the case, or its equivalent under the code, against the party taking the judgment, by one whose lien has been defeated thereby. His remedy against such party is by proceedings to recover the proceeds. *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508.

6. "The criterion of trespass is force directly applied." Tilghman, C. J., in *Smith v. Rutherford*, 2 S. & R. (Pa.) 358. See *TRESPASS*, vol. 26, p. 568.

7. See *COVENANT*, vol. 4, p. 463.

8. *Fitzherbert's Nat. Brev.* 95 E.

9. **Distinction Between Trespass and Case.**—The distinction between trespass and case is thus illustrated in *Reynolds v. Clarke*, 1 Str. 634: "If a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there I tumble over it, and receive an injury, I must

bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all."

So in *Day v. Edwards*, 5 T. R. 648, Lord Kenyon, C. J., said: "The distinctions between actions of trespass *vi et armis*, and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy."

To the same effect, *Scott v. Shepherd*, 2 W. Bl. 892; 1 Smith Lead. Cas. (8th Am. ed.) 797; *Shapcott v. Muford*, 1 Ld. Raym. 187; *Haward v. Bankes*, 2 Burr. 1113; *Hawker v. Birbeck*, 2 Burr. 1556; *Gates v. Bayley*, 2 Wils. 313; *Bourden v. Alloway*, 11 Mod. 380; *Morgan v. Hughes*, 2 T. R. 225; *Savignac v. Roome*, 6 T. R. 125; *Leame v. Bray*, 3 East 593; *Bell v. Troy*, 35 Ala. 184; *Pruitt v. Ellington*, 59 Ala. 454; *Crawford v. Waterson*, 5 Fla. 472; *Johnson v. Castleman*, 2 Dana (Ky.) 377; *Cole v. Fisher*, 11 Mass. 137; *Rappelyea v. Hulse*, 12 N. J. L. 257; *Kelly v. Lett*, 13 Ired. (N. Car.) 50; *Case v. Mark*, 2 Ohio 169; *Carsten v. Murray*, Harp. (S. Car.) 113; *Johnson v. Perry*, 2 Humph. (Tenn.) 569; *Winslow v. Beal*, 6 Call (Va.) 44.

Where Intent Is a Factor.—Where the force which occasions an injury is not that of the person by whom the injury is inflicted, but is only made effective by him, his intent in the application of the force must determine the form of the action to be brought against him. Thus, where a sailing vessel runs down another vessel, the force is rather that of the winds and waves, than of the person steering, and hence, if the collision arise from his negligence, an action on the case lies; but if it be willful, trespass is the proper remedy. *Ogle v. Barnes*, 8 T. R. 188; *Turner v. Hawkins*, 1 B. & P. 472.

Distinction Between "Immediate" and "Consequential."—The distinction stated in the cases cited above is thus amplified by Baldwin, J., in *Jordan v. Wyatt*, 4 Gratt. (Va.) 151; 47 Am. Dec. 720: "Terms 'immediate' and 'consequential' should, as I conceive, be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or

unlawfulness of the act; but in reference to the progress and termination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence."

It must of course be remembered that the distinction between those circumstances which warrant an action of trespass and those where an action on the case applies has not always been carefully observed, for, as was said in an old case, "The court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they see the plaintiff has obtained a verdict for such damages as he deserves, [but] they will establish such verdict if it be possible." *Slater v. Baker*, 2 Wils. 359.

It is also true that the distinction between these two forms of action is sometimes very refined, and it is evidently to avoid the consequent danger of delay or failure of justice that, in several even of those states which have not adopted codes of pleading, the distinction has been abolished by statute. See *infra*, this title, *Modern Changes and Substitutes*.

Instances.—Where the driver of a horse-car, which was moving, told a child to jump off, and the child did so, but was unable to clear the track, and was run over, trespass on the case was held to be the proper remedy, though trespass would have lain had the driver pushed the child off the car. *Bay Shore R. Co. v. Harris*, 67 Ala. 6.

The cutting of a strap and pulley, which transmitted the power in a mill, is trespass as against the party in possession of the strap and pulley; but if the party who is deprived of the use of the power by the such cutting be not in possession of the machinery so cut, his damage is consequential merely, and he should sue in case. *Dale Mfg. Co. v. Grant*, 34 N. J. L. 138.

Where a dog is killed by the direct administration of poison, trespass is the proper remedy; but if poison is put where it is known that the dog will get it, the remedy is by trespass on the case. *Dodson v. Mock*, 4 Dev. & B. (N. Car.) 146; 32 Am. Dec. 677.

the act from which the injury results be in itself rightful or wrongful,¹ willful² or negligent,³ forcible⁴ or fraudulent.⁵

Trespass on the case lies for the diversion of water from a millrace. "If force used in the removal of the splash boards [of the dam] was made the gist of the action, then there would be reason for holding that case would not lie; but that is not the averment. The substantial grievance alleged is diverting the water of the stream from the mill, whereby its use and profits were lessened. The removal of the splash boards was only the means whereby the consequential damages were produced and sustained. No recovery was sought or claimed, but these consequential damages. Case therefore may be sustained." *Meyer v. Horst*, 106 Pa. St. 552.

Where cattle get on a railroad line through defective fencing, and are run over, their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case. *Sharrod v. London, etc., R. Co.*, 4 Exch. 580.

An allegation that the defendant, knowing that the plaintiff's wife was well advanced in pregnancy, violently assaulted two negroes in her immediate presence, so that the fright occasioned thereby brought on a miscarriage and injured her health, presents a cause of action in trespass on the case, and consequently in trespass, where no distinction in the form of action is recognized. *Hill v. Kimball*, 76 Tex. 210.

1. In an action on the case for consequential injuries, the only question which can arise is whether the plaintiff has suffered an injury, recognized by law, in consequence of an act of the defendant or of some one for whose acts he is responsible. It is immaterial whether the particular act was in itself rightful or wrongful. *Keller v. Stoltz*, 71 Pa. St. 356.

2. Thus, case was held to be the proper remedy for forcibly placing the plaintiff on a foreign vessel, to be taken out to sea, which vessel was subsequently captured by one of another nation, whereby the plaintiff incurred ill-treatment. *Cottrel v. Cummins*, 6 S. & R. (Pa.) 348. And for the indirect consequences, medical expenses, detention from business, etc., of an assault upon the plaintiff. *Barnum v. Balti-*

more, etc., *R. Co.*, 5 W. Va. 10. Or of an assault upon some other person. *Hill v. Kimball*, 76 Tex. 210.

3. Thus trespass on the case lies for the negligence of a mill-owner, in leaving machinery uncovered, whereby personal injuries were suffered. *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

For neglect to notify a magistrate of an arrest, whereby the hearing was delayed, to the damage of the person arrested. *Shaw v. Reed*, 16 Mass. 450.

For neglect to repair a division fence, which the defendant was bound to repair, whereby the plaintiff's cattle escaped and were injured. *Cate v. Cate*, 50 N. H. 144.

For carelessly using a defective boiler, which burst and injured the horse of a customer. *Spencer v. Campbell*, 9 W. & S. (Pa.) 32.

For negligently discharging a gun, and wounding the master of a vessel, whereby the voyage was prevented to the damage of the owners. *Adams v. Hemmenway*, 1 Mass. 145.

See also *Pruitt v. Ellington*, 59 Ala. 454; *Price v. New Jersey, etc., R. Co.*, 32 N. J. L. 19; *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith Lead. Cas. (8th Am. ed.) 369; (9th Am. ed.) 354. See NEGLIGENCE, vol. 16, p. 386.

Individual Negligence of One of Several Defendants.—Where the plaintiff was run down on the highway, and had his leg broken, by a coach which was negligently driven by one of the owners, it was claimed that the injury being immediate, the action should have been trespass. It was held that as the plaintiff had a right to sue all the owners, and could not do so in trespass, except, perhaps, as to the one who was driving, he could join him with the others in case. *Moreton v. Harden*, 4 B. & C. 223; 10 E. C. L. 316.

4. *Cottrel v. Cummins*, 6 S. & R. (Pa.) 348; *Drew v. Peer*, 93 Pa. St. 234; *Hill v. Kimball*, 76 Tex. 210; *Barnum v. Baltimore, etc., R. Co.*, 5 W. Va. 10.

5. An action on the case in the nature of a writ of deceit lies for a false affirmation made with intent to defraud the plaintiff, whereby he is injured, whether the defendant be benefited or not. *Pasley v. Freeman*, 3 T. R. 51. See also *Adamson v. Jarvis*, 4 Bing. 66;

Injuries to health,¹ being necessarily consequential, are proper subjects for actions on the case, and the same is true of injuries to intangible property or rights. Hence an action on the case lies for libel or slander,² conspiracy to defame,³ and the enticing away or seduction of a man's daughter, servant,⁴ or wife;⁵ or the infliction of personal injuries upon them,⁶ whereby he loses the society or services to which he was entitled.

13 E. C. L. 343; *Lyde v. Barnard*, 7 M. & W. 101; *Swan v. Phillips*, 3 N. & P. 447; *Barney v. Dewey*, 13 Johns. (N. Y.) 224; 7 Am. Dec. 372; *Culver v. Avery*, 7 Wend. (N. Y.) 380; 22 Am. Dec. 586.

Instances.—An action on the case lies to recover damages for the refusal of one in possession of lands to allow buildings erected by another to be removed by a third party, who had bought them from the builder, on the strength of the defendant's representation that the builder had a right to use them. *Harris v. Powers*, 57 Ala. 139.

Or a false warranty on the sale of chattels. *Williamson v. Allison*, 2 East 446; *Webster v. Hodgkins*, 25 N. H. 128; *Mahurin v. Harding*, 28 N. H. 128; 59 Am. Dec. 401. *Assumpsit*, will also lie. See *ASSUMPSIT*, vol. 1, p. 882.

Case lies for fraud in the sale of lands, notwithstanding that the deed contains covenants. *Bostwick v. Lewis*, 1 Day (Conn.) 250; 2 Am. Dec. 73; *Frost v. Raymond*, 2 Cal. (N. Y.) 193; 2 Am. Dec. 228; *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325; 7 Am. Dec. 383; *Monell v. Colden*, 13 Johns. (N. Y.) 395; 7 Am. Dec. 390; *Ward v. Wiman*, 17 Wend. (N. Y.) 193.

Where the claimants of cotton in the hands of a garnishee, obtained possession of it from him, he being insolvent, and converted it to their own use, pending the trial of an issue between them and one who had recovered a judgment against the owner of the cotton, it was held that, the issue having been decided against the claimants, an action on the case would lie against them for taking the property. The court, *per* Clopton, J., said: "The proceeding by garnishment and condemnation of the cotton did not confer any right of property or right of possession on the plaintiff. His only right was to have the cotton sold for the payment of his judgment, which he was prevented from having done by the tortious act of the defendants, for which wrong and injury he is without rem-

edy, unless he can maintain the present action." *Aderholt v. Smith*, 83 Ala. 486.

Case lies for fraudulently inducing the plaintiff to buy a share of worthless stock. *Smith v. Bellows*, 77 Pa. St. 441. See *DECEIT*, vol. 5, p. 318.

1. 3 Bl. Com. 123.

2. See *LIBEL AND SLANDER*, vol. 13, p. 292.

3. *Mott v. Danforth*, 6 Watts (Pa.) 304; 31 Am. Dec. 468; *Hood v. Palm*, 8 Pa. St. 237; *Haldeman v. Martin*, 10 Pa. St. 369; *Wildee v. McKee*, 111 Pa. St. 335; 56 Am. Rep. 271.

4. Some authorities held that trespass *vi et armis* was the remedy for seduction of a daughter. *Woodward v. Walton*, 6 B. & P. 476; *Tullidge v. Wade*, 3 Wils. 18. But as, in contemplation of law, the only injury to the father is the consequential loss of service, it would seem clear that trespass on the case was the proper remedy where the defendant was charged with seduction only. *Bennett v. Allcott*, 2 T. R. 166; *Speight v. Oliveira*, 23 Stark. 493; *Furman v. Applegate*, 23 N. J. L. 28; *Moran v. Dawes*, 4 Cow. (N. Y.) 412; *Ream v. Rank*, 3 S. & R. (Pa.) 215; *Parker v. Elliott*, 6 Munf. (Va.) 587.

In *Clough v. Tenney*, 5 Me. 446; *Ream v. Rank*, 3 S. & R. (Pa.) 215, it is said that for seduction committed on the plaintiff's own premises trespass *quare clausum fregit* will lie.

For enticing away a servant or minor child, trespass on the case is the proper remedy. *Jones v. Tevis*, 4 Litt. (Ky.) 25; 14 Am. Dec. 98; *Legaux v. Feasor*, 1 Yeates (Pa.) 586.

5. *Winsmore v. Greenbank*, Willes 579; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578; *Martin v. Payne*, 9 Johns. (N. Y.) 387; 6 Am. Dec. 288; *Haney v. Townsend*, 1 McCord (S. Car.) 206.

6. Where the injury has been committed by force, trespass lies, but apparently not to the exclusion of case. *Ditcham v. Bond*, 2 M. & S. 436; *Hoover v. Heim*, 7 Watts (Pa.) 62.

For all consequential injuries to real estate, trespass on the case is the proper remedy, as where the injury results from acts done on other land,¹ or, if on the plaintiff's land, by one who is not a trespasser,² or where the estate injured is of an incorporeal nature.³ So where the estate injured, consists of an estate in reversion,⁴

Case is indisputably the remedy where the forcible injury complained of, was not inflicted by the defendant himself; thus, where the plaintiff's wife had been violently ejected from a theater by the agents of the owner in the course of their employment, an action on the case was held to be the proper remedy. *Drew v. Peer*, 93 Pa. St. 234.

Where the personal injury to the wife itself results from an assault on another person, the remedy is in case for the additional reason that the injury is consequential. *Hill v. Kimball*, 76 Tex. 210.

1. An action on the case lies for injuries to real estate by the construction of a railroad in its proximity. *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352; *Northern Cent. R. Co. v. Holland*, 117 Pa. St. 613; *Philadelphia, etc., R. Co. v. Patent*, 17 W. N. C. (Pa.) 198.

Or the location and use of railroad tracks on the street on which it abuts. *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

Or by the erection of the abutments of a bridge on the highway adjoining plaintiff's property. *Chester County v. Brower*, 117 Pa. St. 647; *Delaware County's Appeal*, 119 Pa. St. 159.

Or for building a house so near the adjoining property, that the eaves project over the latter, intercepting the light and causing water to drip. *Garraty v. Duffy*, 7 R. I. 476.

Or for injuries to the surface by the owner of underlying mineral deposits, who neglects to leave adequate support. *Williams v. Hay*, 120 Pa. St. 485.

Or for filling up of a dock by the discharge of the contents of a city sewer. *Clark v. Peckham*, 9 R. I. 455.

2. Thus, where one who had water rights in certain property, dug up the old pipes and put down new ones, was sued for unnecessarily damaging the property in so doing, it was held that if the right to enter upon the land existed, the abuse of it would sustain an action upon the case, and not an action of trespass. *Edelman v. Yeakel*, 27 Pa. St. 26.

Case lies for injuries resulting from a failure to replace bars or close gates

by which the defendant has lawfully entered. *Hinks v. Hinks*, 46 Me. 423; *Stone v. Knapp*, 29 Vt. 501.

Where heavy articles were stored in a house, in disregard of the contract on which it was rented, and the house fell down from the pressure, trespass on the case was held to be the proper remedy, the injury being consequential. *Brooks v. Clifton*, 22 Ark. 54.

Similarly, case lies for obstruction of the owner's use of real estate, by one not a trespasser. See *Grove v. Barclay*, 106 Pa. St. 155.

3. *Mainwaring v. Giles*, 5 B. & Ald. 361; 7 E. C. L. 129; *Hewlins v. Shipham*, 5 B. & C. 221; 11 E. C. L. 207; *Bryan v. Whistler*, 8 B. & C. 294; 15 E. C. L. 219; *Wetmore v. Robinson*, 2 Conn. 529; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Strickler v. Todd*, 10 S. & R. (Pa.) 63; 13 Am. Dec. 649; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173; *Marshall v. White*, Harp. (S. Car.) 122; *Wilson v. Wilson*, 2 Vt. 68.

Thus, case lies for the obstruction of a right of way. *Greasley v. Coddington*, 9 Moore 489; *Wright v. Freeman*, 5 Har. & J. (Md.) 467; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Smith v. Wiggin*, 48 N. H. 105; *Osborne v. Butcher*, 26 N. J. L. 308; *Okeson v. Patterson*, 29 Pa. St. 22.

Or for using a private way, the action being brought by the party on whose application the way was laid out. *Lambert v. Hoke*, 14 Johns. (N. Y.) 383.

Case lies, although the right interfered with was granted by covenant, under seal. *Lindeman v. Lindsey*, 69 Pa. St. 93; 8 Am. Rep. 219.

4. *Randall v. Cleveland*, 6 Conn. 328; *Bucki v. Cone*, 25 Fla. 1; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Lienon v. Ritchie*, 8 Pick. (Mass.) 235; *Hall v. Snowhill*, 14 N. J. L. 8; *Elliot v. Smith*, 2 N. H. 430; *Brown v. Dinsmoor*, 3 N. H. 403; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511; *Tobey v. Webster*, 3 Johns. (N. Y.) 468; *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9; 42 Am. Dec. 214.

Hence, case is the landlord's remedy

or remainder, the action of trespass on the case affords the available remedy.¹

An action on the case is the remedy for any damage received in consequence of a breach of any duty imposed upon a public officer by virtue of his office,² or upon anyone by charter,³ or statute,⁴ as also for the violation of rights acquired by these means.⁵ It lies for the abuse of legal process regularly

for loss of rent and destruction or dilapidation of the premises, against one who, wishing to injure him, drives the tenant away by threats or force, even though the tenant's abandonment is a breach of contract. *Walden v. Conn*, 84 Ky. 312.

Even though the immediate injury be merely nominal. *Schnable v. Koehler*, 28 Pa. St. 181.

Case lies by a landlord against one who, with notice of the former's lien, removes the tenant's crop. "The landlord having a lien on the crop, and a stranger acquiring possession of it, with notice of the lien, holding it as the tenant held it, subject to the lien, is guilty of a tort, to the damage of the landlord, if he destroys, removes, or so converts or changes its character that the landlord cannot enforce his lien. For this tort the landlord has no other appropriate remedy than an action on the case. Not having a right of property or a right of possession, he cannot maintain trespass, trover or detinue." *Hussey v. Peebles*, 53 Ala. 432.

Case lies for removal of a building by the defendant in an execution, who remains in possession after the sale, without redeeming. *Topping v. Evans*, 58 Ill. 209.

Case may be brought by the assignee of a judgment against a person who has removed buildings from land bound by the lien of the judgment. *Yates v. Joyce*, 11 Johns. (N. Y.) 136.

But a vendor, who has given up possession to the vendee, under articles of agreement in part executed, has not such a reversionary interest, on account of the unpaid purchase money, as to enable him to sue the vendee in case for an injury to the realty. *Ives v. Cress*, 5 Pa. St. 118; 47 Am. Dec. 401.

1. A life tenant and a remainder-man can join in an action on the case, such joinder working no inconvenience to the defendant, but rather the reverse. *McIntyre v. Westmoreland Coal Co.*, 118 Pa. St. 108.

2. *Brown v. Jarvis*, 1 M. & W. 704; *Williams v. Mostyn*, 4 M. & W. 145;

Curling v. Evans, 1 M. & G. 349; *Jacobs v. Humphrey*, 2 C. & M. 413; *Aireton v. Davis*, 9 Bing. 741; 23 E. C. L. 448; *Wintle v. Freeman*, 11 A. & E. 539; 39 E. C. L. 159; *Dorman v. Kane*, 5 Allen (Mass.) 40; *Bridges v. Perry*, 14 Vt. 262; *Starr v. Moore*, 3 McLean (U. S.) 354.

It being one of the duties of county officers to provide a proper jail, they may be sued in case by a sheriff, who, through their neglect to do so, has been held liable in damages for a prisoner's escape. *Brown County v. Bull*, 2 Ohio 348.

3. Thus, where a raft grounded in a canal, on account of low water, and was partially destroyed by storm while aground, trespass on the case was held to lie against the canal company, it being bound by its charter to keep the canal navigable. *Riddle v. Proprietors of Locks, etc.*, 7 Mass. 169; 5 Am. Dec. 35.

4. Case lies for injuries due to allowing diseased animals to run at large, where a statute requires them to be kept in. *Mount v. Hunter*, 58 Ill. 246.

When an action on the case is brought for neglect of a statutory duty, the plaintiff must show that the duty was imposed for his benefit, or for his security from the injury suffered. *Smith v. Tripp*, 13 R. I. 152.

5. 2 Chitty on Pleading (16th Am. ed.) *161.

Thus case lies for infringement of a patent. *Walton v. Potter*, 1 Scott N. R. 91; *Minter v. Mower*, 6 A. & E. 735; 33 E. C. L. 199; *Perry v. Skinner*, 2 M. & W. 471; *Morgan v. Seaward*, 2 M. & W. 544. Or a copyright. *Clementi v. Goulding*, 11 East 244; *Roworth v. Wilkes*, 1 Camp. 94; *Moore v. Clarke*, 9 M. & W. 622. Case also lies for violation of a trade-mark. *Crawstray v. Thompson*, 11 L. J. C. P. 301. Or for selling goods as the manufacture of another. *Blofeld v. Payne*, 4 B. & Ad. 410; 24 E. C. L. 87; *Morrison v. Salmon*, 2 Scott N. R. 449.

Where, however, a statute prescribes a particular form of action for injuries

issued,¹ or for resistance to or disobedience to such process.²

This form of action is equally applicable whether the act be that of the defendant personally, or of some one acting by his direction,³ the act of one person, or of several conspiring together,⁴ or of the public, as in the case of a public nuisance producing special damage.⁵ For injuries inflicted by a servant in the course

resulting from its violation, that form of action must be used. *Cole v. Muscatine*, 14 Iowa 296; *Moore v. White*, 45 Mo. 206; *Green v. Bailey*, 3 N. H. 33.

1. Trespass on the case lies for damage received in consequence of any act wrongfully or maliciously done under authority of lawful process regularly issued from a court of competent jurisdiction. *Boot v. Cooper*, 1 T. R. 535; *Belk v. Broadbent*, 3 T. R. 185; *Gyfford v. Woodgate*, 11 East 297; *Wetherden v. Embden*, 1 Camp. 295; *Chapman v. Pickersgill*, 2 Wils. 145; *Luddington v. Peck*, 2 Conn. 700; *Watson v. Watson*, 9 Conn. 141; *Cannon v. Sipples*, 39 Conn. 505; *Balock v. Randall*, 76 Ill. 224; *Owens v. Starr*, 2 Litt. (Ky.) 234; *Plummer v. Dennett*, 6 Me. 421; *Turner v. Walker*, 3 Gill & J. (Md.) 377; 22 Am. Dec. 329; *Warfield v. Walter*, 11 Gill & J. (Md.) 80; *Hayden v. Shed*, 11 Mass. 500; *McHugh v. Pundt*, 1 Bailey (S. Car.) 441; *Shaver v. White*, 6 Munf. (Va.) 113; 8 Am. Dec. 730; *Olinger v. McChesney*, 7 Leigh (Va.) 660.

Thus it lies in cases of improper arrest or malicious prosecution. *Elsee v. Smith*, 2 Chit. 304; *Grainger v. Hill*, 4 Bing. N. Cas. 212; 33 E. C. L. 328; *Wentworth v. Bullen*, 9 B. & C. 840; 17 E. C. L. 503; *Watkins v. Lee*, 5 M. & W. 270; *Heywood v. Collinge*, 1 P. & D. 202; *James v. Phelps*, 3 P. & D. 231; *Swift v. Chamberlain*, 3 Conn. 537; *Allison v. Rheam*, 3 S. & R. (Pa.) 142; 8 Am. Dec. 644; *Berry v. Hamill*, 12 S. & R. (Pa.) 210; *Royer v. Swazey*, 10 W. N. C. (Pa.) 432.

It is immaterial that the affidavit in support of the warrant of arrest was legally insufficient. *Mask v. Rawls*, 57 Miss. 270.

Or for the entering of judgment and issuing of execution after the claim has been paid, such judgment and execution not being nullities. *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574.

Or for neglect by one who had recovered a judgment, to notify his attorney of the payment of the claim, the latter subsequently proceeding to sell

under an execution. *Fripp v. Martin*, 1 Spears (S. Car.) 236.

In the case of excessive distress, an action on the case lies, although the distress was really void because the rent had been tendered. *Branscomb v. Bridges*, 1 B. & C. 145; 8 E. C. L. 63; *Smith v. Goodwin*, 4 B. & Ad. 413; 24 E. C. L. 89.

* **Conspiracy.**—Trespass on the case lies for a conspiracy to prosecute. *Skinner v. Gunton*, 1 Wms. Saund. 228.

Against Officers of Justice.—Case lies against a justice of the peace, who has jurisdiction, for abuse of his power. *Kennedy v. Barnett*, 64 Pa. St. 141. Or against a constable for disregarding a claim for the benefit of the exemption law. *Van Dresor v. King*, 34 Pa. St. 201; 75 Am. Dec. 643. Or for selling goods not included in the levy. *McCutcheon v. Philadelphia*, 7 Phila. (Pa.) 207.

2. Thus, case lies for pound-breach, or rescue of property distrained. *Parrett Nav. Co. v. Stower*, 6 M. & W. 564. Or against a witness for disobeying a subpoena. *Pearson v. Iles*, Dougl. 556; *Amey v. Long*, 9 East 473; *Lamont v. Crook*, 6 M. & W. 615.

3. Thus trespass on the case lies for injuries resulting from improper treatment of the plaintiff's strayed animal by the defendant's servant, on his master's land and at his direction. *Knott v. Digges*, 6 Har. & J. (Md.) 230. See *AGENCY*, vol. 1, p. 331.

4. Trespass on the case has taken the place of the old writ of conspiracy. *Mott v. Danforth*, 6 Watts (Pa.) 304; 31 Am. Dec. 468. As, apparently, that writ only applied to conspiracy to indict of treason or felony, where the party conspired against was acquitted by verdict, trespass on the case always applied in other cases of conspiracy, though the actions were sometimes called writs of conspiracy. *Skinner v. Gunton*, 1 Wm. Saund. 228, 230, n. 4.

5. *Chichester v. Lethbridge*, Willes 71; *Butterfield v. Forrester*, 11 East 60; *Wilkes v. Hungerford Market Co.*, 2

of his employment, the master is liable in an action on the case¹ (it being his duty to employ careful servants), and this even where the servant would himself be liable in trespass,² unless the injury was inflicted at the master's direction, in which case an action of trespass will lie.³ The owner of animals is also liable in case for any injuries they may inflict,⁴ unless he had no reason to be aware of their noxious propensities.⁵

The liability for consequential damages within the scope of this action may result from an act which is itself a trespass, or it may grow out of a breach of express or implied contract, and in both classes of cases the plaintiff has a choice of remedies. Thus, a negligent act or other trespass may itself be declared upon as the injury,⁶ or the plaintiff may waive the trespass, and sue in case for the consequences.⁷ Similarly, in many instances where *assumpsit*

Bing. N. Cas. 281. See NUISANCES, vol. 16, p. 922.

1. Aldridge v. Great Western R. Co., 4 Scott N. R. 156; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580; Johnson v. Castleman, 2 Dana (Ky.) 377; Campbell v. Phelps, 17 Mass. 244; Hamilton County v. Cincinnati, etc., Turnpike Co., Wright (Ohio) 603; Drew v. Peer, 93 Pa. St. 234. This rule does not hold in the case of deputies of public officers, their acts being considered in law to be directly and personally the acts of their superiors. Broughton v. Whallon, 8 Wend. (N. Y.) 474. See MASTER AND SERVANT, vol. 14, p. 740.

2. Havens v. Hartford, etc., R. Co., 28 Conn. 69.

3. To maintain trespass against an employer, it must appear that he expressly ordered or directly assented to the thing actually done. Thus, where the plaintiff's sheep were run over by a train, the engine driver having orders to go at a certain high rate of speed, it was held that trespass did not lie. Parke, B., said: "It did not follow as a necessary consequence that it [the engine] would infringe on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine, and got out of the way. The act, therefore, cannot be treated as a trespass, on the ground that it was, by necessary implication, ordered to be done by the defendants. . . . This is a simple case of an act done by the servant in the course of his employment, not specifically ordered by the master. . . . If in the present case the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy by action on the case against the company for caus-

ing the engine to be driven in such a way as to injure that right; for the defendants were bound to see that their carriages did not travel at such a speed as to make it impossible to avoid other persons, who had a lawful right to be there. Sharrod v. London, etc., R. Co., 4 Exch. 580. To the same effect, Philadelphia, etc., R. Co. v. Wilt, 4 Whart. (Pa.) 142; Yerger v. Warren, 37 Pa. St. 319; Allegheny Valley R. Co. v. McLain, 91 Pa. St. 442.

4. Mason v. Keeling, 12 Mod. 333; 1 Ld. Raym. 608; Jenkins v. Turner, 1 Ld. Raym. 109; Boulton v. Banks, Cro. Car. 254; Buxendin v. Sharp, 2 Salk. 662; Hodsoll v. Stallbrass, 11 A. & E. 301; 39 E. C. L. 94; Wales v. Ford, 8 N. J. L. 267; Dilts v. Kinney, 15 N. J. L. 130.

5. Hence, the *scienter* must be laid and proved. Mason v. Keeling, 12 Mod. 333; Buxendin v. Sharp, 2 Salk. 662; Jones v. Perry, 2 Esp. 482.

6. Some of the earlier cases held that trespass alone lay where immediate injury followed a negligent act. Gates v. Miles, 3 Conn. 64; Barnes v. Hurd, 11 Mass. 57; Waldron v. Hopper, 1 N. J. L. 390; Case v. Mark, 2 Ohio 169; Taylor v. Rainbow, 2 Hen. & M. (Va.) 423.

7. Branscomb v. Bridges, 1 B. & C. 145; 8 E. C. L. 63; Smith v. Goodwin, 2 N. & M. 114; Frankenthal v. Camp, 55 Ill. 169; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Johnson v. Castleman, 2 Dana (Ky.) 377; Dalton v. Favour, 3 N. H. 465; Gilson v. Fisk, 8 N. H. 404; Blin v. Campbell, 14 Johns. (N. Y.) 432 (see Percival v. Hickey, 18 Johns. (N. Y.) 257; 9 Am. Dec. 210); McAllister v. Hammond, 6 Cow. (N. Y.) 342; Brennan v. Carpenter, 1 R. I.

will lie for a breach of contract, case also will lie for a violation of the duty which the contractual relation involves.¹ In the case of negligent performance of an undertaking requiring especial skill,² or of the breach of a duty arising in law from the circumstances of the case, or the breach of a duty imposed by operation of law,³

474; *Howard v. Tyler*, 46 Vt. 683, *qualifying* *Clafin v. Wilcox*, 18 Vt. 605; *Waterman v. Hall*, 17 Vt. 128; 42 Am. Dec. 484. And see *Jordan v. Wyatt*, 4 Gratt. (Va.) 151; 47 Am. Dec. 720.

It has even been held that case will lie where a recovery has already been had in trespass. *Blin v. Campbell*, 14 Johns. (N. Y.) 432.

1. The form of action is *assumpsit* or case, according as the contract, or the duty growing out of it, is made the basis of the defendant's liability. *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Howe v. Cook*, 21 Wend. (N. Y.) 29; *Cogswell v. Baldwin*, 15 Vt. 404; 41 Am. Dec. 686.

Case lies against attorneys at law for negligence in the conduct of cases intrusted to them. *Walker v. Goodman*, 21 Ala. 647; *Sevier v. Holliday*, 2 Ark. 512; *O'Barr v. Alexander*, 37 Ga. 195; *Dearborn v. Dearborn*, 15 Mass. 316; *Salisbury v. Gourgas*, 10 Met. (Mass.) 442; *Wilson v. Coffin*, 2 Cush. (Mass.) 316; *Holmes v. Peck*, 1 R. I. 242; *Crooker v. Hutchinson*, 1 Vt. 73.

The more usual common-law remedy, however, is *assumpsit*. See ASSUMPSIT, vol. 1, p. 882.

Case lies against a broker for neglect of his duty to his principal, *e. g.*, the unauthorized investment of money given him for a not her investment. *Shreeve v. Adams*, 6 Phila. (Pa.) 260.

It lies for abuse of authority under a power of attorney to sell stocks, when such abuse does not involve conversion. *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28.

So in the case of other kinds of work which a man may be employed to do. *Smith v. White*, 6 Bing. N. Cas. 218; 37 E. C. L. 353.

Case is equally appropriate where a breach of warranty is superadded to the negligent performance of the contract, such warranty being merely an inducement to the contract, or to the acceptance of the article contracted for. *Brown v. Edington*, 2 M. & G. 279; 40 E. C. L. 371; *City Iron Works v. Barber*, 102 Pa. St. 156.

2. Thus, case lies against surgeons, physicians, and apothecaries for want

of skill or care in the treatment of a patient. *Slater v. Baker*, 2 Wils. 359; *Seare v. Prentice*, 8 East 48; *Peck v. Martin*, 17 Ind. 115; *West v. Martin*, 31 Mo. 375; 80 Am. Dec. 107.

The want of skill being the gist of the action, it may be brought by the party injured, whether the defendant was employed by him or by some one else. *Gladwell v. Steggall*, 5 Bing. N. Cas. 733; 35 E. C. L. 292; 8 Scott 60.

The distinction between the liability on an express contract and that on the contract implied in law to use all necessary skill, is stated at length in *Zell v. Arnold*, 2 P. & W. (Pa.) 293, where a millwright contracted to build a mill, carding-machine, millrace, etc., but laid off the millrace unskillfully, so that the water failed to flow. The supreme court of *Pennsylvania*, *per* Gibson, C. J., said that although the action grew out of an express contract, "no other contract formed an ingredient in the subject of it than that implied by the law, which requires any one employed in an art or calling, to bring to the business a competent share of diligence and skill. The gist of an action on the case like the present is not a failure to perform, but a failure to perform in a workmanly manner, which is a tort. An undertaking for skill and diligence is implied no further than to raise a duty, the breach of which is the gravamen and meritorious cause of the action."

. . . A special action on the case lies for what is substantially a tort, although a tort deducible from the existence of a contract."

3. "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of action. But where from a given state of facts the law raises a legal obligation to a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by the law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his dec-

as in the case of common carriers,¹ an action on the case is the more proper remedy.

IV. PLEADING AND PRACTICE.—The form of the declaration in actions on the case depends on the circumstances which give rise to the action, and hence admits of considerable variety.² The injury ought not, in general, to be stated to have been committed *vi et armis* nor *contra pacem*.³ The statements should truly and specifically disclose the cause of action.⁴ The action being wholly distinct from that of trespass, counts in trespass cannot be joined with those in case, except where a statute specifically allows this.⁵ The plea and the evidence admissible thereupon are treated of in PLEADING.⁶ Whatever will, in equity and conscience, bar recovery, may be given in evidence.⁷ The judgment includes full costs of

laration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." *Burnett v. Lynch*, 5 B. & C. 589; 12 E. C. L. 326, per Littledale, J. Hence it was held in that case, that an action on the case lies for non-performance, by an assignee of the term, of the covenants in a lease, to the damage of the lessee, the lease having been assigned by deed-poll, without any express promise to perform the covenants or contract to indemnify, so as to sustain an *assumpsit*, and the ground of the action being the damage resulting to the plaintiff from the defendant's breach of duty.

1. Although *assumpsit* will lie against common carriers for breach of an express or implied contract of carriage, a breach of their common-law duty to carry and convey goods and passengers in safety is a tort, the subject of an action on the case, which was indeed originally regarded as the only remedy. *Bretherton v. Wood*, 3 B. & B. 54; *Ansell v. Waterhouse*, 2 Chit. 1; *Pozzi v. Shipton*, 8 A. & E. 963; 35 E. C. L. 574; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Walker v. Jackson*, 10 M. & W. 161; *Bank of Orange v. Brown*, 3 Wend. (N. Y.) 158; *McCall v. Forsyth*, 4 W. & S. (Pa.) 179; *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Emigh v. Pittsburgh, etc., R. Co.*, 4 Biss. (U. S.) 114.

The same holds true of shipowners, even though the master be also liable on the charter party. *Leslie v. Wilson*, 6 Moore 415.

Where a city keeps a public wharf, and receives tolls for its use, it is liable in an action on the case for neglect of

its corporate duty, to maintain such wharf in proper repair. *Pittsburgh v. Grier*, 22 Pa. St. 54.

A *fortiori*, case lies against common carriers, inn-keepers, public warehousemen, etc., for refusal to exercise their trades. *Y. B. 21 Hen. VI. 55*; *Jackson v. Rogers*, 2 Show. 327; *Allnutt v. Inglis*, 12 East 527; *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372; *Ansell v. Waterhouse*, 6 M. & S. 393. See *Rex v. Kilderby*, 1 Wms. Saund. 312 a, n. 2.

2. 1 Chitty's Pleading (16th Am. ed.) *163.

3. 1 Chitty's Pleading (16th Am. ed.) *163; 1 Com. Dig., "Action Upon the Case," chs. 3, 4.

4. 1 Chitty's Pleading (16th Am. ed.) *163.

5. *Guilford v. Kendall*, 42 Ala. 651. But this has subsequently been changed by statute in *Alabama*. See *infra*, this title, *Modern Changes and Substitutes*. *Dale Mfg. Co. v. Grant*, 34 N. J. L. 138.

6. PLEADING, vol. 18, p. 467.

7. *Plowman v. Foster*, 6 Coldw. (Tenn.) 52.

"An action on the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect is so; and therefore a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only." *Bird v. Randall*, 3 Burr. 1345; 1 Wils. 45. To the same effect, *Kil-*

suit irrespective of the amount of the damages, except as this may be modified by state law.¹

V. MODERN CHANGES AND SUBSTITUTES.—In *Alabama, Florida, Maryland, Mississippi, New Hampshire, New Jersey, Rhode Island*, and the Territory of *New Mexico*, the action on the case remains substantially as at common law, except that in *Alabama* counts in trespass and case may be joined, when they relate to the same subject-matter.²

In *England*, and in those states which have adopted codes of pleading, case does not now exist as a distinct form of action, being merged in the single form of civil action.³ In *Massachusetts*, it has been merged with other actions for damages *ex delicto* in the "action of tort."⁴ In *Pennsylvania*, in the "action of trespass,"⁵ and in *Tennessee* in the "action on the facts of the case."⁶ In *Michigan*, it is employed to recover damages where, by the wrongful act of any person, an injury is produced, either to the person, personal property, or rights of another, or to his servant, child or wife, for which trespass lies, whether such act be willful, forcible, or not, and whether the injury be immediate or consequential.⁷ In *Delaware, Illinois*, and *Maine*, the distinction between trespass and trespass on the case has been abolished, and either form may be used.⁸ In *Virginia* and *West Virginia*, trespass on the case may be brought for injuries wherever trespass would lie.⁹ The rights of action which, before these changes took place, were sued on in actions on the case, remain, of course, unchanged,¹⁰ and, under whatever system they are prosecuted, must be supported by the same evidence as at common law.¹¹

Jeffer v. Herr, 17 S. & R. (Pa.) 325; 17 Am. Dec. 658; *Gilchrist v. Bale*, 8 Watts (Pa.) 355; 34 Am. Dec. 469.

Hence, in an action to recover the value of chattels, the defendant can, under the general issue, justify the taking and sale of the chattels by proof of a chattel mortgage purchased and held by him. *Fulton v. Merrill*, 23 Ill. App. 599.

1. 1 Chitty's Pleading (16th Am. ed.) *164.

2. Code of *Alabama* (1886), § 2673, p. 594.

3. See PLEADING, vol. 18, p. 467.

4. *Massachusetts* Pub. Stats. (1882), ch. 167, § 1, p. 964.

5. Act of May 25, 1887, § 2, P. L. 271, *Purd. Dig. Supp.*, p. 2369. The *Pennsylvania* courts cannot now distinguish between these forms of action. *Duffield v. Rosenzweig*, 144 Pa. St. 520.

In an action on the case for injuries by the conversion of down timber, brought before the passage of this law, but decided by the supreme court on writ of error after the passage, that

court declined to entertain the objection that the form of action should have been trespass, and not case, as the distinction no longer existed. *Short v. Messenger*, 126 Pa. St. 637.

6. Code of *Tennessee* (1884), § 3441.

7. 2 Howell's Stats. *Michigan* (1882), § 7759, p. 1942. It does not apply to trespass on lands. *Wood v. Michigan A. L. R. Co.*, 81 Mich. 358.

8. Laws of *Delaware* (1874), ch. 106, § 11, p. 648; *Illinois* Rev. Stats. (1891), ch. 110, § 22, p. 1045; *Maine* Rev. Stats. (1884), ch. 82, § 15, p. 696. Hence, counts in both forms may be joined in the same declaration. *Krug v. Ward*, 77 Ill. 603; *Barker v. Koozier*, 80 Ill. 205.

9. Code of *Virginia* (1887), § 2901, p. 693; Code of *West Virginia* (1891), ch. 103, § 8, p. 726.

Hence, a declaration alleging a case of trespass at common law, is sufficient for trespass on the case. *Daingerfield v. Thompson*, 33 Gratt. (Va.) 136; 36 Am. Rep. 783.

10. See *Hill v. Kimball*, 76 Tex. 210.

11. The statute abolishing the distinc-

TRIAL.—(See ADJOURNMENT, vol. 1, p. 192; BILL OF EXCEPTIONS, vol. 2, p. 218; CHANGE OF VENUE, vol. 3, p. 90; CONSTITUTIONAL LAW, vol. 3, p. 670; CONTEMPT, vol. 3, p. 777; CRIMINAL PROCEDURE, vol. 4, p. 729; DISTRICT OR PROSECUTING ATTORNEYS, vol. 5, p. 713; INSTRUCTIONS, vol. 11, p. 236; INTERPRETER, vol. 11, p. 523; JUDGE, vol. 12, p. 2; JURY AND JURY TRIAL, vol. 12, p. 318; JUSTICE OF THE PEACE, vol. 12, p. 390; MASTER IN EQUITY, vol. 14, p. 919; NEW TRIAL, vol. 16, p. 500; OATH, vol. 16, p. 1017; PRODUCTION OF DOCUMENTS, vol. 19, p. 227; QUESTIONS OF LAW AND FACT, vol. 19, p. 598; REFEREES, vol. 20, p. 660; STAY OF PROCEEDINGS, vol. 23, p. 520; SUNDAY, vol. 24, p. 528; VERDICT; WITNESSES.)

TRIMMINGS.—See note 1.

TROOPS.—(See MILITIA, vol. 15, p. 474.)

TROUBLE.—See note 2.

tion between the actions of trespass and case does away with the technical distinction only, but does not affect the substantial rights and liabilities of the parties, so as to operate to give any other remedy for acts done, than before existed. *Blalock v. Randall*, 76 Ill. 224.

Under the *New York Code*, where the plaintiff's remedy is in equity, an action at law in the nature of an action on the case cannot be maintained. *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508. See *PLEADING*, vol. 18, p. 467.

1. In *Wright v. Hitchcock*, 5 Exch. 46, the word was held to mean something attached to any part of the dress, either of man or woman, whether it is called the frill of a sleeve, or the ruffle of a shirt, or the trimmings of a lady's dress.

Hat Trimmings.—Ribbons composed of silk and cotton, in which silk is the component material of chief value, used as trimmings for ornamenting hats and bonnets and having commercial value only for that purpose, are liable only to the duty imposed upon such articles under *Robertson v. Edelhoff*, 132 U. S. 614. Artificial fruits and artificial stems and leaves are trimmings. *Marsh v. Seeberger*, 30 Fed. Rep. 422.

2. In *Whitney v. Lynn*, 122 Mass. 338, it was held that under a statute providing full indemnity to a person whose land had been taken for laying out a street, for the trouble and expense to which he has been put by the proceeding, a person could not recover for the disquiet, vexation, and annoyance to which he had been subjected

by the proceeding, nor for the uncertainty in which he has been kept as to whether the street would be laid out; but he may recover for his trouble and expense in visiting the city, where his land was situated, in consulting with counsel and in conferring with the officials. In that case the court, by Endicott, J., said: "The statute provides that any person claiming damages shall have full indemnity for the trouble and expense to which he has been put by the proceedings. General Statutes, ch. 43, §§ 14, 63. The respondent contends that the words 'vexation,' 'disquietude,' 'annoyance,' 'uncertainty,' as used by the learned Judge, refer to conditions of mind, and are not the subject-matter of damages within the meaning of the statute. We are of opinion that the objection is well taken. The word 'trouble,' in the statute, refers to trouble from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land; all of which may be estimated in damages by a standard common to all cases. But mental troubles, so difficult to estimate by any pecuniary standard, and which may vary in different individuals, according to their temperament or health, do not come within the meaning of the statute, and are not the subject-matter of damages. The other objection must be overruled. The petitioner's trouble and expense in visiting Lynn, employing counsel and conferring with the mayor, come clearly within the statute."

TROVER.—(See BAILMENT, vol. 2, p. 61; CONVERSION, vol. 4, p. 104; DEMAND, vol. 5, p. 528s; FINDER OF PROPERTY, vol. 7, p. 977; LOST PAPERS, vol. 13, p. 1059; PLEADING, vol. 18, p. 467; PLEDGE, vol. 18, p. 585; RECAPTION, vol. 19, p. 1093.)

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Definition.

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I. DEFINITION.—Trover, at common law, was an action on the case, whereby the owner of personal property recovered damages against a person who had committed the wrong of conversion with respect to that property. The action derives its name from the form which the declaration originally assumed: "That the defendant found goods which the plaintiff lost;" the finding (*trouver*), in the language of the ancient pleaders, was the inducement and the conversion the gist of the action.¹

1. "In form," said Lord Mansfield in *Cooper v. Chitty*, 1 Burr. 20, 1 Smith's L. C. 810, "the action is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted. The form supposed the defendant to have come by the possession of the goods in a lawful manner. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten. The gist of the action is the conversion." See also 1 Chitty on Pl., p. 167; Cooley on Torts, p. 516; Bigelow's Leading Cas., tit., "Conversion."

History of the Action.—The common law afforded the owner of chattels who had been unlawfully deprived of them by the wrongful act of another, four distinct remedies, the application of each depending upon the character of the wrongdoer's act and the nature of the relief sought. *First*: the appeals of robbery and larceny furnished a remedy in those cases where the defendant feloniously deprived the plaintiff of his property. The judgment was restitution of the goods to the owner and punishment to the wrongdoer. 4 Bl. Com., p. 146; 2 Stephen's Hist. Crim. Law, p. 247; Bigelow's L. C. 420. *Second*: replevin was the proper form of action in those cases where the defendant had unlawfully distrained the goods of the plaintiff. 4 Bl. Com., p. 148. See REPLEVIN, vol. 20, p. 1041. *Third*: trespass was the action whereby one whose property had been unlawfully taken by another, was afforded relief. It was inapplicable to a case where the defendant acquired possession lawfully, however tortious his

holding might have become subsequently. See TRESPASS, vol. 26, p. 568; 1 Chitty on Pl., tit. "Trespass"; Bradley v. Davis, 14 Me. 44; 30 Am. Dec. 729; Van Brunt v. Schenck, 11 Johns. (N. Y.) 377; Parker v. Walrod, 13 Wend. (N. Y.) 296; 16 Wend. (N. Y.) 514; 30 Am. Dec. 124; Cooley on Torts, 442; Cooper v. Chitty, 1 Burr. 31. *Fourth*: detainee afforded a more direct remedy for the recovery of chattels unlawfully detained, and in some manner supplied the defects of the action of trespass. This was the proper form of action for the recovery in specie, of chattels which were unlawfully detained by the defendant. The judgment in detainee was conditional: "That the plaintiff recovers the said goods, or (if they cannot be found) their respective values and damages for detaining them." But detainee was attended with some disadvantages. It was essential for the plaintiff to set out with minute accuracy a description of the goods detained, so as to identify them from other goods of like character. A failure to comply with this particular was fatal to the plaintiff's case; and where several chattels were detained, each had to be described so minutely that it rendered the pleadings long, tedious, and cumbersome. Nor did this formal accuracy cease with the written pleadings of the parties. The verdict of a jury which did not find a detainer as to each article separately, and estimate the damages for the detention of each specific chattel, was of no effect. 1 Chitty Pl., p. 164; 3 Bl. Com. 152; Cro. Jac., p. 681. Again, the defendant, by swearing to the non-existence of the plaintiff's cause of action, could at once defeat the plaintiff's claim,

In *England*, the necessity of a fictitious allegation of a losing and finding has been dispensed with by statute,¹ while procedural legislation in recent years, in the various states, has almost totally abolished the form of the action, though preserving the substantive right to recover for the wrong of conversion.²

which privilege, called *wager at law*, was grounded upon the analogy of *detinue* to the action of debt; *detinue* being nothing more than an action of debt for chattels. History of Assumpsit, J. B. Ames, 2 Harv. L. Rev., p. 100; Bigelow's L. C., p. 422; 3 Bl. Com., p. 152; Burroughs v. Bayne, 5 H. & M. 296, per Martin, B.

After the enactment of the statute, *in consimili casu*, 13 Edw. I., the common lawyers were not long in devising means of overcoming the disadvantages of the action of *detinue*. *Indebitatus assumpsit* had usurped the functions of the action of debt, *wager of law* not being an incident to actions on the case. It was very desirable to procure a remedy in place of *detinue*, and several actions of *assumpsit* were brought which, under the old law, might have been made the subject of an action of *detinue*. In 26 Henry VIII., there appears an action on the case, "for that the plaintiff had delivered the goods to the defendant and the defendant for ten shillings promised to keep them safe." Bro. N. C. 4. So, again, in an action upon the case, that the goods of the plaintiff came into the hands of the defendant, and he wasted them, the defendant says they came not to his hands, etc., and gives in evidence that they were not the proper goods of the plaintiff. 34 Hen. VIII.; Bro. Action Sur Le Case 103.

Whenever *detinue* could be supplanted by another form of action, it was invariably rejected and an action upon the case adopted. Many actions were brought in case which, under the old law, would have been in *detinue*. Thus, it was held that an action on the case lay against one who had hired a horse to ride to Everwick and had ridden it to Carlisle; 21 Edw. IV., p. 76; also that it lay against one who had hired a horse to ride to Everwick and had ridden it so fast that it could not be used for many days; that it lay against one who had killed a horse which had been bailed to him. Bigelow's L. C., p. 423.

It was not, however, until the fourth year of the reign of Edward VI. that

an action in the precise form from which the action of *trover* derived its name, appears. Brooke's N. C. 6. Judging from the exceptions taken to the declaration, the form of the action was a novelty. The earliest cases were no doubt actual instances of where the defendant found goods which the plaintiff had lost. But the advantages of the new action over *detinue* soon gave it a popularity among the pleadings, since the finding, as in *detinue*, was not traversable and the "conversion" was the gist of the action. See Reeves' Hist. of Eng. Law, vol. 3, p. 552; Bigelow's L. C., p. 425; Brooke's N. C. 122, pl. 404; Bacon's Abr., tit. "Trover;" Rolle's Abr., tit. "Trover" [a]. See also the valuable note of Mr. F. W. Maitland, Appendix A, Pollock on Torts, p. 467.

1. 15 and 16 Vict., ch. 76, § 69, the first Common Law Procedure Act. The form of the declaration prescribed by this enactment simply alleges that, "The defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods." The alternative words were inserted at the suggestion of Lord Denman, with a view merely of explaining the nature of the "conversion." Per Bramwell, B., in *England v. Cowley*, L. R., 8 Exch. 126. These allegations are exactly similar to one another, and it is the latter that most correctly described the nature of the action, since the plaintiff sues in respect of the loss of goods for which he has suffered, irrespective of any particular appropriation of them, which may have been made by the defendant. *Keyworth v. Hill*, 3 B. & Ald. 687; *Glyn v. East Indian Dock Co.*, 6 Q. B. Div. 490; *Burroughs v. Bayne*, 5 H. & N. 309; *England v. Cowley*, L. R., 8 Exch. 129; *Hiorst v. Bott*, L. R., 9 Exch. 89.

2. PLEADING, vol. 18, p. 478; 494, n. 4, and the various sub-heads under the sub-title, *Pleading Under Codes*. See also Maxwell on Code Pleading, pp. 595, 326-327, 532, 533.

The action of *detinue* is now nearly obsolete, and if the suitor desires to

II. CONVERSION—WHAT CONSTITUTES—1. Elements of Conversion—

a. IN GENERAL.—A conversion, in the sense of the law of trover, is any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily.¹

recover the specific chattel, he brings replevin. See *REPLEVIN*, vol. 20, p. 1041.

In *Cooley on Torts*, p. 516, it is said that in many states, there are statutes which permit the plaintiff, in an action of replevin, to proceed in it as in trover, and recover the value of the property, in case the officer fails to find it. See *REPLEVIN*, vol. 20, p. 1041.

1. Prof. J. B. Ames, 15 *Am. Law Rev.* 363.

Other definitions of conversion. "A conversion is any unauthorized act which deprives another of his property either permanently or for an indefinite time." *Bosanquet*, adopted by *Bramwell, B.*, in *Hiorst v. Bott*, *L. R.*, 9 *Exch.* 86.

In *Bouvier's Law Dict.*, conversion is defined as, "The turning or applying the property of another to one's own use."

In *Liptrot v. Holmes*, 1 *Kelly (Ga.)* 381, *Warner, J.*, said: "The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

One who assumes to himself the property in and right of disposition of the goods of another, is guilty of conversion. *Ramsby v. Beezley*, 11 *Oregon* 49. But if the disposition of the property is consented to by the owner, there is no conversion. *Tousley v. Board of Education*, 39 *Minn.* 419; *Griffin v. Bristle*, 39 *Minn.* 456. As where the plaintiff lends an article to the defendant, to be used by him until the delivery of another which the plaintiff has contracted to sell, he cannot sue for con-

version of the article loaned until delivery or tender of the one sold. *Jackson v. Appleton*, 2 *N. Y. Supp.* 787.

The mere assertion of ownership without in any way interfering with the property or the owner's right to control it, is no evidence of a conversion. *Irish v. Cloyes*, 8 *Vt.* 30; 30 *Am. Dec.* 446.

Forbidding an outgoing tenant taking his property from the premises, except on paying a demand which is not a lien, amounts to a conversion. *Voss v. Bassett* (*Tex.* 1890), 15 *S. W. Rep.* 503.

The gist of the action is the conversion, and unless the defendant has had an actual or virtual possession of the goods, he cannot be charged with conversion of them to his own use. *Traylor v. Horrall*, 4 *Blackf. (Ind.)* 317.

The mere driving an estray from one's close into the highway is not a conversion. *Stevens v. Curtis*, 18 *Pick. (Mass.)* 227. One who, knowing property to be under attachment, suffers it to be sent away and sold by the owner, under an agreement by which he receives the avails of the sale, is not thereby guilty of conversion. *Polley v. Lenox Iron Works*, 2 *Allen (Mass.)* 182. Nor is the sale of property by the defendant after the commencement of the suit, evidence of conversion. *Storm v. Livingston*, 6 *Johns. (N. Y.)* 44. Where, in a usurious contract, the delivery of personal property by the borrower to the lender is a part of the transaction, the possession of such property by the lender is tortious from the beginning and trover will immediately lie. *Schroeppel v. Corning*, 5 *Den. (N. Y.)* 236.

Where one sells goods, and, because the buyer does not remove them when ordered, sells them over again, he is guilty of conversion. *Koon v. Brinkerhoff*, 39 *Hun (N. Y.)* 130. The indorsement and delivery of an elevator receipt by the consignee is a conversion of the grain represented by the receipt, as against the holder of a draft drawn against it with transfer of the bill of lading. *Hamlin v. Carruthers*, 19 *Mo.*

It is a rule of law that a person who assumes dominion over the property of another, does so at his peril, and is responsible in

App. 567. The sale on execution of personal property belonging to a third person amounts to a conversion, whether the officer making the sale removes it or not. *Scudder v. Anderson*, 54 Mich. 122. Where a bank causes stock, indorsed in blank with a power of attorney to have transferred on the corporation books and deposited with it as collateral, to be transferred to it on the books of the corporation, and insists on its right to vote on the same, it does not constitute a conversion, the bank not intending a conversion. *Union, etc., Bank v. Farrington*, 13 Lea (Tenn.) 333.

In an action for the conversion of a quantity of broom corn, where the evidence showed that the defendant received the corn in question to be sold on commission, and held it in anticipation of an advance in price, until the freight and storage charges, together with the amount previously advanced, exceeded the sum realized therefor, it was held that the charge of conversion was entirely unsupported by the evidence. *Worth v. Buck*, 34 Neb. 703.

The Defendant, at the time of purchase of the plaintiff's farm, made a distinct oral agreement for the purchase of the manure, it being agreed that it should be put up at auction, and if the defendant was the highest bidder, he should have it. The plaintiff conveyed the farm, and put up the manure for sale, but the defendant forbade the sale, claiming the manure as his own, and spread it on the land, and it was held a conversion of the plaintiff's property. *Strong v. Doyle*, 110 Mass. 92. Castrating a hog running among one's stock is not such proof of a change of property as to be evidence of a conversion or appropriation to his own use. *Byrne v. Stout*, 15 Ill. 180.

As to what has been held a conversion under various facts, see *Maxwell v. Harrison*, 8 Ga. 61; 52 Am. Dec. 385; *Conner v. Allen*, 33 Ala. 515; *West Jersey R. Co. v. Trenton, etc., R. Co.*, 32 N. J. L. 517; *Hutchinson v. Bobo*, 1 Bailey (S. Car.) 546; *Marcum v. Beime*, 6 J. J. Marsh. (Ky.) 603; *Scott v. Perkins*, 28 Me. 22; 48 Am. Dec. 470; *Asher v. Reizenstein*, 105 N. Car. 213; *Plumer v. Brown*, 8 Met. (Mass.) 578; *Bray v. Bates*, 9 Met. (Mass.) 237; *Thomas v. Morse*, 80 Tex.

289; *Fuller v. Tabor*, 39 Me. 519; *Walcott v. Keith*, 22 N. H. 196; *Thomson v. Gortner*, 73 Md. 474; *Stuart v. Phelps*, 39 Iowa 14, levy of execution on mortgaged crop; *Powell v. Powell*, 71 N. Y. 71, reversing 2 Hun (N. Y.) 413, where the maker of a note agreed to take it in part payment of goods, and then tore his signature from the note and repudiated the contract; *Woodis v. Jordan*, 62 Me. 490, forbidding the owner of cord wood to enter and remove it from the defendant's land.

Joint-Conversion.—In order to constitute a joint conversion, the acts of the defendants need not be contemporaneous, if they all tend to the same result. *Cram v. Thissell*, 35 Me. 86.

Trespass by Cattle.—Where the cattle of one person break into the inclosure of another, and eat and destroy the growing corn, his remedy is in trespass, and trover will not lie. There is no conversion in such a case. *Smith v. Archer*, 53 Ill. 241.

Unauthorized Sale for Taxes.—The unauthorized sale of property by a tax collector amounts to a conversion. *Thompson v. Currier*, 24 N. H. 237.

Cancellation of Certificate of Membership.—The cancellation of a certificate of membership in the board of trade amounts to a conversion. *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445.

Giving "Free Certificate" to a Slave.—Giving to a negro a certificate that he is free, does not amount to a conversion in the one giving the certificate, if the negro should turn out to be a slave. *Glover v. Riddick*, 11 Ired. (N. Car.) 582.

Sale of Mortgaged Property.—The sale of mortgaged property by the mortgagor to the exclusion of the rights of the mortgagee, is a conversion. *Ashmead v. Kellogg*, 23 Conn. 70.

Use of Property Attached to the Freehold.—Where machinery has become incorporated in a mill so as to be part of the realty, the use thereof by the owners of the mill is not a conversion, and this, though the machinery was obtained through the fraud of the agent of the owners. *Woodruff, etc., Iron Works v. Adams*, 37 Conn. 233.

Sale Under Process.—Where, by statute, an officer is required to have

damages, if, by means of his act, a fraud or an injury is inflicted upon the real owner.¹ Therefore, in trover, as in trespass, the honesty of the defendant's motive cannot enter as an element in the determination of his liability.² His intention may have been to preserve the goods for the owner, yet, if his act is unauthorized, and results in the destruction or deprivation of the owner's possession, he is liable. And this is true even where the owner has by his fault in the first instance laid bare the opportunity for the defendant's honest, but unauthorized act.³ It is only in cases of imminent peril and danger that a destruction of property is excus-

property appraised before its sale by him under process, he will be liable for conversion if he sells without an appraisal. *Tripp v. Grouner*, 60 Ill. 474.

1. *Pollock on Torts*, pp. 15-16; *Nutter v. Varney*, 64 N. H. 611; *Savage v. Darling*, 151 Mass. 5.

2. *Hollins v. Fowler*, L. R., 7 H. L. Cas. 757.

3. *Alvord v. Davenport*, 43 Vt. 30.

In *Hiorst v. Bott*, L. R., 9 Exch. 86, it appeared that the plaintiffs, in consequence of a telegram from one G., their broker, forwarded to Birmingham 83 quarters of barley, and at the same time sent to the defendant a letter inclosing an invoice for the barley, in which it was stated to be "sold by Mr. G. as broker between buyer and seller," and the delivery order which made the barley deliverable "to the order of consignee or consignee." The barley had, in fact, never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or G. A day or two after the receipt of these documents by the defendant, G. called; the defendant produced the documents and said, "What does this mean? I never bought any barley through you of the plaintiffs." G. said, "It was a mistake of the plaintiffs; they had no doubt confused the defendant's name and some other name." G. then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to G., who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded. The jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and with a view of returning the barley to the plaintiffs.

It was held to be a conversion. *Bramwell, B.*, in this case, said: "Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all, it would have been delivered to the plaintiffs. And there is no doubt that by what he did, he deprived the plaintiffs of their property; because, by means of this order so indorsed, G. got the barley and made away with it, leaving the plaintiffs without any remedy against the railroad company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus; that by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley, without any remedy except against G., and that is worthless. It seems to me, therefore, that this was assuming control over the disposition of these goods, and causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out. Though his intention originally was to preserve the property for the owner, if he is subsequently guilty of any unauthorized act concerning it, he is liable for conversion, as where the defendant, at the plaintiff's request, bid in property of the plaintiff sold to enforce a claim against it, and afterwards, without his consent, removed it from the state, he was held guilty of conversion." *Fitchett v. Nanary* (Super. Ct.), 14 N. Y. Supp. 479.

A field driver merely detaining an estray in his yard, in order to notify the owner before impounding, is not liable for a conversion. *Dean v. Lindsey*, 16 Gray (Mass.) 264; *Van Valkenburgh v. Thayer*, 57 Barb. (N. Y.) 196.

In *Fitzgerald v. Burrill*, 106 Mass. 446, the plaintiff delivered a letter to

able, though the lack of judicial expression renders it impossible to place any limitation upon the doctrine.¹

6. MUST BE A MISFEASANCE.—The common-law fiction that trover was founded upon the idea that the defendant had found goods which the plaintiff had lost, prevented the maintenance of the action where the property was destroyed through the negligence of the defendant: "For no law compelleth him who found a thing to keep it safely."² There must be some overt tortious act. Where the defendant is wholly passive and asserts no right to the property, even though his omission causes its complete destruction, he cannot be held liable in trover.³ Where property is in the possession of a defendant who, without denying the plaintiff's right of possession, refuses to transfer it physically to the

the defendant, a clerk in a post office, to be sent by mail as a registered letter, under a mutual mistaken belief that a letter could be registered to the place to which it was addressed. On discovering the mistake, the defendant sent it by mail unregistered and it was lost. It was held that he was answerable to the plaintiff in trover. *Hawkes v. Dunn*, 1 C. & J. 519; 6 Wait's Act. & Def. 187.

It is no conversion for the vendee of a slave, upon the improper refusal of the vendor to receive her back and rescind the sale, to set her to work instead of abandoning her. *Rand v. Oxford*, 34 Ala. 474.

1. *Drake v. Shorter*, 4 Esp. 165. In *Bird v. Astcock*, 2 Buls. 280, Lord Coke said: "There was a case resolved in the common bench, when I was there, concerning a Gravesend barge, in which were a great number of passengers; one there had a pack of great value and of great weight in the barge. There suddenly happened a very great storm and they were all in great danger, and were for their own safety enforced to throw out a great part of the goods for the safeguard of their lives, which were then in the barge; amongst which goods for the lightening of the barge, this pack of goods was thrown over; afterwards he, which was the owner of this pack, brought his action upon the case against the bargeman for these his goods thus cast over. It was resolved that he should recover nothing, it being the act of God."

In a case where the plaintiff shipped 5000 cigars to the defendant, with the understanding that he could have as many as he wanted at \$35 per thousand; the defendant elected to take

2000, packing away the remaining 3000, which were subsequently appropriated by the public during a yellow-fever epidemic, when the defendant was absent from the city. It was held that an action of trover would not lie against the defendant. *Traylor v. Hughes*, 88 Ala. 617.

When Destruction of Property Justifiable at Sea.—See *JETTISON*, vol. 11, p. 972; *GENERAL AVERAGE*, vol. 8, p. 1297.

To Prevent Spreading of Fire.—See *FIRE DEPARTMENT*, vol. 7, p. 999; *POLICE POWER*, vol. 18, p. 756.

2. In *Mulgrave v. Ogden*, Cro. Eliz. 219, decided in 1591, there was an action *sur trover* for twenty barrels of butter and counts that the defendant *tam negligenter custodivit* that they became of little value. Upon this it was demurred and held by all the justices that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is a conversion, so if he of purpose misuseth it, as if one finds a paper and puts it into the water, etc.; but for negligent keeping no law punisheth him.

3. *Owen v. Lewyn*, 1 Vent. 223; *George v. Wilburn*, 1 Roll. Abr. 6 Pl. 4; *Lowndes's Case*, Clayt. 104; *Anonymous*, 2 Salk. 655; *Attersol v. Briant*, 1 Camp. 409; *Severin v. Kerpell*, 4 Esp. 156; *Heald v. Carey*, 21 L. J. C. P. 97; *Beaton v. Wade*, 14 Colo. 4; *Knapp v. Willetts*, 1 Thomp. & C. (N. Y.) 206.

"In order to constitute a conversion, there must be an intention of the

defendant to take to himself the property, or to deprive the plaintiff of it." Parke, B., in *Simmons v. Lillystone*, 8 Exch. 442. There must be some repudiation by the defendant of the owner's right or some exercise of dominion over them in consistence with such right. *Heald v. Carey*, 11 C. B. 977; 73 E. C. L. 977. And see *School District v. Fink*, 25 Wis. 636.

One who receives goods into his possession and control as bailee, knowing them to have been stolen, and afterwards suffers the party depositing them to take them away, is not thereby guilty of conversion. *Loring v. Mulcahy*, 3 Allen (Mass.) 575. And see *Hill v. Hayes*, 38 Conn. 532. But one who receives goods to keep and redeliver to the owner, but delivers them to a third person, or suffers him to take them away, is guilty of conversion. *Lockwood v. Bull*, 1 Cow. (N. Y.) 322; 13 Am. Dec. 539. But in *Decker v. Shelton*, 1 Thomp. & C. (N. Y.) 224, the plaintiff sent logs to the defendant's mill to be sawed, the logs afterwards being claimed by one W. One of the defendants, on seeing W. approach the mill, said to a person present, "There comes W. after that lumber; you show him where it is," and the person addressed put his head out of the window and said to W., "There is your lumber." W. carried the logs away. It was held that the action of the defendant did not render him, or his co-defendant, liable to the plaintiff for the conversion of the logs.

The accidental loss or destruction of an article by one lawfully in possession of it, is not a conversion. *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 493; 8 Am. Rep. 564.

Thus, a bank cannot be held liable in trover for bonds deposited with it, but which have been either lost or stolen. *Dearbourn v. Union Nat. Bank*, 58 Me. 273; *Smith v. First Nat. Bank*, 99 Mass. 605; 47 Am. Dec. 59; nor the drawee of a bill of exchange to whom it has been presented for acceptance, for its accidental loss or destruction. *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; 8 Am. Rep. 564; nor a carrier or warehouseman for the loss of goods destroyed by fire. *Heald v. Carey*, 11 C. B. 977; 73 E. C. L. 977; nor goods lost or stolen by non-feasance merely. *Bowlin v. Nye*, 10 Cush. (Mass.) 416; *Packard v. Getman*, 4 Wend. (N. Y.) 613; 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill

(N. Y.) 586; 41 Am. Dec. 767; *Williams v. Gesse*, 3 Bing. N. Cas. 849; 32 E. C. L. 353; nor for omitting seasonably to deliver the goods without a previous demand. *Robinson v. Austin*, 2 Gray (Mass.) 564; *Johnson v. Strader*, 3 Mo. 359; *Scovill v. Griffith*, 12 N. Y. 509.

In *La Place v. Aupoix*, 1 Johns. Cas. (N. Y.) 407, sometimes cited to the contrary, it appeared that the goods had been placed in the defendant's possession and had been sold by him, contrary to orders, and it was held that their subsequent loss on the voyage on which they were shipped made no difference.

In *George v. Wiburn*, 1 Roll. Abr. 6, pl. 4, it is said: "If I bail goods to a common carrier to carry to a place, and then the goods are taken from the carrier, that is no conversion in the carrier to charge him in trover and conversion. But an action on the case lies against him as carrier, on the custom of the realm to carry goods safely and to deliver them as is appointed." And see *Lownsdell's Case*, Clayt. 104; *Owen v. Lewyn*, 1 Vent. 223; *Youl v. Harbottle*, Peake's N. P. Cas. 49; *Ross v. Johnson*, 5 Burr. 2825; *Heald v. Carey*, 11 C. B. 977; 73 E. C. L. 977; *Clerk & Lindsell on Torts*, p. 172. Nor will an officer be liable in trover for the loss of attached property stolen from him, where due care was taken. *Dorman v. Kane*, 5 Allen (Mass.) 38. For losses or injuries arising to property through the neglect of a bailee, a special action and not trover must be brought. *Johnson v. Strader*, 3 Mo. 359. So, where the plaintiff gave goods to the defendant, as agent, with full powers of sale, and the latter gave the goods to an irresponsible agent, it was held that trover would not lie. *Bromley v. Caxwell*, 2 B. & P. 438. But see *Doulin v. McQuade*, 61 Mich. 275, where the proprietor of a skating rink was held liable for the loss of a pair of skates, which he had received from a patron and given a check for; when the plaintiff made demand for the skates, a search for them was made, but they could not be found, and he was told that they were not there, but that he could have them if they were. The court said it was the duty of the bailee to preserve the property and deliver it to the bailor, and his failure to do so, simply because he could not find it, was a conversion.

Trover may be maintained against a

plaintiff, such a refusal is not a conversion, it being nothing more than a mere omission.¹

common carrier where the goods are delivered to the wrong person through mistake or under a forged order. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; 41 Am. Dec. 767.

The defendant borrowed a double-barreled gun "to try," and in loading, he overcharged and burst it; it was held that this did not amount to a conversion, the injury being induced by an accident; and a demand of the gun in the same plight and condition as it was, etc., and a refusal to deliver it in such condition was not evidence of a conversion. *Rushworth v. Taylor*, 3 Q. B. 699.

In *Cutter v. Fanning*, 2 Iowa 580, the plaintiff's sheep by accident became mixed with the defendant's, and they were driven away to a neighboring town. It was held that, "If the defendant did not know that the sheep of the plaintiff mixed with his, he would not be liable without a demand. But though he did not know at the time of the taking, if he subsequently knew it and made no effort to separate them, the conversion would be wrongful." In *Wellington v. Wentworth*, 8 Met. (Mass.) 548, a cow going at large on the highway, joined a drove of cattle, without the knowledge of the owner of the drove, and was driven into *New Hampshire* and pastured there during the season with defendants' cattle and in the autumn returned with the drove and was delivered to plaintiff. It was held to be no conversion. But if defendant had known the cow belonged to plaintiff, the action would have been maintainable. *Parker v. Lombard*, 100 Mass. 405.

One who takes an estray and keeps him for the owner is not liable in trover, notwithstanding he neglects to pursue the course provided by statute for such cases. *Nelson v. Merriam*, 4 Pick. (Mass.) 249.

Where the plaintiff placed a bicycle with defendant for sale, and told him to use it, if necessary, and "show it to the boys" to effect a sale; and while riding with the boys broke the machine in ascending a hill, it was held not a conversion. *Whittingham v. Owen*, 19 D. C. 277.

Assignment of Property Subject to Lien.—Where a person assigns his interest in a chose in action, subject

to a lien held by another, of which the assignee is cognizant, there is no conversion as against the holder of the lien. *Comfort v. Creelman*, 52 Minn. 280.

1. *Fifield v. Maine Cent. R. Co.*, 62 Me. 77; *O'Connell v. Jacobs*, 115 Mass. 21; *Ware v. First Congregational Soc.*, 125 Mass. 584; *Gillet v. Roberts*, 57 N. Y. 28; *Munger v. Hess*, 28 Barb. (N. Y.) 75; *Richards v. Pitts. Agr. Works*, 37 Hun (N. Y.) 1. And see *Houghton v. Butler*, 4 T. R. 364.

In *Farrar v. Rollins*, 37 Vt. 295, the plaintiff loaned the defendant a sled, and, upon demanding it, insisted that the defendant should carry it back to the plaintiff's house. The defendant offered to return the chattel, but refused to carry it back. It was held not a conversion.

Where the plaintiff knew where the property was, and might have taken it when he pleased, there is no conversion. *Roll v. Black, Dudley* (Ga.) 18.

Where no act is done, where there is no refusal to deliver and no claim of right to the property, where in truth the defendant is wholly passive, though the property is found in his possession, this does not *per se* subject him to an action of trover. *Ragsdale v. Williams*, 8 Ired. (N. Car.) 498; 49 Am. Dec. 406.

But where a bank refuses to allow stock to be transferred on its books, in accordance with a written power of attorney, thereby impairing its value to the owner, he may treat such action as a conversion of the stock and recover its value. *Bank of America v. McNeil*, 10 Bush (Ky.) 54.

And where B, by permission of the owner of a lot, turned his sheep into a pasture where A's sheep were pastured, and subsequently his son, by his direction and acting as his servant, removed them to another lot, and in doing so carelessly and negligently removed some of A's sheep also, and B declined, when requested by A, to assist in separating them, and his son afterwards, by his direction, removed them all to B's own farm without separating or making any effort to separate them, and B afterwards refused, on demand of A, to separate or assist in separating them, whereby A's sheep were lost to him, it was held that the latter could recover their value in a joint action of

c. HOW FAR DEFENDANT'S IGNORANCE OF PLAINTIFF'S RIGHTS A DEFENSE.—The proposition that persons deal with property in chattels or exercise dominion over them at their peril, is so well established as to have the force of a maxim in modern law.¹ And the only limitation of this principle is found in dealing with the liability of agents and servants acting innocently under the authority of a principal, in possession or actual custody of the property, but whose title is really defective.²

Generally, the capacity in which a defendant commits a wrong, can never enter as an element in the determination of his liability; therefore, an agent invested with possession, who sells or otherwise deals with the property as owner, can never justify under the authority of his principal.³ But there are circumstances where, from the nature of the agent's act, and the character of his possession,

trover against B and his son. *Willey v. Cox*, 25 Mich. 116.

1. 2 Bl. Com. 449; *Crane v. London Dock Co.*, 33 L. J. Q. B. 224; *Anonymous*, 12 Mod. 521; *Lee v. Bayes*, 18 C. B. 599; 86 E. C. L. 599; *Benjamin v. Andrews*, 5 C. B. N. S. 299; 27 L. J. Q. B. 310; *McCombie v. Davies*, 6 East 548; *Burroughs v. Bayne*, 5 H. & N. 310; *Mennie v. Blake*, 6 E. & B. 851. See opinion of Walworth, C., in *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278.

2. *Hollins v. Fowler*, L. R., 7 H. L. Cas. 767; *Fowler v. Hollins*, L. R., 7 C. B. 630; *Cochrane v. Rymill*, 40 L. T. 744; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 650; 93 E. C. L. 616; *Greenaway v. Fisher*, 1 C. & P. 190; 11 E. C. L. 362; *Alexander v. Southey*, 5 B. & Ald. 247.

3. *Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581; *Perminster v. Kelly*, 18 Ala. 716; *Edgerly v. Whalan*, 106 Mass. 307.

It is no defense to an action of trover that the defendant acted as servant or agent of another, who was himself a wrongdoer. *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772. Thus, an auctioneer who, in the regular course of his business and without knowledge of the theft, sells stolen property and pays the proceeds of the sale over to the thief, from whom he received the goods, is liable in trover to the owner. *Hoffman v. Carow*, 20 Wend. (N. Y.) 21; *aff'd* 22 Wend. (N. Y.) 285; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Robinson v. Bird*, 158 Mass. 357; *Everett v. Coffin*, 6 Wend. (N. Y.) 602; *Rogers v. Huie*, 1 Cal. 429; 44

Am. Dec. 300; *Consolidated Company v. Curtis* (1892), 1 Q. B. Div. 495. The aforesaid case of *Rogers v. Huie*, 1 Cal. 429; 44 Am. Dec. 300, was overruled in *Rogers v. Huie*, 2 Cal. 571; 44 Am. Dec. 363; but the latter decision was practically overruled in *Cerkel v. Waterman*, 63 Cal. 34, where a commission merchant, who sold a quantity of meat, supposing it to be the property of one W., and paid him the proceeds, was held liable to the owner for conversion; and in *Swim v. Wilson*, 90 Cal. 126, the doctrine laid down in *Rogers v. Huie*, 2 Cal. 571; 44 Am. Dec. 363, was expressly disapproved, and it was held that a stock-broker who sold stolen certificates of stock indorsed in blank, which he had received for sale from the thief, and paid the latter the proceeds, was liable to the true owner for conversion and to the same effect. *Anderson v. Nicholas*, 5 Bosw. (N. Y.) 121.

In *Koch v. Branch*, 44 Mo. 542, it was held that an agent who collected the money on a *United States* commissionary voucher, for an innocent purchaser thereof after the voucher had been stolen, would be liable for its conversion to the original owner.

In *Spooner v. Holmes*, 102 Mass. 503, it was held that a broker who, in good faith, received stolen interest coupons of *United States* bonds, transferred them to the buyer, and paid the proceeds to his employer, could not be held liable in trover to the true owner. The court, in this case, said that the coupons did not stand upon the same ground as chattels. That they were not to be considered as goods, but as representatives of money, and subject

the law absolves him from liability, although the rights of the owner are thereby infringed.¹ A servant in charge of goods upon his master's premises does not ordinarily have such possession as

to the same rules as bank bills or other negotiable instruments payable in money to bearer.

One Bayley fraudulently obtained cotton from Fowler, the plaintiff; Hollins, the defendant, a broker, purchased it from Bayley in good faith, in the belief and expectation that M. one of his ordinary clients, would accept it. M. did accept it, but at the time Hollins purchased, M. had not ordered or intimated that he desired to purchase any cotton. Hollins only received from M. a broker's commission and not a trade profit on the sale. It was held, in this instance, that Hollins had made himself a principal, and, by transferring the cotton to M., had committed an act of conversion, which made him liable in trover to Fowler, the owner of the cotton. *Hollins v. Fowler*, L. R., 7 H. L. Cas. 757; *Fowler v. Hollins*, L. R., 7 Q. B. 627.

Where a cotton factor sells the crop of a tenant, under circumstances which would reasonably appraise him of the landlord's lien for rent, he will be liable to the landlord, as for a conversion of the crop. *Merchants' etc., Bank v. Meyer*, 56 Ark. 499. And if a commission merchant, without notice of the mortgage, sells mortgaged cattle received by him from the mortgagor, to whom he accounts for the proceeds, he will be liable to the mortgagee for conversion, for the record of the mortgage is notice to all parties. *La Fayette County Bank v. Metcalf*, 40 Mo. App. 494; *Sprights v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *aff'g* 40 Barb. (N. Y.) 397. And the same may be said of an elevator company issuing a receipt for, and transferring mortgaged wheat. *Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dakota 62.

A bailee who, after being informed of the ownership of the property by another than the bailor, refuses to deliver it up, is guilty of conversion, although it is so intermingled with other property as to be difficult of separation. *Dusky v. Rudder*, 80 Mo. 400.

1. The development of this branch of the law is rather curious. It was originally held that an agent or servant could under no circumstances be held liable in trover for an act author-

ized by a principal or master, which infringed upon the rights of the real owner. In *Mires v. Solebay*, 2 Mod. 242, the court is reported to have said that, "The action would not lie against the servant, for, it being in obedience to his master's command, though he had no title, yet he shall be excused. And this rule Justice Scroggs said would extend to all cases where the master's command was not to do an apparent wrong, for if the master's case depended upon a title, be it true or not, it is enough to excuse the servant; for otherwise it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's title and right before he obey his commands, and it is very requisite if an action would lie against him for what he doth in obedience to the master." *Wine v. Ryder*, 2 Mod. 67; 4 Bacon's Abr. 258.

There was, however, a complete revolution from the principle of these early cases in *Stephens v. Elwall*, 4 M. & S. 259, founded upon the analogy of trover to trespass. In that case, a bankrupt, being possessed of certain goods, sold them after the act of bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London and for whom Deane bought the goods. Heathcote was in *America*, and the defendant was his clerk and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, who disposed of them by sending them to *America* to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. This was held to be a conversion. Lord Ellenborough, C. J., said: "The only question is whether this is a conversion in the clerk, which was undoubtedly so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself

would render him liable for a refusal to deliver at the request of the owner, of whose rights he is ignorant.¹ Neither is an agent or servant liable who merely assists in a wrongful transfer of title, acting innocently in a ministerial capacity, without reference to the ownership of the goods.² If B, having a wrongful possession of A's goods, employs a broker to sell, who sells to C, and all the broker does is to send bought and sold goods to B and C, no action of trover or any other form of action can be maintained against the broker.³ Upon the same principle, a carrier who transports goods from place to place; a packer who prepares goods for shipment; a watchmaker who repairs a watch and returns it to the person who left it; a farrier who shoes a horse for a thief; a broker who simply negotiates a contract of sale, cannot be charged for assisting a wrongdoer in his conversion, if ignorant of the rights of the owner.⁴

A rule which seems to embrace all cases, and forms an accurate test, is: "One who deals with goods at the request of a person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, is excused for what he does if the

no authority to dispose of it. The court is governed by the principles of law and not by the hardship of any particular case." See *Cranch v. White*, 1 Bing. N. Cas. 414; *Davies v. Vernon*, 6 Q. B. 443; 51 E. C. L. 443. Also cases cited *Ames' L. C.* 421.

The decision in *Hollins v. Fowler*, L. R., 7 H. L. 757, has generally been followed in the *United States*.

1. In *Alexander v. Southey*, 5 B. & Ald. 247, the defendant had charge and kept the key, of a warehouse, for an insurance company, in which were stored the goods of the plaintiff, which had been rescued from a fire. The plaintiff demanded of the defendant the goods so deposited, and not obtaining them immediately, began an action of trover. It was held that the defendant was not liable because he had only the custody of the goods; the possession being in his employers, the insurance company. The question here was apparently one of demand and refusal; but the judgment of *Holroyd, J.*, proceeds upon the idea that the *custody* of the defendant could hardly be regarded as possession of the property within the meaning of the law of trover. See *Clerk & Lindsell on Torts*, p. 173.

2. *Greenaway v. Fisher*, 1 C. & P. 190; 11 E. C. L. 362. See the opinion of Lord Blackburn in the House of Lords, in *Hollins v. Fowler*, L. R., 7 H. L. 757, and the illustrations there given.

3. *Brett J.*, L. R., 7 Q. B. 627, adopted by Lord Blackburn. *Hollins v. Fowler*, L. R., 7 H. L. 757.

A warehouseman who receives tobacco and sells the same on commission in the regular course of his business, without notice of any claim adverse to his consignor, cannot be held liable for conversion. *Abernathy v. Wheeler*, 92 Ky. 320. The warehouseman assumes an obligation to serve the entire public, and cannot refuse to receive the tobacco of a producer when shipped to him. *Nash v. Page*, 80 Ky. 539; 44 Am. Rep. 490.

4. *Hollins v. Fowler*, L. R., 7 H. L. 757. The illustrations are given and answered in the judgment of Lord Blackburn.

A carrier who removes goods from the owner's place of deposit, under the direction of a person in apparent control and able to immediately assume the actual custody of them, and delivers them to such person, is not liable to the owner for their conversion. *Gurley v. Armstead*, 148 Mass. 267. And see *Strickland v. Barrett*, 20 Pick. (Mass.) 415. But where a cartman went with B. to the stable of C. and took and carried away goods there deposited, under circumstances sufficient to put him on his guard, as to the legality of the taking, he was held to be liable in trover for the conversion of the goods. *Thorpe v. Burling*, 11 Johns. (N. Y.) 285. And see *Flanders v. Colby*, 28 N. H. 34.

act is of such a nature as would be excused, if done by the authority of the person in possession, if he was the finder of the goods, or intrusted with their custody." ¹

d. ADVANTAGE TO THE DEFENDANT NOT THE TEST.—The plaintiff in the action of trover sues with respect, not to the advantage gained by the defendant from the wrongful act, but his own loss. Hence it is immaterial whether the defendant uses the property for his own profit, or confers the right to use it upon some third person. ²

It is conceived that, under some circumstances, it is not even necessary that the defendant should have acquired possession of the property; as where such force or contrivance has been used as, in the opinion of the jury, placed the owner in such a position as to prevent him from asserting his rights over the property. ³

1. This rule, furnished by Lord Blackburn, was never before distinctly enunciated until the judgment of *Hollins v. Fowler*, L. R., 7 H. L. 757, and is founded purely upon the technical nature of the action of trover. The test of liability seems to resolve itself into the question: Did the agent or servant have the possession of the goods and deal with it as a principal? In *Alexander v. Southey*, 5 B. & Ald. 247, the servant could thereby be said to have had the possession, because he kept the key of the warehouse in which the goods were stored in a capacity somewhat like a watchman of the premises, and upon this basis the judgment of Holroyd seems to proceed. The possession of the defendant in this case may be compared with the possession of the defendant in *Cochrane v. Rymill*, 40 L. T. 744. In that case, the plaintiff by agreement let some cabs on hire to P., who took them to the defendant, an auctioneer, and obtained an advance upon them. The defendant, by P.'s instructions and without any notice of the plaintiff's property in the goods, subsequently sold them by auction, and, having recouped himself for his advances, expenses, and commissions, handed over the balance to P. It was held a conversion.

The opposite phase of the question was presented in *Turner v. Hockey*, 56 L. J. Q. B. 301. The ostensible owner of a cow brought it to a public market and placed it in the pen rented by the defendant, an auctioneer, whom he instructed to sell it. The defendant, without notice that the cow was not the property of the person instructing him, sold the cow, and immediately

after he received the money paid it over to the ostensible owner, the latter having previously paid him his commission. It was held that the real owner could not maintain trover against the auctioneer.

In *Clerk & Lindsell on Torts*, p. 171, note, it is said that the decision in *Turner v. Hockey*, 56 L. J. Q. B. 301, can hardly be reconciled with *Cochrane v. Rymill*, 40 L. T. 744.

2. Pollock on Torts, p. 169; *Clerk & Lindsell on Torts*, p. 118; *Platt v. Tuttle*, 23 Conn. 233; *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772.

3. See *infra*, this title, *Taking by Duress and Fraud*.

In *England v. Cowley*, L. R., 8 Exch. 126, the plaintiff was the holder of a bill of sale over the household furniture of a tenant of the defendant, which bill contained a clause enabling the plaintiff to take possession of and receive the furniture in case of the default of the tenant. Default was made and the plaintiff put a man in possession, and subsequently sent two men to remove the furniture. They were met by the defendant, who said he was the landlord, and as the rent was in arrear, he did not intend to permit the goods to be removed. The plaintiff thereupon went to the house himself, and was told by the defendant that he would not suffer any of the goods to be removed until his rent was paid, as he intended to distrain the next day. The defendant did not actually take possession of any of the goods. It was held that the plaintiff could not recover in trover.

Wansbrough v. Maton, 4 Ad. & El. 884; 31 E. C. L. 217, was a case where the court reached a different conclu-

The mere assertion of title to, or interest in, a chattel, however, when the claimant has neither possession nor control of it, does not constitute a conversion.¹ But it is a conversion where one having the possession, actual or constructive, asserts a title to the property antagonistic to the real owner;² or threatens violence if it is removed.³

The test, in any case, can never be what the defendant has or has not acquired; but what has been the effect of his act with respect to the plaintiff, and does it amount to an absolute denial and repudiation of the plaintiff's right.⁴

c. CONVERSION ARISING FROM CONTRACT.—The fact that the plaintiff might have brought his action *ex contractu*, does not prevent him from suing in trover for a conversion.⁵ Neither is the

sion. There the plaintiff had occupied land belonging to the defendant, which he subsequently quitted and a new tenant entered. The plaintiff left on the land a movable barn, which he sent men to remove; but the defendant, meeting them on the ground, ordered them off. It was held that the defendant was liable, although he had not possession, actual or constructive, at the time. Clerk & Lindsell on Torts, p. 178, pointed out that in neither of these cases, was there any actual interference with the goods themselves, or any unlawful detention. See *Boobier v. Boobier*, 39 Me. 408; *Guthrie v. Jones*, 108 Mass. 191; *Platner v. Johnson*, 26 Miss. 142; *Crocket v. Beaty*, 8 Humph. (Tenn.) 20.

1. *Lowry v. Walker*, 4 Vt. 181.

2. *Glaze v. McMillion*, 7 Port. (Ala.) 279; *Taylor v. Harrall*, 4 Blackf. (Ind.) 317; *Reid v. Colcock*, 1 Nott & M. (S. Car.) 592; 9 Am. Dec. 729; *Reynolds v. Schuler*, 5 Cow. (N. Y.) 323.

Assuming to one's self the property, though qualified, and right of disposing of another's goods, is a conversion, even though they are disposed of for the benefit of a third party and the defendant derives no advantage therefrom. *Gilman v. Hill*, 36 N. H. 311.

3. *Crocket v. Beaty*, 8 Humph. (Tenn.) 20.

In *Hare v. Pearson*, 4 Ired. (N. Car.) 76, it was held that the wrongful dominion or assumption of property in personal chattels by one who menaces the rightful owner if he attempts to take them, amounts in law to a conversion, and is not merely evidence of a conversion to be left to the jury.

4. In the case of *Nelson v. Wheatmore*, 1 Rich. (S. Car.) 318, it was decided that if the defendant's conduct

still left the owner's rights undisputed, it was not a conversion, even though attended with damage to the owner.

Where the plaintiff purchased corn standing in the field and was proceeding to gather it, when the defendant came to the field and forbade him, and he desisted, it was held no conversion. *Platner v. Johnson*, 26 Miss. 142. But where a landlord, when a tenant is about to remove, during the term of the lease, chattels attached by him to the realty, but which are not fixtures, and the landlord places his hand on his shoulder and orders him to desist, and refuses a demand of the tenant for leave to remove them, and claims them as his own, he will be liable for their conversion. *Guthrie v. Jones*, 108 Mass. 191.

5. See *infra*, this title, *Conversion by Vendees*, etc. By electing to sue in tort the right of action upon the contract terminates. Countess of Rutland's Case, 1 Roll. Abr. 5; *Musgrove v. Ogden*, Cro. Eliz. 219; *Bagshaw v. Gaward*, Cro. Jac. 147, 148; *Isaac v. Clark*, 2 Buls. 306; *Baldwin v. Cole*, 6 Mod. 212; *Keyworth v. Hill*, 3 B. & Ald. 685; *Cushing v. Beck*, 10 N. H. 111; *Perley v. Dole*, 40 Me. 139; *Clark v. Whitaker*, 18 Conn. 543; 46 Am. Dec. 327; *Maguyer v. Hawthorn*, 2 Harr. (Del.) 71; *Harvey v. Epes*, 12 Gratt. (Va.) 15; *Towne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85; *Briggs Iron Co. v. North Adams Co.*, 12 Cush. (Mass.) 114; *Vincent v. Cornell*, 13 Pick. (Mass.) 294; 23 Am. Dec. 683; *Estey v. Graham*, 46 N. H. 169; *Caulfield v. Monger*, 12 Johns. (N. Y.) 347; *Hall v. Daggert*, 6 Cow. (N. Y.) 653; *Voltz v. Blackmar*, 64 N. Y. 646; *Finch v. Clarke*, Phill. (N. Car.) 335. An instructive article on "Waiver of

plaintiff debarred because the possession of the defendant springs from a contract unenforceable because of illegality,¹ or the status of the parties.²

Tort," appears in 6 Harvard L. Rev., p. 223.

The defendant purchased a machine from the plaintiff, paying therefor by a promissory note. On default in payment, the seller demanded the machine from the purchaser's wife, he having left the state, and her father refused to allow the seller to take it. It was held that the father was guilty of conversion. *Bolling v. Kirby*, 90 Ala. 215.

Lessor and Lessee.—The absolute sale by the lessee of chattels, gives the lessor the right to avoid the lease, and trover will lie against the purchaser after a demand on the latter and a refusal on his part to surrender the property. *Bryant v. Wardell*, 2 Exch. 479; *Sanborn v. Colman*, 6 N. H. 14; 22 Am. Dec. 703; *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomatt*, 1 C. B. 672; 50 E. C. L. 672. But trover cannot be maintained, even on demand and refusal, where the lease contains a stipulation by the lessor to convey absolutely on the payment of a certain sum by the lessee at the end of the term, because there the purchaser is entitled to hold the property until default is made in the payment. *Vincent v. Cornell*, 13 Pick. (Mass.) 294; 23 Am. Dec. 683. And case and not trover is the proper remedy, where the goods are sold or removed by the wrongful act of a stranger, under color of legal process or otherwise; for such an act cannot have the effect of determining the lease. *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Fairbanks v. Phelps*, 22 Pick. (Mass.) 535; *Gordon v. Harper*, 7 T. R. 9.

The right to sue in trover, or even in trespass, would seem not to be affected by mere bailment, because the present and general right of property remains in the bailor. *Drake v. Redington*, 9 N. H. 243; *Hart v. Hyde*, 5 Vt. 330; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Root v. Chandler*, 10 Wend. (N. Y.) 110; 25 Am. Dec. 356; *Smith v. James*, 7 Cow. (N. Y.) 328. See *Story on Bailm.* (9th ed.), p. 2.

1. The delivery of a chattel in violation of a statute, will enable the general owner to maintain an action against the vendee, for the conversion of the chattel, not under the possession so acquired, but for its use in a manner

and for a purpose not contemplated in the illegal contract, and of itself amounting to a conversion. Where the plaintiff, while unlawfully traveling on the Lord's day, stopped at an inn and left a robe with the innkeeper's servant, after a demand and refusal, the next morning he was allowed to maintain an action of trover against the innkeeper for the conversion, inasmuch as the claim of the plaintiff to the property did not necessarily require him to show in its support, a violation of the Lord's day. *Cox v. Cook*, 14 Allen (Mass.) 165.

"The settled principle is," observed Chief Justice Parker in *Dwight v. Brewster*, 1 Pick. (Mass.) 50; 11 Am. Dec. 133, "that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy to discern how a party to such a contract, who becomes possessed of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed, if it remains in the hands of him to whom it is committed. If he has executed the contract with it, or if it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession, he must be liable for the value of it; so that in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail." *King v. Green*, 6 Allen (Mass.) 139; *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Scarfe v. Morgan*, 4 M. & W. 270; *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368.

2. Where chattels are delivered to an infant for a fixed purpose, and he uses them in a manner inconsistent with or contrary to that purpose, he is liable in trover for the conversion of the chattels, although if sued upon in contract, his infancy would be a valid defense. *Furness v. Smith*, 1 Roll. Abr. 530. In *Bunard v. Haggis*, 14 C. B. N. S. 45; 108 E. C. L. 45, the defendant hired a mare for a ride along the road, being expressly told by the plaintiff that she was not fit for leaping. The

2. Conversion by Detention—*a.* IN GENERAL.—While a mere detention, without more, was sufficient to support an action of detinue, the action of trover required that the defendant not only detain the property, but accompany the detention with a claim of right as against the plaintiff. The intention of the defendant here becomes an element in the determination of his liability. The customary method of proving intention is by a demand and refusal.¹

defendant loaned the mare to a friend and the latter put it to a fence, and in taking it she fell upon a stake, from the effects of which she died. It was held that the defendant was liable in trover, independently of the contract. Byles, J., said: "Here the mare was lent for a specific purpose of a ride along the road and for the purpose of being ridden only by the defendant. The defendant not only allows his friend to mount, but allows him to put the mare to a fence for which he was told she was unfit. Quite independently, therefore, of the question of necessities, the defendant is responsible for the wrong done."

The American courts have generally adopted the English rule just stated in its entirety. Redfield, J., in *Town v. Wiley*, 23 Vt. 355, declared that so long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the chattels or used them immoderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, as if he had taken the horse in the first instance without permission, and it was accordingly held that an infant, in whose hands money had been put by the plaintiff to abide the result of an illegal wager, and who paid it to the winner after notice from the plaintiff not to do so, was liable in trover. *Lewis v. Littlefield*, 15 Me. 233; *Loeschman v. Mackin*, 2 Stark. 276; *Deane v. Keate*, 3 Camp. 4; *Cooper v. Burton*, 3 Camp. 5; *Jones on Ballm.* 86; *Bray v. Mayne*, Gow 1; *Farrar v. Thompson*, 5 B. & Ald. 826.

The cases seem to support the following distinction: Where the chattel is used in a manner inconsistent with the spirit of the contract of bailment, as in the ordinary case of where a horse is driven beyond the distance agreed upon in the contract, the bailee or lessee is liable in trover to the owner. But where the chattel is used for a purpose assented to by the owner

and agreed upon in the contract, an immoderate use of the chattel, which results in its destruction, is an injury which can be redressed only in an action of trespass on the case. *Fisher v. Kyle*, 27 Mich. 454; *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Disbrow v. Ten Broeck*, 4 E. D. Smith (N. Y.) 397; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310; *Angus v. Dickerson*, Meigs (Tenn.) 459; *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Mullen v. Ensley*, 8 Humph. (Tenn.) 428; *Bell v. Cummings*, 3 Sneed (Tenn.) 275; *Parker v. Thompson*, 5 Sneed (Tenn.) 349; *M'Neill v. Brooks*, 1 Yerg. (Tenn.) 73.

In *Spooner v. Manchester*, 133 Mass. 270; 43 Am. Rep. 514, there was a curious modification of this principle. The defendant hired a horse to go to a particular place and unintentionally took a wrong road. Discovering his mistake, he endeavored to return by the best road, which was by a circuit through another town. It was held that there had been no conversion.

In *Pennsylvania*, the courts have invariably refused to recognize the doctrine which would make an infant liable in tort for a possession acquired under a contract which, if sued upon, his infancy would be a defense. In *Penrose v. Curren*, 3 Rawle (Pa.) 351; 24 Am. Dec. 356, *Rodgers, J.*, said, that the foundation of all these suits is contract, and disguise it as you may, it is but an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant. *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Livingston v. Cox*, 6 Pa. St. 360; *Cooley on Torts*, 125. And see *INFANTS*, vol. 10, p. 668.

1. Much that would otherwise be treated of here, may be found in *DEMAND*, vol. 5, p. 528r. "It is no conversion for one to have in his possession the goods of another—the plaintiff must come to the defendant and demand the property, for a defendant having in his possession the goods of another, is not bound to seek out

an owner and send the property to him." *Clements v. Flight*, 16 M. & W. 42; *Fitz. Nat. Brew.* 138 "A"; *Clossman v. White*, 7 C. B. 55; 62 E. C. L. 843; *Knight v. Harrison*, *Saunders's Pl. & Ev.* 641; *Wilson v. Ander-ton*, 1 B. & Ad. 750; 20 E. C. L. 426; *Thompson v. Trail*, 6 B. & C. 36; 13 E. C. L. 103; *Dirks v. Richards*, 4 M. & G. 574; 43 E. C. L. 374; *Caunce v. Spanton*, 7 M. & G. 903; 49 E. C. L. 903; *Catterall v. Kenyon*, 3 Q. B. 310; 43 E. C. L. 749; *Jones v. Tarleton*, 9 M. & W. 675; *Lee v. Bayes*, 18 C. B. 599; 86 E. C. L. 599; *Weeks v. Goode*, 6 C. B. N. S. 367; 95 E. C. L. 367; *Hinckley v. Baxter*, 13 Allen (Mass.) 139; *Lexington, etc., R. Co. v. Kidd*, 7 Dana (Ky.) 245; *Mattice v. Brinkman*, 74 Mich. 705; *Buffington v. Clarke*, 15 R. I. 437; *Durgin v. Gage*, 40 N. H. 302; *Jillson v. Wilburn*, 41 N. H. 106; *Town v. Hazen*, 51 N. H. 506; *Lathrop v. Blake*, 23 N. H. 46; *Ogden v. Lucas*, 48 Ill. 492; *Sibley v. Ives*, 21 Barb. (N. Y.) 284; *McNaughton v. Cameron*, 44 Barb. (N. Y.) 406; *Pren-tiss v. Hannay*, 4 Whart. (Pa.) 508; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300; *Adams v. Mizell*, 11 Ga. 106, detention of slaves by loanee after death of loanor.

In the leading case of *Baldwin v. Cole*, 6 Mod. 212, a carpenter sent his servant to work for hire in the queen's yard; and having been there for some time he would go no more. The surveyor of the work refused to let him have his tools, pretending a usage to retain tools to enforce workmen to continue until the queen's work was done. Upon proof of a demand and refusal, it was held, a conversion. *Watkins v. Wooly*, Gow 69; *Davies v. Nicholas*, 7 C. & P. 339; 32 E. C. L. 533; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; 80 N. Y. 353; 99 N. Y. 65; 52 Am. Rep. 6; *Montanye v. Mont-gomery* (C. Pl.), 19 N. Y. Supp. 655; *Doherty v. Madgett*, 58 Vt. 323.

Where the defendant had the right to detain certain brandy by virtue of a lien, but insisted upon his right to detain the property upon other grounds, it was held by Lord Ellenborough, to be a conversion. "As the brandy was detained on a different ground, and as no demand for warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt." *Boardman v. Sill*, 1 Camp. 410.

A tenant having the right to remove

fixtures placed by him upon the de-mised premises during the term, in case he holds over after its termina-tion without a new lease, has the same right of removal so long as he remains in possession, and on being evicted by summary proceedings, if he claims and is refused the right to take such fix-tures with him, may maintain an ac-tion for their conversion. *Lewis v. Ocean Nav., etc., Co.*, 125 N. Y. 341. And see *Adams v. Goddard*, 48 Me. 212; *Bircher v. Parker*, 43 Mo. 443.

Where a bank, with which the treas-urer of a corporation had deposited bonds belonging to his company as se-curity for a personal debt, after being informed that the bonds belonged to the corporation and that the treasurer had no right to pledge them, asserted its authority to retain them and to ap-ply the proceeds of their sale to the satisfaction of its debt, it was held that the assertion of such authority was in itself a conversion, and that proof of formal demand and refusal were un-necessary. *University of North Caro-lina v. State Nat. Bank*, 96 N. Car. 280.

Detention Under a Lien.—Where, by agreement between a landlord and tenant, the former is to retain possession of the latter's part of the crop until all his advances are paid, a demand and refusal before full payment does not establish a conversion by the landlord. *Hudson v. Goff*, 77 Ga. 281. But where the plaintiff offers to pay the charges and demands the goods, it is a conver-sion to detain them. *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393. And see *Coller v. Shepard*, 19 Barb. (N. Y.) 305; *Whitcomb v. Hungerford*, 42 Barb. (N. Y.) 177; *Parkerson v. Simons*, 2 McMull. (S. Car.) 188.

But where one having a lien sets up a right hostile to the owner, he cannot afterwards set up the lien as a bar to an action against him. *Andrews v. Wade* (Pa. 1886), 6 Atl. Rep. 48. And see *Williams v. Smith*, 153 Pa. St. 462; *Bean v. Bolton*, 3 Phila. (Pa.) 87; *West v. Tupper*, 1 Bailey (S. Car.) 193.

Refusal to Pay Over Money Received for Another.—A person receiving money for another, on refusing to pay it over until a debt due him by the lat-ter is paid, is guilty of conversion. *Richmond v. Soportas* (City Ct.), 18 N. Y. Supp. 433. And the same is the case if he withholds sufficient to pay the debt. *Tobin v. Kage* (Supreme Ct.), 19 N. Y. Supp. 440.

Detention by Co-Owner.—Where one

The detention may be either by the defendant or by his agents or servants, and if by the latter, they will also be liable for conversion, for ignorance of a master's want of title does not excuse a servant.¹

b. DEMAND AND REFUSAL EVIDENCE OF CONVERSION.—Proof of a demand properly made by the plaintiff or his agent, and a refusal to deliver by the defendant, is evidence of a conversion. The principle rests upon the idea that the law regards it as highly probable that, if one person detains the property of another and refuses to deliver it to the owner upon request, the intention of the detainer is to exercise a dominion in defiance of the owner's right.²

of the owners of grain detains it in his possession, refusing to allow his co-owner to sever and take away his share, he is liable for conversion. *Channon v. Lusk*, 2 Lans. (N. Y.) 211. And see *Loddell v. Stowell*, 51 N. Y. 70; *Bray v. Bray*, 30 Mich. 479.

Surrender of Pledge on Payment of Debt.—The failure to surrender stock pledged, on payment of the debt secured by it, is a conversion, and where \$18,000 worth of stock was pledged to secure a debt of \$8,000, upon payment of which the pledgee refused to return the stock, and afterwards set up the defense that \$37 interest due, which both had overlooked at the time, was neither paid nor tendered, it was held that the defense was of no avail, the maxim *de minimis non curat lex* being applied. *Kullman v. Greenebaum*, 92 Cal. 403. And see *Abrahams v. Southwestern, etc., Bank*, 1 S. Car. 441; 7 Am. Rep. 33.

Effect of a Demand as to Time of Conversion.—A demand and a refusal is not only evidence to prove a conversion at the time the demand is made, but it may be made the basis of an inference from which the jury may find a conversion any time prior to the demand and during the defendant's possession. In *Wilton v. Girdlestone*, 3 B. & Ald. 847; 7 E. C. L. 278, it was held that a demand and refusal was evidence of a prior conversion, and therefore where deeds were in the defendant's possession, prior to Michaelmas Term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term, to be determined by the jury.

1. *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459; *State v. Stevenson*, 46 N. J. L. 326; *Judah v. Kemp*, 2 Johns.

Cas. (N. Y.) 411; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; 35 Am. Dec. 607; *Rogers v. Weir*, 34 N. Y. 463; *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511; *Thompson v. Rose*, 16 Conn. 85; *Scarfe v. Morgan*, 4 M. & W. 270; *White v. Gaimer*, 2 Bing. 23; 9 E. C. L. 302.

But the refusal of a bailee to deliver up the article on the demand of a third person who has authority from the bailor to demand it, but who gives no evidence of such authority, does not amount to a conversion. *Beckley v. Howard*, 2 Brev. (S. Car.) 94; *Dowd v. Wadsworth*, 2 Dev. (N. Car.) 130; 18 Am. Dec. 567. But unless he demands evidence of authority at the time the demand is made on him for the goods, he cannot afterwards, in an action against him, object that the demandant did not exhibit the evidence of his title. *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; 35 Am. Dec. 607. A bailee who claims no property in himself, but only asks for time to surrender the goods to his bailor, is not guilty of conversion. *Dowd v. Wadsworth*, 2 Dev. (N. Car.) 130; 18 Am. Dec. 567. Nor where he requests an order from his bailor, or reasonable time to confer with his partner. *Carroll v. Mix*, 51 Barb. (N. Y.) 212; or requests time to ascertain the ownership. *Singer Mfg. Co. v. King*, 14 R. I. 511.

2. See DEMAND, vol. 5, p. 528r; *Pollock on Torts*, p. 169; *Fry v. Clow*, 50 Hun (N. Y.) 574; *Moore v. Prentiss Tool, etc., Co.* (Super. Ct.), 15 N. Y. Supp. 150; *Dozier v. Pillot*, 79 Tex. 224.

It is upon the principle that a demand and refusal is only evidence of a conversion, that a finding of that fact by a jury in a special verdict without more, is insufficient to support the action. *Eason v. Newman*, Cro. Eliz.

c. PROPERTY MUST BE IN DEFENDANT'S POSSESSION.—Failure to deliver goods upon demand is no evidence of a conversion, where it appears that they were not in the defendant's possession at the time the demand was made, and that, had he so minded, he could not have delivered them.¹

495; *Chancellor of Oxford's Case*, 10 Rep. 56b; *Isaac v. Clark*, 2 Buls. 308; *Morris v. Pugh*, 3 Burr. 1243; *Cutter v. Fanning*, 2 Iowa 580; *Hill v. Coverell*, 1 N. Y. 522.

It was said by Lord Holt, in a very early case, that, "The very denial of goods to him that hath the right to demand them, is an actual conversion, not only evidence of it; for what is a conversion but the assuming upon one's-self the property and right of disposing of another's goods." *Baldwin v. Cole*, 6 Mod. 212. It is upon the assumption that the denial in the case before him was absolute and unexplained, that the statement is based. *Morris v. Pugh*, 3 Burr. 1243. A conversion is proved by evidence, that the president of a corporation having possession of the plaintiff's property, instructed the manager, upon demand being made upon him for the property, not to deliver it, claiming title in the company. *Campan v. Bemis*, 35 Ill. App. 37.

Where the plaintiff's agent told the defendant that the team in his possession was claimed by the plaintiff and that he demanded the same, producing a paper by virtue of which he made the demand and which he read to the defendant, it was held a sufficient demand, though the paper was ambiguous and at the trial required parol proof as to its meaning. *Kendrick v. Beard*, 90 Mich. 589.

Where furniture was left under a contract for repairs, the plaintiff, after waiting a reasonable time for them to be made, is not bound, as a condition precedent to demand before bringing an action for conversion, to tender the money that would have been due had the defendant performed his contract. *Phillips v. McNab*, 16 Daly (N. Y.) 150.

Though the defendant be unable to deliver through the action of the plaintiff, as where the defendant requested the plaintiff to remove ice purchased by the latter from his ice house, as he wished to house the new crop, and the plaintiff told him to go ahead and put the new crop in over his ice, which he did, if afterwards,

upon demand being made, he base his refusal, not upon his inability to deliver, but upon a claim of title in himself, he will be liable for conversion. *Hartford Ice Co. v. Greenwood's Co.*, 61 Conn. 166.

When Demand Necessary.—Where the only question is as to whether a delivery by a carrier of the plaintiff's goods to a third person was rightful or wrongful, a demand upon them for the return of the goods is unnecessary. *Fulton v. Lydecker* (City Ct.), 17 N. Y. Supp. 451. And where the defendant was a trespasser in taking away the goods, no demand is necessary. *Clink v. Gunn*, 90 Mich. 135. Where there is an actual conversion of the property, demand before action is unnecessary. *Baker v. Lothrop*, 155 Mass. 376; *Knipper v. Blumenthal*, 107 Mo. 665; *First Nat. Bank v. Kickbusch*, 78 Wis. 218. Where a sheriff attaches mortgaged property at the suit of the mortgagor's creditors, who claim that the mortgage is fraudulent, the mortgagee need not demand the goods of the officer before suing him in trover for the value of the mortgage lien. *Malachiski v. Stellwagen*, 85 Mich. 41.

1. *Owen v. Lewyn*, 1 Vent. 223; *Frome v. Dennis*, 45 N. J. L. 515; *Dearbourn v. Union Nat. Bank*, 58 Me. 273; *Johnson v. Strader*, 3 Mo. 359; *Packard v. Getman*, 4 Wend. (N. Y.) 613; 21 Am. Dec. 166; *Hawkins v. Hopkins*, 6 Hill (N. Y.) 586. See also DEMAND, vol. 5, p. 528r.

In *Ross v. Johnson*, 5 Burr. 2825, goods belonging to the plaintiff were delivered by the captain of a vessel to the defendant as wharfingers, for the use and account of the plaintiff, but were lost or stolen out of their possession. A demand was made before the commencement of this action and the wharfage tendered, but the goods were not delivered to him. Lord Mansfield said: "This is not to be esteemed a refusal to deliver goods. They cannot deliver them. It is not in their power to do it. It is a bare omission."

The fact that he claims the goods will not, in such case, amount to a

d. PROPERTY IN CUSTODIA LEGIS.—Where goods are *in custodia legis*, as under an attachment proceeding by a sheriff, although in the actual custody of the defendant, and upon his premises, a demand and refusal is no evidence of a conversion, since the defendant could not deliver without a breach of the law.¹ But where goods in the custody of a warehouseman have changed ownership, and are subsequently attached as the property of a former owner, for the purposes of the law of trover, such

conversion, nor will the fact of his giving an undertaking, to prevent the delivery of the property by the sheriff, to the plaintiff in an action brought to recover the possession, operate as an estoppel *in pais*. *Andrews v. Shattuck*, 32 Barb. (N. Y.) 396.

1. See DEMAND, vol. 5, p. 528^a. *Mires v. Solebay*, 2 Mod. 242; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381.

A carrier in whose hands property is attached, cannot be held liable for conversion for refusing to deliver it to the owner. *Stiles v. Davis*, 1 Black (U. S.) 101. The action does not lie against one who, as a magistrate, has the custody of papers which have been used in evidence in a pending suit, and have been placed on file. *Greene v. Mead*, 18 N. H. 505.

In an action of trover for a chaise, it appeared that one B. had hired the chaise in question from the plaintiff and had placed it at livery with the defendant, and that whilst it was in the defendant's possession, it was attached by process out of the sheriff's court as the property of B. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver. It was held that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law and not the defendant. *Verrall v. Robinson*, 2 C. M. & R. 495.

In *Catterall v. Kenyon*, 3 Q. B. 310; 43 E. C. L. 749, certain cattle of the plaintiff had been wrongfully taken in execution by means of process directed against the goods of her father, and lodged by the attaching officer in the stable of an inn. The plaintiff demanded them several times of the wife of the defendant, who refused to deliver them. It was held that the facts did not show that the goods were in the custody of the law, per Lord Denman. The learned judges who decided that case (*Verrall v. Robinson*, 2 C. M. & R. 495), thought that the chattel was in

the custody of the law, and that the defendant was not at liberty to give it up. The particular article being attached by process, the defendant held it as servant of the law and would not have been justified in surrendering it. Here the officers, being authorized only to seize the goods of A B, had seized the goods of C D. The owner claimed them of defendant, and she at first took time for consideration, but ultimately said: "I am told I shall be borne harmless and I will keep them." That is sufficient to make the husband and wife liable in trover. See *Jenner v. Joliffe*, 8 Johns. (N. Y.) 381. This was an action of trespass on the case. The declaration contained four counts, the first and second of which were in trover for a quantity of oak timber. It appeared that the defendant, an officer of the court, had attached certain timber, and kept it so negligently that it became worthless. It was resolved at the outset that trover would not lie for goods seized by virtue of legal process and held in the custody of the law.

A bailee of chattels, without the knowledge or consent of the owner, mortgaged them to secure rent, and the rent remaining unpaid, they were seized by the landlord, with a view to a foreclosure of the mortgage. The owner of the property replevied the property and placed it back in the possession of the original bailee, and while so in the custody of the latter, pending the proceeding in replevin, were again seized by the landlord under a distress. It was held that the property, when placed in the hands of the bailee, under the writ of replevin, was in the custody of the law, and its seizure by the landlord under his distress warrant was wrongful, so that the owner could maintain trover without a demand. *Hardy v. Keeler*, 56 Ill. 152; *Black v. Cleasby*, 97 Cal. 482.

In *Garabaldi v. Wright*, 52 Ark. 416, an action was maintained for goods in the custody of a chancery court in a suit

property is not regarded as being within the custody of the law, and their custodian is not justified in refusing to deliver them to the real owner.¹

Process directed to A, the custodian of the goods of B, informing him that B's goods are attached, will not justify A in detaining goods belonging to C, merely because the server of the process tells him that those particular goods form the subject of the attachment. In such a case there can be no custody of the law.²

e. DEMAND DOES NOT WAIVE ACTUAL CONVERSION.—If there has been a tortious use or taking of a chattel, which of itself amounts to a conversion, a subsequent demand will not amount to a waiver of the right to sue for an actual conversion.³

f. TENDER SUBSEQUENT TO DEMAND AND REFUSAL.—Where the refusal is absolute and unexplained it is plenary evidence of a conversion.⁴ But where the character of the refusal is doubtful, the evidence which results from an unsuccessful demand is neutralized to some extent by a subsequent demand and the defendant's then offering to surrender the property.⁵

3. Conversion by Purchase.—It is no defense to an action of trover that the defendant is a purchaser for value, and without notice of the rights of the real owner.⁶ It is fundamentally clear that a

between the same parties, as such action did not interfere with the possession of the property.

1. *Pillot v. Wilkinson*, 3 H. & C. 345.

2. *Bramwell, B.*, in *Pillot v. Wilkinson*, 3 H. & C. 345. See *Black v. Clabby*, 97 Cal. 482; *Kane v. Hutchison*, 93 Mich. 488.

3. *Manwell v. Briggs*, 17 Vt. 176; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539.

4. In *Baldwin v. Cole*, 6 Mod. 212; *Magee v. Scott*, 9 Cush. (Mass.) 148; 55 Am. Dec. 49. The demand and refusal may be explained or rebutted. *Dietus v. Fuss*, 8 Md. 148.

5. The evidence of conversion is very much affected by a subsequent demand and the defendant's then offering to surrender the property. *Manwell v. Briggs*, 17 Vt. 176. If the taking is willful, or the refusal to surrender is willful and unqualified, or the property has suffered injury or deteriorated in value, the defendant cannot compel the plaintiff to accept the property in mitigation of damages. *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Green v. Sperry*, 16 Vt. 390; 42 Am. Dec. 519. The plaintiff may claim damages for their deterioration. *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65. But if the property came lawfully into the defendant's hands, and the refusal was qualified or the conversion not willful, it would seem

that the defendant may compel an acceptance in mitigation of damages. *Wells v. Kelsey*, 15 Abb. Pr. (N. Y. Supreme Ct.) 53; *Pickering v. Truste*, 7 T. R. 53; *Hayward v. Seaward*, 1 Moore & S. 459; 28 E. C. L. 459. In this last case, the defendants refused to deliver a boiler until a sum of money due them was paid. The plaintiffs would not pay this sum, but made tender of a smaller amount, which the defendants refused. Subsequently the defendants offered to restore the boiler, and resorted to an action to recover what was due them; it was held no conversion.

If, after demand and refusal, the defendant, before suit is brought, unconditionally offers to deliver the possession, the plaintiff, although he cannot maintain an action for the possession, may yet have his action for the damages for refusing to deliver when demanded. *Savage v. Perkins*, 11 How. Pr. (N. Y. Supreme Ct.) 17. The return of the chattel will only go in mitigation of damages. *Sparks v. Purdy*, 11 Mo. 219.

6. *McCombie v. Davies*, 6 East 538; *Baldwin v. Cole*, 6 Mod. 212; *Fowler v. Hollins*, L. R., 7 H. L. 757; *Hollins v. Fowler*, L. R., 7 Q. B. 616; *Cuckson v. Winter*, 2 M. & R. 313; *Herron v. Hughes*, 25 Cal. 555; *Davis v. Buffum*,

vendor whose title is derived through theft,¹ trespass,² conver-

51 Me. 160; *Mills v. Van Camp*, 41 Mich. 645; *Roe v. Campbell*, 40 Hun (N. Y.) 49; *Scofield v. Kreiser* (N. Y. City Ct.), 3 N. Y. Supp. 803; *McDaniel v. Adams*, 87 Tenn. 756; *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41; *Tuttle v. Campbell*, 74 Mich. 652; *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98; *Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dakota 62; *U. S. v. Kelly*, 3 Wash. Ter. 421; *Rhodes v. Dickinson*, 79 Ga. 724; *Arnaz v. Gassen*, 73 Cal. 618; *Mann v. Arkansas Valley Land, etc., Co.*, 24 Fed. Rep. 261; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; *Gilmore v. Newton*, 9 Allen (Mass.) 171; 85 Am. Dec. 749; *Garden City Nat. Bank v. Fitler*, 155 Pa. St. 210; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; 32 Am. Dec. 541. In this last case it is said, that the doctrine that possession carries with it the evidence of property so as to protect one acquiring property in the usual course of trade, is limited to cash, bank bills and bills payable to bearer.

But in an action for the conversion of railroad ties, both parties claiming as purchasers from a third party, an instruction which ignores the necessity of the plaintiff's possession, as required by the Statute of Frauds, is erroneous. *Thomas v. Ramsey*, 47 Mo. App. 84.

One who, without notice and in the absence of any representation to mislead him, purchases the husband's property from the wife, will be liable to the former in trover. *Rice v. Yocum*, 155 Pa. St. 538; 32 W. N. C. (Pa.) 356.

If the purchaser knows of the claim of another to the property, he is so much the more guilty of conversion. *Allison v. King*, 25 Iowa 56; *Babcock v. Gill*, 10 Johns. (N. Y.) 287.

Where the purchase is for the joint account of two, and after being informed of the ownership of a third party, one of the joint purchasers sells the goods for the benefit of the joint account, both are liable for the conversion. *Guerry v. Kerton*, 2 Rich. (S. Car.) 507.

It is immaterial that the purchaser acted in good faith and afterward parted with the goods before any demand was made upon him. *Carter v. Kingman*, 103 Mass. 517.

A plaintiff consigned a carload of potatoes to an agent who had no author-

ity to sell, but was to deliver them to a purchaser as demanded. A third party, to whom the plaintiff was indebted, purchased them of the agent with knowledge of the facts, and sold them to the original purchaser and credited the plaintiff with the amount received, after paying the agent for freight, etc., and his own expenses. The original purchaser had knowledge of all the facts, and it was held that all the parties to the transaction were jointly liable for the conversion, and that the original purchaser, having abandoned the contract of the plaintiff and purchased of the third party to assist him in collecting his debt, could not be heard to say that he purchased them from the plaintiff and that his only liability was in contract. *Kavanaugh v. Taylor*, 2 Ind. App. 502.

If, after the purchase of goods in satisfaction of a debt, the purchaser is informed that his debtor holds the goods only as factor, his subsequent taking of them away is a conversion. *Scriber v. Masten*, 11 Cal. 303.

Lien on Crops—Liability of Purchaser.—One purchasing crops from a tenant for value and without notice of the landlord's lien allowed by *Illinois Rev. St. ch. 80*, p. 31, is not liable to the landlord for their conversion. *Finney v. Harding*, 136 Dec. 573, reversing 32 Ill. App. 98. And see *Thew v. Miller*, 73 Iowa 742.

1. *Breckenridge v. McAfee*, 54 Ind. 141; *Parham v. Riley*, 4 Coldw. (Tenn.) 9; *Sharp v. Parks*, 48 Ill. 511; 95 Am. Dec. 565; *Lee v. Bayes*, 18 C. B. 599; 86 E. C. L. 599; *Robinson v. Skipworth*, 23 Ind. 311; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Florence Sewing Machine Co. v. Warford*, 1 Sweeny (N. Y.) 433; *Williams v. Givens*, 6 Gratt. (Va.) 268; *Andrews v. Dietrich*, 14 Wend. (N. Y.) 34; *Malcolm v. Loveridge*, 13 Barb. (N. Y.) 372; *Jonsson v. Lindstrom*, 114 Ind. 152; *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98; *Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dakota 62; *U. S. v. Kelly*, 3 Wash. Ter. 421; *Dame v. Baldwin*, 8 Mass. 518; *Heckle v. Lurvey*, 101 Mass. 344; 3 Am. Rep. 366.

2. *Parham v. Riley*, 4 Coldw. (Tenn.) 9; *Riley v. Boston Water Works Co.*, 11 Cush. (Mass.) 11; *Nesbitt v. St.*

sion¹, or other unlawful means,² can transmit no title to a vendee; each successive vendee stands in no better position with respect to the property than his vendor;³ hence every participant in the chain of transfers is regarded as a tort-feasor, and may be sued separately or jointly by the owner.⁴

4. **Conversion by Taking**—a. **GENERALLY**.—Anyone who, without authority, takes possession of another man's goods, with the

Paul Lumber Co., 21 Minn. 491; Whitman Gold, etc., Mfg. Co. v. Tittle, 4 Nev. 494; Freeman v. Underwood, 66 Me. 229; Stanley v. Gaylord, 1 Cush. (Mass.) 351; 48 Am. Dec. 643; Griffith v. Fowler, 18 Vt. 390; Cooper v. Newman, 45 N. H. 339; Williams v. Miller, 16 Conn. 143; Morse v. Crawford, 17 Vt. 499; 44 Am. Dec. 349; Williams v. Merle, 11 Wend. (N. Y.) 80; 25 Am. Dec. 604; Chapman v. Cole, 12 Gray (Mass.) 141; 71 Am. Dec. 739; Prescott v. De Forest, 16 Johns. (N. Y.) 159; St. Louis, etc., R. Co. v. Kaulbrumer, 59 Ill. 152; Ogden v. Lucas, 48 Ill. 492.

1. Riford v. Montgomery, 7 Vt. 411; Dodd v. Arnold, 28 Tex. 97; Sanborn v. Coleman, 6 N. H. 14; 22 Am. Dec. 703; Hyde v. Noble, 13 N. H. 494; 38 Am. Dec. 508; Sargent v. Gile, 8 N. H. 325; Baily v. Colby, 34 N. H. 29; 66 Am. Dec. 752; Roland v. Gundy, 5 Ohio 202; Heacock v. Walker, 1 T aylor (Vt.) 338; Buckmaster v. Mower, 21 Vt. 204; Stanley v. Gaylord, 1 Cush. (Mass.) 536; 48 Am. Dec. 643; Gilmore v. Newton, 9 Allen (Mass.) 171; 85 Am. Dec. 749; Newcomb Buckanan Co. v. Baskett, 14 Bush (Ky.) 658; Wooster v. Sherwood, 25 N. Y. 278; Covill v. Hill, 4 Denio (N. Y.) 323; Linnen v. Cruger, 40 Barb. (N. Y.) 633; Saltus v. Everett, 20 Wend. (N. Y.) 267; 8 Am. Dec. 541; Burroughs v. Bayne, 5 H. & N. 296; Chamberlain v. Smith, 44 Pa. St. 431; Grant v. King, 14 Vt. 367; Hart v. Carpenter, 24 Conn. 427; Galvin v. Bacon, 11 Me. 28; 25 Am. Dec. 258; McNeill v. Tenth Nat. Bank, 55 Barb. (N. Y.) 59; Hartop v. Hoare, 3 Atk. 44; Donald v. Suckling, L. R., 1 Q. B. 585; Halliday v. Holgate, L. R., 3 Exch. 299; Talty v. Freedman's Sav. Bank, 93 U. S. 886; Parsons v. Webb, 8 Me. 38; 22 Am. Dec. 220; Rodick v. Coburn, 68 Me. 170; Nowell v. Pratt, 5 Cush. (Mass.) 111; Haas v. Damon, 9 Iowa 589; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Wright v. Solomon, 19 Cal. 64; 79 Am. Dec. 106.

So where a wharfinger sold certain lead intrusted to his care, without any authority from the owner, to an inno-

cent purchaser, who paid full value for it, it was held that this was not a sale in market overt to change the property, and that trover would lie for the goods at the suit of the owner against the purchaser. Wilkinson v. King, 2 Camp. 335.

2. Hurst v. Grennap, 2 Stark. 306; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412; Winter v. Belmont Min. Co., 53 Cal. 428; Lord Chancellor Cairns, in Cundy v. Lindsay, L. R., 3 App. Cas. 463; Stephens v. Elwall, 4 M. & S. 259; Hoare v. Parker, 2 T. R. 376; Harris v. Saunders, 1 Strobh. Eq. (S. Car.) 370, n.; Wells v. Ragland, 1 Swan (Tenn.) 501; Miller v. Thompson, 60 Me. 322; Clark v. Wells, 45 Vt. 4; Ogden v. Lucas, 48 Ill. 492; Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471; 3 Am. Dec. 345; Wilson v. Crockett, 43 Mo. 216; 97 Am. Dec. 389; Roberts v. Dillon, 3 Daly (N. Y.) 50; Hartop v. Hoare, 3 Atk. 49.

3. Breckinridge v. McAfee, 54 Ind. 141; Parham v. Riley, 4 Coldw. (Tenn.) 9; Hollins v. Fowler, L. R., 7 H. L. 757; Robertson v. Hunt, 77 Tex. 321; Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41; Tuttle v. Campbell, 74 Mich. 652.

4. A striking illustration of the truth of this statement is to be found in the case of Hollins v. Fowler, L. R., 7 H. L. Cas. 757; L. R., 7 Q. B. 616. A. fraudulently obtained cotton from the plaintiff; the defendant, a broker, purchased it from A. in good faith in the belief and expectation that M., one of his ordinary clients, would accept it. M. had not ordered or intimated that he desired to purchase any cotton. The defendant only received from M. a broker's commission, and not a trade profit on the sale. It was held that the defendant was liable for the conversion. In the opinion of the House of Lords, Lord Blackburn declared that the plaintiff was not limited to an action against the defendant, but that he might with propriety have sued A., the original wrongdoer—M., the

intention of asserting some right or dominion over them, is guilty of a conversion.¹ The defendant need not assert an absolute

purchaser; and it was even doubted whether the yarners and pickers in the mill operated by M., where the cotton was worked into yarn, were not also liable.

But where a creditor receives in pledge the goods of another, supposing them to belong to the debtor, and afterwards permits the debtor to sell and deliver them on the promise of the buyer to pay him the purchase price towards the discharge of his debt for which they were pledged, he does not thereby render himself liable to the true owner in an action of trover. *Leonard v. Tidd*, 3 Met. (Mass.) 6.

1. *Clark v. Rideout*, 39 N. H. 238; *McPortland v. Read*, 11 Allen (Mass.) 231; *Coughlin v. Ball*, 4 Allen (Mass.) 334; *Sadler v. Sadler*, 16 Ark. 628; *Pharis v. Carver*, 13 B. Mon. (Ky.) 236; *Carroll v. McCleary*, 19 Mich. 93; *Consolidated Co. v. Curtis* (1892), 1 Q. B. Div. 495; *Robinson v. Bird*, 158 Mass. 357; *Waverly Timber Co. v. St. Louis Co.*, 112 Mo. 383; *Watson v. Coburn*, 35 Neb. 492; *Valentine v. Duff* (Ind. App. 1893), 33 N. E. Rep. 529; *Williams v. Smith*, 153 Pa. St. 462; *Reynolds v. St. Paul Trust Co.*, 51 Minn. 236; *Hartford Ice Co. v. Greenswood Co.*, 61 Conn. 166; *O'Connor v. Jones*, 65 Hun (N. Y.) 48; *Hughes v. Coors*, 3 Colo. App. 303; *Leoffel v. Pohlman*, 47 Mo. App. 574; *Ryman v. Gerlach*, 153 Pa. St. 197; *Krager v. Pierce*, 73 Iowa 359, the conversion of a bank check; *Johnson v. Walker*, 23 Neb. 736; the conversion, by the farmer raising it, of a crop sold under execution.

Where a title has passed under a contract of sale, which provided that the purchase price should be secured by a mortgage, the seller is liable for conversion if he enters and takes the property during the buyer's absence, the latter being ready and willing to execute the mortgage. *Washburn v. Cordis*, 1 Misc. (N. Y.) 427. More so if the sale is on credit without any provision for a mortgage. *Huelet v. Reynolds*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 27.

Where a clerk, left in a store in the absence of the owner, permitted an alleged creditor to enter without process, and, without the owner's knowledge, sell the stock and close out the con-

cern, it was held to be a conversion by the creditor for which trover could be maintained by the owner without demand. *Bane v. Detrick*, 52 Ill. 19.

So where the defendant, on applying to A for the loan of a horse, was told that he had none, but that the defendant might take the plaintiff's, and the plaintiff being absent, the defendant took the horse, knowing that A had no authority to lend him, the defendant was held liable for conversion upon the horse being accidentally killed while in his possession. *Childress v. Ford*, 1 Heisk. (Tenn.) 463.

Where by a contract between a landlord and tenant, the latter was to prepare cotton for market as rapidly as it could be reasonably done, by picking and carrying it to whatever gin the landlord might select, the title to all the cotton to remain in the landlord until the tenant's indebtedness to him should be paid, the landlord, on ascertaining that seven or eight thousand pounds of cotton had been gathered and stored in the gin house, requested the tenant to have it packed and sent to market, in order that his indebtedness might be paid, also for fear the gin house might be burned. The tenant refused until he had first gathered the entire crop. It was held that no conversion of the property by the tenant was shown which would authorize a recovery in trover. *Forehand v. Jones*, 84 Ga. 508.

Act of Agent.—Where the general agent of the defendant lodged a negro in the workhouse as the defendant's property, the negro remaining some time without any disclaimer on the part of the defendant of the acts of his agent, he was held guilty of conversion. *Miller v. Reigne*, 2 Hill (S. Car.) 593.

Taking Under Legal Process.—Where the possession of property is acquired under legal process, although the proceeding in which the process issued is afterwards dismissed, such possession is not tortious. *Smith v. Kershaw*, 1 Ga. 259. And see *Nutt v. Wheeler*, 30 Vt. 436; 73 Am. Dec. 316. But see *Nutter v. Ricketts*, 6 Iowa 92; *Hubbard v. Lyman*, 8 Allen (Mass.) 520; *Burk v. Baxter*, 3 Mo. 207, as to when an attachment will amount to a conversion.

title; it is sufficient if his intention is to acquire a special property.¹

b. DISTINCTION BETWEEN CONVERSION AND TRESPASS.—Every conversion consists of—First: A dealing with the goods in a manner inconsistent with the right of the person entitled to the immediate possession; Second: An intention in so doing to deny his right, or assert a dominion which is inconsistent with such right.²

While the intention of the wrongdoer can never alter the effect of his act, it may determine its character and the measure of his liability. To take another's goods without his consent is always a trespass, regardless of how honest the taker's intention may be. But a mere taking, without more, is never a conversion unless there is an intention in the taker to assert a right of property.³

Finding Lost Property.—One finding lost property and refusing to surrender it may be held liable for conversion. *Sovern v. Yoran*, 15 Oregon 644.

Mistake of Servant in Cutting Timber.—Where the defendant contracted with a laborer to cut timber for him on his own land, and the laborer, by mistake, cut it from the land of the plaintiff, the defendant was held liable in trover for converting it to his own use, although he supposed it was cut on his own land. *Benton v. Beattie*, 63 Vt. 186. And see *Lee v. McKay*, 3 Ired. (N. Car.) 29. And in *Donahue v. Shippee*, 15 R. I. 453, it was held that the laborer who made the mistake was guilty of conversion.

Taking Property by a Soldier.—A soldier in the confederate army who took a horse from a federal soldier, the latter's private property, sold it and applied the proceeds to his own use, was held liable to the owner for conversion. *Barnhill v. Phillips*, 4 Coldw. (Tenn.) 1.

1. *Tear v. Freebody*, 4 C. B. N. S. 228; 93 E. C. L. 228, where the defendant's object in taking possession was to acquire a lien. And see *Putnam v. Mathewson* (Supreme Ct.), 2 N. Y. Supp. 579, where mortgaged property was purchased under an agreement by the mortgagee to release the mortgage, but who afterwards foreclosed the mortgage and sold the property.

Taking under color of a license which has been revoked, is a conversion. *Holland v. Osgood*, 8 Vt. 281. But taking a note from the agent of another for the purpose of carrying to the principal, by whom it had been intrusted to such agent, is not a conversion. *Gellatly v. Lowery*, 6 Bosw. (N. Y.) 113.

Taking for Government Use.—The defendant was held liable for conversion in taking horses for the use of the confederate government during the war. *Davidson v. Manlove*, 2 Coldw. (Tenn.) 346.

2. In *Beckwith v. Elsey*, Clayt. 112, there was an "action of trover and conversion and nothing proved but a tortious taking of the cattle by way of trespass, and driving them away, and it was ruled a good ground for this present action, and a conversion shall be intended, otherwise when he comes to them by trover, there an actual conversion shall be proved." *Metcalf's Case*, Clayt. 113; *Bruen v. Roe*, 1 Sid. 264. Thus, where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode by sweeping instead of lifting the toll, so as to take more, it was held that trover lay against him for the excess. *Norman v. Bell*, 2 B. & Ad. 190; 22 E. C. L. 57. And see *Milliken v. Hathaway*, 148 Mass. 69; *Richardson v. Stevens* (Supreme Ct.), 6 N. Y. Supp. 361; *Paden v. Billenger*, 87 Ala. 575; *Dexter v. Dexter*, 56 N. Y. Super. Ct. 568; *Qurley v. Armstead*, 148 Mass. 267; *Clegg v. Boston Storage Warehouse Co.*, 149 Mass. 454; *Flannery v. Brewer*, 66 Mich. 509; *Loveless v. Fowler*, 79 Ga. 134; 11 Am. St. Rep. 407; *Knapp v. Sioux Falls Nat. Bank*, 5 Dakota 378.

3. For example, if A B become possessed of the personal chattels of C D by finding, and subsequently lose them, or be deprived of them, he is not thereby guilty of a conversion, because he does not, in either case, treat the goods as if they were his own. *Bacon's*

On the other hand, if there is a use or any act done with respect to the property taken, inconsistent with the owner's rights, it is a conversion, despite the taker's intention.¹

Abr., "Trover" (B); 1 Leon. 223; Vandrink v. Archer, 1 Roll. Abr. 6 (L), pl. 4.

As long as the owner's right is recognized and nothing is done inconsistent with such ownership, no claim asserted, nor act of appropriation committed, the alleged wrongful force does not amount to a conversion. *Wilson v. McLaughlin*, 107 Mass. 587; *Nelson v. Merriam*, 4 Pick. (Mass.) 249.

Tobin v. Deal, 60 Wis. 87; 50 Am. Rep. 345, would seem contrary to the principle that it is not conversion when force is employed with no purpose to deprive the proprietor of his rights of ownership, temporarily or permanently. This was an action for the wrongful conversion of four calves belonging to the plaintiff. On the trial, the defendant testified, among other things, that after having taken the calves in the afternoon while they were doing damage on his premises, he kept them confined during the night and in the morning turned them into the highway; that they fed about two hours in front of his house, and then went up on a cross-road further from the plaintiff's premises; that afterwards, while he was driving away some stray pigs, he scared the calves and they ran along with the pigs in the direction opposite plaintiff's land, and went into the field of one P. The plaintiff, on searching for the calves, was unable to find them. The lower court decided in favor of the defendant and the plaintiff appealed from the judgment. Upon appeal, the supreme court reversed this judgment, on the ground of an alleged erroneous charge by the lower court regarding the question of intent in defendant. The propriety of the form of action does not appear to have been questioned. From the standpoint of reason and authority, it seems that it should not have been *trover*.

1. In *Fouldes v. Willoughby*, 8 M. & W. 540, the plaintiff had embarked with two horses on the defendant's ferry boat and paid for their passage; subsequently the defendant without justification refused to carry out his contract, and desired the plaintiff to remove the horses from the ferry boat, which he refused to do. The defendant

then took them from the plaintiff and turned them loose on the landing, whereby they were lost. The jury were directed that this was a conversion. Upon appeal the verdict was set aside. Lord Abinger, C. B., said: "It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of *trover*. I entirely dissent from this argument; and therefore, I think that the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightfully or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner or anyone else to receive them, what is he to do with them? Suppose,

Intention serves only to determine, where there has been a wrongful taking, and no apparent further act towards the chattel, whether the wrongdoer has committed a trespass or a conversion. It follows, therefore, that under such circumstances, the owner may always sue in trespass where there has been a conversion by wrongful taking, but it is not true that whenever trover will lie, trespass may be maintained.¹

c. TAKING NEED NOT BE ACTUAL.—There may be a symbolical taking, as where the defendant takes by assignment from one who has no title, thereby acquiring a right with respect to the property, which hinders or prevents the real owner from obtaining possession. Any indorsement of a document of title or a transfer on the books of a warehouseman which vests in the transferee the control, or right to control the property, and which is effectual to deprive the owner of his right of possession, is a conversion.²

under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses, when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be; if the plaintiff had immediately gone on shore and taken possession of them, there would be no conversion."

1. There seems to have been some doubt prior to the decision just quoted, as to whether, when trespass for taking goods would lie, trover would also lie. In *Bishop v. Montague*, Cro. Eliz. 824, beasts were taken absolutely by the defendant's bailiff as for a heriot due, the defendant afterwards agreeing to the taking and converting them. The court differed in opinion as to whether trover was maintainable, or whether the action should not have been trespass.

In Bacon's Abr., "Trover" (A), it is said: "It is said if J. S. takes the goods of D. N. unlawfully, this is a conversion, such a taking being a disposing of the goods as if they were the goods of J. S." Such indeed seems to have been the well-defined rule of the common

law, and in *Bruen v. Roe*, 1 Sid. 264, it was resolved that an actual taking of the goods of another is sufficient to support trover without evidence of a demand. It is settled at the present time, both in *England* and in the *United States*, that a mere taking without more is insufficient to support trover. *Sparks v. Purdy*, 11 Mo. 219; *Eldridge v. Adams*, 54 Barb. (N. Y.) 417. See also *Jordan v. Greer*, 5 Sneed (Tenn.) 165.

So in *Tucker v. Housatonic R. Co.*, 39 Conn. 447, where the plaintiffs forwarded some grain over the defendant's railroad in a sealed car, which was not to be opened until it reached its place of destination. The defendant, for his own convenience, opened the car and transferred the grain to another car. For this reason, upon its arrival, the plaintiff refused to receive the consignment, and brought trover against the defendant for the grain. It was held that the action would not lie. Foster, J., said: "If the arrangement between the parties was such that the plaintiff was entitled to have his grain go through in a blue car, a change of the property from one car to another for the convenience of the defendant would not be a conversion."

2. In *McComble v. Davis*, 6 East 538, the defendant advanced money to a broker upon a quantity of tobacco in the king's warehouse, taking an assignment from him of the tobacco and having it transferred to his own name. The broker, in fact, had bought the tobacco for the plaintiff, but the defendant had no knowledge of the transaction and his dealings with the

The mere transfer, however, of a document of title to personal property in the possession of a third person, without any other interference with the chattel, is not, as against the owner of the property, a conversion by either the person giving or receiving such document.¹

d. TAKING POSSESSION OF PREMISES UPON WHICH GOODS ARE DEPOSITED.—Bare entry and assumption of dominion over premises upon which are the goods of a former tenant, is no evidence of a conversion, where the entry is lawful. If the owner, however, comes and demands the property, or enters quietly upon the land with his servants, and attempts to remove it, and the person in possession prevents the removal, he is liable.²

The rule is, that if the entry of the defendant was lawful, it is

broker were *bona fide*, under the belief that he owned the tobacco and it stood in the broker's name in the warehouse, being so entered by the broker without the plaintiff's knowledge. A rule of the warehouse prevented the removal of property therein except by the person in whose name it was warehoused. The defendant declined to deliver to plaintiff without the broker's order and payment of advances. The court held that this was a conversion, although in fact the defendant had never had the tobacco in his possession, because by the assignment he controlled its delivery from the warehouse. *Hiort v. Bott*, L. R., 9 Exch. 86; *Johnson v. Stear*, 15 C. B. N. S. 338; 109 E. C. L. 330; *Clerk & Lindsell on Torts*, p. 169.

To constitute a conversion, the party need not have the exclusive control or manucaption of the goods; the term embraces, in its legal import, any intermeddling with, or dominion over the property of another, subversive to the rights of the true owner; as if the defendants are actually present, aiding and assisting another in the unlawful design of removing the plaintiff's slaves from the state, with the intention of wrongfully depriving him of them, each act in furtherance of the common design is the act of all, and all are guilty. *Freeman v. Scurlock*, 27 Ala. 407. No manual taking or removal is necessary. *Dickey v. Franklin Bank*, 32 Me. 572.

1. In *Fuller v. Tabor*, 39 Me. 519, the plaintiff brought trover for a building which had been placed on the land of another by his consent. The defendant, when a demand was made, said he had bought it and paid for it. The court

instructed the jury that taking a quitclaim of the land and building and putting it on record, would not of itself constitute a conversion on the part of the individual so receiving the deed.

Upon the same principle, the mere giving of a deed of land, the lessee continuing in quiet possession, will not be deemed a conversion of fixtures which the lessee has the right to remove during his term. *Burnside v. Twitchell*, 43 N. H. 390.

Taking a mortgage of personal property from one having no title, and recording the same, without taking possession of the mortgaged property or interfering with the same, constitutes no conversion for which trover will lie. *Davis v. Buffum*, 51 Me. 160; *Burnside v. Twitchell*, 43 N. H. 390. And see *Mattewan Co. v. Bentley*, 13 Barb. (N. Y.) 641.

In *Davis v. Buffum*, 5 Me. 160, the defendant leased his sawmill to one M., who, after putting in the machinery which was the subject-matter of the action, assigned the lease and sold the machinery to the plaintiffs, who thereupon entered the mill and occupied it. During their occupation, the defendant conveyed the mill, together with "the privilege and appurtenances thereto belonging" by deed, to a third person, to whom the plaintiff attorned, paying to them rent during the residue of the term. It was held that the giving of the deed on the part of the defendant did not of itself constitute a conversion.

2. *Woodis v. Jordan*, 62 Me. 490; *Fouldes v. Willoughby*, 8 M. & W. 540.

The bare removal of the chattels from the premises by the party taking possession, is no conversion. *Sparks v. Purdy*, 11 Mo. 219; *Shea v. Milford*,

always a question for the jury, whether his intention was to take possession of the goods themselves.¹

c. TAKING BY DURESS OR FRAUD.—If the defendant acquires possession through duress or fraud, he is liable, because the possessory title so derived is without right and against the plaintiff's

145 Mass. 525. And see *Farnsworth v. Lowery*, 134 Mass. 512. Nor is the removal of them to another part of the building a necessary act in taking possession, where the right of the former tenant, who was alone in fault for not removing them, is not denied. *Mattice v. Brinkman*, 74 Mich. 705.

Where the owner of land felled timber and sold it, and afterwards, before it was removed, sold the land, notifying the vendee that the timber had been sold, the vendee of the land was held liable for conversion for refusing to permit the purchaser of the timber to remove it. *Sherman v. Way*, 56 Barb. (N. Y.) 188.

In *Thorogood v. Robinson*, 6 Q. B. 769; 51 E. C. L. 768, the plaintiff was in possession of some land on which was lying certain lime and breeze, etc. The defendant had recovered judgment in ejectment for the land, and he entered under the writ of possession and turned two of the plaintiff's servants, who were loading a barge there with lime, off the premises. It was held that it was a question for the jury whether the conduct of the defendant, in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. The jury found that it did not. *Patterson, J.*, said: "The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off." See also *Needham v. Rawbone*, 6 Q. B. 771, where the plaintiff brought an action for a lot of wearing apparel. It appeared that he had left his house in which were stored the articles in question. The defendant entered the premises, under an order from the court of chancery, placed a man in charge, took an inventory of the goods, locked up the rooms containing them and prevented the plaintiff's servants from having access thereto, and finally expelled them from the house. It was held that, "It did not constitute a conversion, because it did not appear that the plaintiff might not have had the use of the goods had he desired it." *Badger*

v. Batavia Paper Mfg. Co., 70 Ill. 302; *Shea v. Milford*, 145 Mass. 525; *Fouldes v. Willoughby*, 8 M. & W. 540; *Farnsworth v. Lowrey*, 134 Mass. 512; *Roe v. Campbell*, 40 Hun (N. Y.) 49.

The assignee of a chattel mortgage on a boiler attempted, after the maturity of the debt, to reduce the same into possession, in accordance with the provisions of the mortgage. He was forbidden to do so by the party in possession who had succeeded to the title to the real estate, upon which the boiler was situated. It was held a conversion. *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302.

1. Cooley on Torts, p. 531.

In an action for the conversion of mirrors claimed by the plaintiff under a chattel mortgage, it appeared that the mirrors were in different apartments of a building occupied by tenants of the defendant's predecessor in title, the defendant having purchased the building at a sale under a mortgage. Afterwards, some of the tenants moved out, and the defendant, with notice of the plaintiff's claim, relet the apartments with the mirrors in them to other tenants. It was held to be an error to dismiss the complaint on the ground that the plaintiff did not show that the defendant was in actual possession of the mirrors. *Wilson v. Cummings* (Super. Ct.), 24 N. Y. Supp. 115.

The plaintiff stored goods in a building-occupied by a company in which the plaintiff had an interest. The defendant afterward assumed possession of the premises under a mortgage against the company and put an agent in charge of the same. The agent notified the plaintiff to remove the goods, but refused to allow him to remove them without a receipt, "in good order." No demand had been made on the defendant for the goods; he had given no order in reference thereto, and he was not informed that the plaintiff had applied therefor. It was held that the defendant was not liable for a conversion. *Amberg v. Philbrick*, 33 Ill. App. 200; *Miller v. Lamery*, 62 Vt. 116.

will.¹ To secure property by a threat is a conversion, but the conduct of the defendant must amount to a forcible taking.²

1. See *supra*, this title, *Advantage to Defendant Not the Test*. In *Bristol v. Burt*, 7 Johns. (N. Y.) 254; 5 Am. Dec. 264, the defendant, a collector of the port, prevented the removal of certain goods of the plaintiff which were stored in a warehouse, on the ground that the plaintiff was going to carry them into *Canada*, contrary to an embargo. Two armed men were stationed near the warehouse, and the defendant avowed his determination to prevent the removal of the goods in question from any of the stores in the port. It was held that this was sufficient evidence to support an action for conversion. The court said: "The bare denial to deliver is not always a conversion, as in *Thimblethrop's Case*, 2 Bulst. 310, where a piece of timber was left upon the lands of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property, not only by claiming jurisdiction over it, but in placing armed men near it to prevent its removal. This fact is of itself a conversion. It is intermeddling with the property in the most decisive manner and detaining it for months in the storehouse." See *Chapman v. Allen*, Cro. Car. 271; *Brenen v. Currint*, Sayer 224; *Dewell v. Moxon*, 1 Taunt. 391; *Pattison v. Robinson*, 5 M. & S. 105; *Wilton v. Girdlestone*, 5 B. & Ald. 847; *Sharp v. Pratt*, 3 C. & P. 34; 14 E. C. L. 197; *Clendon v. Dinneford*, 5 C. & P. 13; 24 E. C. L. 191; *Cranch v. White*, 1 Bing. N. Cas. 414; *Wansbrough v. Maton*, 4 Ad. & El. 884; 31 E. C. L. 217; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Clark v. Hale*, 34 Conn. 398; *Maxwell v. Harrison*, 8 Ga. 67; 52 Am. Dec. 385; *Hale v. Barrett*, 26 Ill. 195; 79 Am. Dec. 367; *Ring v. Billings*, 51 Ill. 475; *Hipple v. DeFuaie*, 57 Ill. 528; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Pullen v. Bell*, 40 Me. 314; *Neal v. Hanson*, 60 Me. 84; *Buel v. Pumphrey*, 2 Md. 261; 56 Am. Dec. 714; *Chamberlin v. Shaw*, 18 Pick. (Mass.) 278; 29 Am. Dec. 566;

Magee v. Scott, 9 Cush. (Mass.) 148; 55 Am. Dec. 49; *Folsom v. Manchester*, 11 Cush. (Mass.) 334; *Boston Acid Mfg. Co. v. Moring*, 15 Gray (Mass.) 211; *Hinckley v. Baxter*, 13 Allen (Mass.) 139; *Cox v. Cook*, 14 Allen (Mass.) 165; *Bates v. Stansell*, 19 Mich. 91; *O'Donoghue v. Corby*, 22 Mo. 395; *Huxley v. Hartzell*, 44 Mo. 270; *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205; *Dunlap v. Hunting*, 2 Den. (N. Y.) 643; *Farrar v. Chauvetete*, 5 Den. (N. Y.) 527; *Hall v. Robinson*, 2 N. Y. 293; *Tuttle v. Gladding*, 2 E. D. Smith (N. Y.) 157; *Solomon v. Waas*, 2 Hilt. (N. Y.) 179; *Chambers v. Lewis*, 28 N. Y. 454; *Hare v. Pearson*, 4 Ired. (N. Car.) 76; *McDaniel v. Nethercut*, 8 Jones (N. Car.) 97; *Berry v. Vantricia*, 12 S. & R. (Pa.) 89; *Harger v. McMains*, 4 Watts (Pa.) 418; *Ratcliff v. Vance*, 2 Mill (S. Car.) 239; *Fowler v. Stuart*, 1 McCord (S. Car.) 504; *Trowell v. Youmanes*, 5 Strobbh. (S. Car.) 67; *Roach v. Damron*, 2 Humph. (Tenn.) 425; *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 446; *Albee v. Cole*, 39 Vt. 319; *Vilas v. Mason*, 25 Wis. 310.

If the goods are received by a third person with a knowledge of the fraud, or under such circumstances as would put him on inquiry, or if such third person fails to put himself on the footing of a *bona fide* purchaser for value, he will be liable for conversion. *Gage v. Epperson*, 2 Head (Tenn.) 669.

2. In *Granger v. Hill*, 4 Bing. N. Cas. 212, the defendant obtained from the plaintiff, under threat of executing a warrant of *ca. sa.*, a ship's register, and it was held that this amounted to a conversion because the chattel was taken without right and against the defendant's will. See *Powell v. Hoyland*, 6 Exch. 67.

In *Harlan v. Brown* (Ind. App.), 30 N. E. Rep. 928, the complaint alleged that the plaintiff was the owner of a note which was past due; that while he was intoxicated, it was wrongfully taken from him without his consent, and sold to the defendants; and the defendants delivered it to the makers for a new note. It was held that the complaint stated a cause of action against the defendants for the conversion of the note.

The owner of a note of which another

5. Conversion by Wrongful Use or Disposition.—Any wrongful disposition of property which purports to vest in another, along with the possession, some right over the property itself, whether as owner or as *dominus pro tempore*, is a conversion.¹ If one intrusted with property for a qualified purpose transgress the limits

fraudulently obtains possession, and which he converts to his own use by suing to judgment, and collecting the amount due thereon, may, in an action of trover, recover from the latter the value of the note; notwithstanding such note and judgment and the collection thereof, and notwithstanding that the plaintiff had knowledge of these facts before bringing suit. *Rushin v. Tharpe*, 88 Ga. 779.

1. *Loeschman v. Machin*, 2 Stark. 311; *Samuel v. Morris*, 6 C. & P. 620; 25 E. C. L. 565; *Cooper v. Willomatt*, 1 C. B. 672; 50 E. C. L. 672; *Van Amringe v. Peabody*, 1 Mason (U. S.) 440; *Blakely v. Ruddell*, *Hempst. (U. S.)* 18; *St. John v. O'Connell*, 7 Port. (Ala.) 466; *Robinson v. Hartridge*, 13 Fla. 501; *Yeldell v. Shinholster*, 15 Ga. 189; *Seago v. Pomeroy*, 46 Ga. 227; *Haas v. Damon*, 9 Iowa 589; *White v. Wall*, 40 Me. 574; *Webber v. Davis*, 44 Me. 147; 69 Am. Dec. 87; *Carpenter v. Hale*, 8 Gray (Mass.) 157; *Simpson v. Carleton*, 1 Allen (Mass.) 109; 79 Am. Dec. 707; *Carroll v. McCleary*, 19 Mich. 93; *Johnston v. Whittemore*, 27 Mich. 463; *White v. Phelps*, 12 N. H. 382; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; 9 Am. Dec. 193; *Bates v. Conkling*, 10 Wend. (N. Y.) 389; *Vincent v. Conklin*, 1 E. D. Smith (N. Y.) 203; *Campbell v. Parker*, 9 Bosw. (N. Y.) 322; *Jaroslausi v. Sanderson*, 1 Daly (N. Y.) 232; *Covell v. Hill*, 6 N. Y. 374; *Boyce v. Brockway*, 31 N. Y. 490; *Strong v. National Mechanics' Bank Assoc.*, 45 N. Y. 718; *Ogden v. Lathrop*, 35 N. Y. Super. Ct. 73; *Hope v. Lawrence*, 1 Hun (N. Y.) 317; *Carraway v. Burbank*, 1 Dev. (N. Car.) 306; *Etter v. Bailey*, 8 Pa. St. 442; *Harris v. Saunders*, 1 Strobb. Eq. (S. Car.) 370, note; *Garvin v. Luttrell*, 10 Humph. (Tenn.) 16; *Ainsworth v. Bowen*, 9 Wis. 348; *Couillard v. Johnson*, 24 Wis. 533; *Downer v. Rowell*, 22 Vt. 347; *Follett v. Edwards*, 30 Ill. App. 386; *Hooks v. Smith*, 18 Ala. 338; *Frost v. Plumb*, 40 Conn. 111; 16 Am. Rep. 18; *Mosely v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Columbus v. Howard*, 6 Ga. 219; *Phillips v. Brigham*, 26 Ga. 617; *Kelly v. White*, 17 B. Mon. (Ky.) 131; *Ripley v. Dolbler*, 18 Me. 382; *Morton v. Gloster*, 46 Me. 520; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Rotch v. Hawes*, 12 Pick. (Mass.) 136; 22 Am. Dec. 414; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30; *Fisher v. Kyle*, 27 Mich. 454; *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Disbrow v. Ten Broeck*, 4 E. D. Smith (N. Y.) 397; *Beach v. Raritan R. Co.*, 37 N. Y. 457; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310; *Angus v. Dickerson*, *Meigs (Tenn.)* 459; *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Mullen v. Ensley*, 8 Humph. (Tenn.) 428; *Price v. Allen*, 9 Humph. (Tenn.) 703; *Bell v. Cummings*, 3 Sneed (Tenn.) 275; *Rice v. Clark*, 8 Vt. 109; *Hart v. Skinner*, 16 Vt. 138; 40 Am. Dec. 500; *Towne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85; *Spencer v. Pilcher*, 8 Leigh (Va.) 563; *Harvey v. Epes*, 12 Gratt. (Va.) 153; *Maguyer v. Hawthorn*, 2 Harr. (Del.) 71; *M'Neill v. Brooks*, 1 Yerg. (Tenn.) 73; *Parker v. Thompson*, 5 Sneed (Tenn.) 349; *McClellan v. Wyatt* (N. Y. City Ct.), 11 N. Y. Supp. 686; 26 Abb. N. Cas. (N. Y.) 144; *Gregory v. Fichner* (C. Pl.), 14 N. Y. Supp. 891; 27 Abb. N. Cas. (N. Y.) 108.

In *Wheelock v. Wheelwright*, 5 Mass. 104, the defendant hired a horse and sleigh of the plaintiff to go from Boston to the Punch Bowl and return, the trip to occupy four hours and a half. He rode the horse four and a half miles farther to Watertown, and while returning, owing to the hard driving and intense coldness of the weather, the horse fell dead. In an action on the case for improperly using the horse, it was held that the plaintiff could not recover. "The plaintiff has misconceived his action. He should have brought trover. The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover." And to the same effect see *Perham v. Coney*, 117 Mass. 102.

of his authority, he is liable.¹ The intention of the wrongdoer need not necessarily be to confer an absolute property upon the defendant; to deliver goods so as to enable another to acquire a lien, is a conversion. "If a person take my horse to ride and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me."² So, if a person in possession of another's property pledge it without the owner's consent, it is a conversion.³ The same principle applies to the repledge by a

1. See *infra*, this title, *Conversion of Money*.

Marr v. Barrett, 41 Me. 403; *Bissell v. Huntington*, 2 N. H. 142; *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Sibley v. Story*, 8 Vt. 15; *Palmer v. Jarmain*, 2 M. & W. 282; *Stiernel v. Holden*, 4 B. & C. 5; 10 E. C. L. 260; *Harris v. Schultz*, 40 Barb. (N. Y.) 315; *Jordan v. Shireman*, 28 Ind. 136. See *Dufresne v. Hutchinson*, 3 Taunt. 117.

One misapplying property or funds intrusted to him for a specific purpose, may be held liable for conversion. *Norton v. Kidder*, 54 Me. 189; *Hagood v. Elson*, 21 Tex. 506; *Neale v. Weare Bank*, 3 Allen (Mass.) 202; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228. And so may one who sells goods furnished him as samples. *Kruse v. Seeger*, etc., Co. (C. Pl.), 16 N. Y. Supp. 529.

Where an attorney, on making a collection for an infant client, without his knowledge, takes notes in his own name, which he transfers to one not a *bona fide* purchaser, either the attorney or purchaser will be liable in trover. *Petrie v. Williams*, 68 Hun (N. Y.) 589.

Where the agent of a mortgagor disposed of the mortgaged chattels by sale and paid the proceeds, which were sufficient to satisfy both mortgages, to a prior, in exclusion of the rights of a junior, mortgagee, he will be liable to the latter for the damages sustained by the conversion. *Merchants', etc., Bank v. Meyer*, 56 Ark. 499.

But it is not a conversion for an agent intrusted with property to sell at a certain price, to sell for a less price. *Moore v. McKibbin*, 33 Barb. (N. Y.) 246.

Where one left in charge of horses wrecked on board a steamboat, part of the horses belonging to himself, sold them and took notes payable to himself and the other owner jointly, he was not guilty of conversion. *Wood v. Worthington*, 4 J. J. Marsh. (Ky.) 174.

Where a slave put on board a steamboat for transportation was set to "wooding" by one of the officers of the boat, without permission of the master, and while so employed fell overboard and was drowned, the boat was held liable for conversion if the employment contributed to the loss. *Johnson v. The Arabia*, 24 Mo. 86. And see *Scruggs v. Davis*, 5 Sneed (Tenn.) 261.

Sale by Conditional Purchaser.—Where the conditional purchaser of chattels, the property in which was to remain in the vendor until paid for, sells or gives them away before fully paid for, he is liable for conversion. *Johnston v. Whittemore*, 27 Mich. 463.

Conversion by Carrier.—A carrier may be held liable in trover for the loss or wrongful delivery of goods intrusted to him for carriage. *Bullard v. Young*, 3 Stew. (Ala.) 46. But not for a mere delay in delivery. *Briggs v. New York*, etc., R. Co., 28 Barb. (N. Y.) 515.

An adulteration of liquor by a carrier will be a conversion. *Dench v. Walker*, 14 Mass. 499.

2. *Baldwin v. Cole*, 6 Mod. 212, *Holt, C. J.* But one who hires a horse to go to a certain place and return without stopping, does not convert him to his own use by waiting at the place for half an hour, having the horse put up at a stable and fed. *Evans v. Mason*, 64 N. H. 98. And where one had a horse for agistment and rode him fifteen miles, the horse dying immediately afterward, though not in consequence of the riding, it was held no conversion. *Johnson v. Weedman*, 5 Ill. 495.

3. *Thrall v. Lathrop*, 30 Vt. 307; *Carpenter v. Hale*, 8 Gray (Mass.) 157; *Com. v. Tenney*, 97 Mass. 50; *Loveless v. Fowler*, 79 Ga. 134; 11 Am. St. Rep. 407; *Muller v. Ryan* (N. Y. City Ct.), 2 N. Y. Supp. 736; *Knapp v. Sioux Falls Nat. Bank*, 5 Dakota 378; *Shea v. Milford*, 145 Mass. 525; *Newcomb Buchanan Co. v. Baskett*, 14

pledgee,¹ or a change in the nature of the security.² But a sale by a mortgagee of personal property before condition broken would not be a conversion.³

It is not necessary that there should be a sale of the entire chattel by the defendant; an alienation or use of a portion may be treated as a conversion of the whole.⁴ But it seems that where there is a distinct bailment of several chattels, each independent of the other, a conversion of one will not operate as a conversion of all.⁵

One having a life interest in chattels who attempts to convey

Bush (Ky.) 658; *Kentgen v. Parks*, 2 Sandf. (N. Y.) 60.

If one having the possession of another's property for a specified purpose, pledges it as security for advances, both he and the one with whom it is pledged are liable to the owner for conversion, and trover may be maintained without demand. *Hotchkiss v. Hunt*, 49 Me. 213. And see *Stump v. Roberts*, Cooke (Tenn.) 352.

But the pledge of a bond, and as incident thereto of collaterals, is not *per se* a conversion of the collaterals. If they are redeemed by the obligee of the bond before maturity, and before suit brought, and are in his hands ready to be restored upon payment of the bond, the obligor has no cause for complaint. *Shelton v. French*, 33 Conn. 489.

1. *Lawrence v. Maxwell*, 53 N. Y. 19; *Bryan v. Baldwin*, 52 N. Y. 232. So, also, a sale by a pledgee, without authority, for non-compliance with a demand which he had no right to make, or after a tender of the debt for which the pledge is held, is a conversion. *Hope v. Lawrence*, 1 Hun (N. Y.) 317.

2. The payee of a promissory note receiving collateral security from the maker, has no authority, without the latter's consent, to surrender the collateral to the makers of the note or exchange it for their promissory note, giving them time for payment, and such acts amount to conversion. *Greenwald v. Metcalf*, 28 Iowa 363.

3. *Phelps v. Hendrick*, 105 Mass. 106; *Eslow v. Mitchell*, 26 Mich. 500.

Where a mortgagee, after payment of the mortgage, sold timber cut upon the mortgaged premises, he was held guilty of conversion. *Hutchins v. King*, 1 Wall. (U. S.) 53.

Sale by Mortgagee After Default.—If the mortgagee of property, after default, sells more than is necessary to satisfy the debt and costs, he will be liable for conversion of the excess.

Omaha Auction Co. v. Rogers, 35 Neb. 61.

Sale by Conditional Vendor After Condition Broken.—Under the *Vermont* acts of 1884, No. 93, a conditional vendee is entitled to the possession of the chattel until taken and sold by a public officer, and he may maintain trover against the vendor who takes and sells the same at private sale. *Smith v. Wood*, 63 Vt. 534; *Roberts v. Hunt*, 61 Vt. 612.

Sale by Second Mortgagee.—A second mortgagee who takes possession of and sells the mortgaged chattels after default in a condition of the first mortgage, is guilty of conversion and liable to the first mortgagee. *Kleinberger v. Brown* (Super. Ct.), 8 N. Y. Supp. 866.

4. *Gentry v. Madden*, 3 Ark. 127.

5. *Gentry v. Madden*, 3 Ark. 127. See, generally, *Richardson v. Atkinson*, 1 Stra. 576; *Bowen v. Fenner*, 40 Barb. (N. Y.) 383.

In *Philpot v. Kelly*, 3 Ad. & El. 106; 30 E. C. L. 40, the question was as to the liability of one who, having in his possession a cask of wine belonging to the plaintiff, drew part of it off and bottled it, to preserve it from destruction on account of the rotten wood in the casks. Much space is devoted in the opinions of the various judges to the discussion of when a conversion of a part amounts to a conversion of the whole. *Patteson, J.*, said: "I think that the mere taking away or destroying a part of property which remains in the hands of a bailee, is not such a conversion that the owner may sue in trover for the whole. In *Richardson v. Atkinson*, 1 Stra. 576, where part of the liquor was drawn off, it was held a conversion; but the defendant had filled the vessel up with water. I am not prepared to say that if a person draws off part of the contents of a cask, and is ready to deliver the rest, his taking away such part is necessarily a conver-

the entire property, is guilty of a conversion.¹ The remainderman is not bound to follow the property into the hands of the purchaser, but may, at his option, sue either the life tenant or successive purchaser.²

A temporary use of a chattel by a licensee, whose title is derived from a tortfeasor, it has been held, does not amount to a conversion.³

III. TITLE TO MAINTAIN TROVER—1. Who May Maintain Trover—a. IN GENERAL.—A plaintiff in trover must recover upon the strength of his own legal title;⁴ and there must be a concurrence both of the right of property, general or special, and of the actual possession or the right to immediate possession.⁵ But it is not essential

sion of the whole. If it were so held, a person with whom a cask of liquor was deposited, and who wished to convert all of it, might draw off a part of the contents, and if the vessel remained with him for six years afterwards, refuse to deliver up the rest, and set up his conversion of the part so many years ago, in answer to an action of trover."

1. *Moore v. Baker*, 4 Ind. App. 115.

2. *Moore v. Baker*, 4 Ind. App. 115.

The plaintiff purchased negroes of a tenant for life, intending to run them out of the state and to defeat the interests of those in remainder, who, to protect their interests, seized the negroes, and such seizure was held not to be a conversion. *Sharp v. Nesmith*, 6 Rich. (S. Car.) 31.

3. In *Frome v. Dennis*, 45 N. J. L. 515, the plaintiff left his plough upon A's farm for safekeeping. The farm changed ownership and the new owner loaned the plough to the defendant, who used it three or four days in the belief that the lender was the owner. The defendant returned it and was subsequently notified by the plaintiff that the plough belonged to him. It was held there was no conversion. *Dixon, J.*, said: "He (the defendant) received it for temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor, from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon the ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's

right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion."

4. The nature of the title in the plaintiff, upon which his suit in trover is to be founded, must be a legal, in contradiction to an equitable title. In *Myers v. Hale*, 17 Mo. App. 204, the court reaches the conclusion that where there is a deed of trust conveying the legal title to the trustee, he only, and not the beneficiary, is entitled to bring trover for the conversion of chattels embraced therein.

In *Byam v. Hampton* (Supreme Ct.), 10 N. Y. Supp. 372, the court uses this language: "A mere equitable interest in personal property where legal title and actual possession are in another, is not sufficient to enable the party to maintain trover for the conversion." See *Northern Pac. R. Co. v. Paine*, 119 U. S. 513; *Halleck v. Mixer*, 16 Cal. 574; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Barker v. Furlong* (1891), 2 Ch. 172; *Webster v. Heylman*, 11 Mo. 428; *Edwards v. Welton*, 25 Mo. 379; *Todd v. Crookshanks*, 3 Johns. (N. Y.) 432; *Fulton v. Fulton*, 48 Barb. (N. Y.) 581; *Abercrombie v. Bradford*, 16 Ala. 560; *Ames v. Palmer*, 42 Me. 197; 44 Am. Dec. 271; *Burke v. Savage*, 13 Allen (Mass.) 408; *Landon v. Emmons*, 97 Mass. 37; *Winship v. Neale*, 10 Gray (Mass.) 382; *Lamb v. Clark*, 30 Vt. 347; *Clark v. Rideout*, 39 N. H. 238; *Herring v. Tilghman*, 13 Ired. (N. Car.) 392; *Killian v. Carroll*, 13 Ired. (N. Car.) 431.

5. In *Darlington on Personal Prop.*, p. 36, the rule is stated that the action of trover "may be maintained only when the plaintiff has been in possession of the goods, or has such a prop-

erty in them as draws to it the right of possession." See also *Swenson v. Kleinschmidt*, 10 Mont. 473; *Glaze v. McMillion*, 7 Port. (Ala.) 279; *Kemp v. Thompson*, 17 Ala. 9; *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242; *Owens v. Weedman*, 82 Ill. 409; *Ames v. Palmer*, 42 Me. 197; 44 Am. Dec. 271; *Winship v. Neale*, 10 Grav (Mass.) 382; *Landon v. Emmons*, 97 Mass. 37; *Horne v. Briggs*, 98 Mass. 510; *Fairbanks v. Phelps*, 22 Pick. (Mass.) 535; *Stephenson v. Little*, 10 Mich. 433; *Parkhurst v. Jacobs*, 17 Mich. 302; *Morton v. Preston*, 8 Mich. 60; 100 Am. Dec. 146; *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Traylor v. Horrall*, 4 Blackf. (Ind.) 317; *Redman v. Gould*, 7 Blackf. (Ind.) 361; *Grady v. Newby*, 6 Blackf. (Ind.) 442; *Alexander v. Swackenhamer*, 105 Ind. 81; 55 Am. Rep. 180; *Branch v. Morrison*, 6 Jones (N. Car.) 16; *Barwick v. Barwick*, 11 Ired. (N. Car.) 80; *Robert v. Hardle*, 10 Ired. (N. Car.) 490; *Hostler v. Skull*, 1 Tayl. (N. Car.) 95; 1 Am. Dec. 583; *Swift v. Mosely*, 10 Vt. 208; 33 Am. Dec. 197; *Grant v. King*, 14 Vt. 367; *Hickock v. Buck*, 22 Vt. 149; *White v. Norton*, 22 Vt. 15; 52 Am. Dec. 75; *Harvey v. Epes*, 12 Gratt. (Va.) 153; *Slack v. Littlefield*, *Harp. (S. Car.)* 208; *Bryson v. Rayner*, 25 Md. 432; *Winner v. Penniman*, 35 Md. 165; 6 Am. Rep. 385; *Dungan v. Mutual Ben. L. Ins. Assoc.*, 38 Md. 242; *Stewart v. Speddon*, 5 Md. 449; *Baltimore v. Norman*, 4 Md. 358; *Debow v. Colfax*, 10 N. J. L. 128; *Purdy v. McCullough*, 3 Pa. St. 466; *Holmes v. Bailey*, 16 Neb. 300; *Geohagan v. Baker*, 3 Bibb (Ky.) 284; *Stott v. Alexander*, 2 Sneed (Tenn.) 650; *Bartlett v. Hoyt*, 29 N. H. 317; *Clark v. Draper*, 19 N. H. 419; *Cheshire R. Co. v. Foster*, 51 N. H. 490; *Bushman v. Brown* (Supreme Ct.), 11 N. Y. Supp. 1; *Cobb v. Dows*, 9 Barb. (N. Y.) 230; *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362; *Green v. Clark*, 12 N. Y. 343; *Heyl v. Burling*, 1 Cal. (N. Y.) 14; *Fulton v. Fulton*, 48 Barb. (N. Y.) 581; *Bowen v. Fenner*, 40 Barb. (N. Y.) 383; *Cook v. Howard*, 13 Johns. (N. Y.) 276; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 403; *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 377; *Putnam v. Wiley*, 8 Johns. (N. Y.) 432; 5 Am. Dec. 346; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352; *Sevier v. Holliday*, *Hempst. (U. S.)* 160; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206; *Owen v. Knight*, 4 Bing. N. Cas. 56; 33

E. C. L. 277; *Gordon v. Harper*, 7 T. R. 9; *Jeffries v. Great W. R. Co.*, 34 Eng. L. & Eq. 122; 5 Bac. Abr. 258; *Beny v. Head*, *Cro. Car.* 242; *Phillips v. Robinson*, 4 Bing. 106; 13 E. C. L. 362; *Smith v. Milles*, 1 T. R. 475; *Bloxam v. Sanders*, 4 B. & C. 941; 10 E. C. L. 477.

Trover must be founded on the right of property in the plaintiff, *Pyne v. Dor*, 1 T. R. 55; and the plaintiff must have the right of possession as well as the right of property at the time. *Gordon v. Harper*, 7 T. R. 9; *Owen v. Knight*, 4 Bing. N. Cas. 54; 33 E. C. L. 277; *Bradley v. Copley*, 1 C. B. 685; 50 E. C. L. 685; *Jeffries v. Great Western R. Co.* 5 El. & Bl. 802; 85 E. C. L. 802; *Webb v. Fox*, 7 T. R. 391; *Armory v. Delamirie*, 1 Str. 505; *Bridges v. Hawkesworth*, 15 Jur. 1079; *Hunt v. Holton*, 13 Pick. (Mass.) 216; *Foster v. Gorton*, 5 Pick. (Mass.) 185; *Eaton v. Lynde*, 15 Mass. 242; *Middleworth v. Sedgwick*, 10 Cal. 392; *Scriber v. Masten*, 11 Cal. 303; *Drake v. Redington*, 9 N. H. 243; *Hart v. Hyde*, 5 Vt. 328; *Elmore v. Simon*, 67 Ala. 526; *Heflin v. Slay*, 78 Ala. 180; *Lehr v. Taylor*, 90 Pa. St. 381; *Duffield v. Miller*, 92 Pa. St. 286; *Tatum v. Sharpless*, 6 Phila. (Pa.) 18; *American Exchange v. Robertson*, 52 N. Y. Super. Ct. 44; *Dubois v. Harcourt*, 20 Wend. (N. Y.) 41; *Moorhead v. Scofield*, 111 Pa. St. 584; *Passavant v. Gummey*, 2 Pa. Dist. Rep. 389; *Kellogg v. Fox*, 45 Vt. 348; *Seward v. Heflin*, 20 Vt. 144; *Stevenson v. Fitzgerald*, 47 Mich. 166; *Edwards v. Frank*, 40 Mich. 616; *Hardy v. Monroe*, 127 Mass. 64; *Newhall v. Kingsbury*, 121 Mass. 445; *Jacques v. Steward*, 81 Ga. 81; *Rushin v. Tharpe*, 88 Ga. 779; *Montgomery v. Brush*, 121 Ill. 513; *Forth v. Pursley*, 82 Ill. 152; *Owens v. Weedman*, 82 Ill. 409; *Reeve v. Fox*, 40 Ill. App. 127; *Krager v. Pierce*, 73 Iowa 359; *Street v. Nelson*, 80 Ala. 230; *Parker v. First Nat. Bank* (N. Dak. 1892), 54 N. W. 313; *Brooks v. Rodgers* (Ala. 1893), 13 So. Rep. 386. As to the beneficial interest in the title to iron ore before it is mined, sufficient to support trover, see *Hartford Iron Mining Co. v. Cambria Min. Co.*, 93 Mich. 90.

Consignees.—Whether or not consignees may maintain an action of trover for conversion of goods shipped, before they are received, depends upon the construction of the contract of consignment—the same principles applying to consignees as to other plaintiffs.

Where, by the contract of consignment, the property, absolute or special, passes, coupled with a right to the possession, the action of trover lies. *Fitzhugh v. Wiman*, 9 N. Y. 559; *O'Neill v. New York Cent., etc., R. Co.*, 60 N. Y. 138. See also *Green v. Clarke*, 12 N. Y. 343; *Perkins v. Dacon*, 13 Mich. 81; *Gibbons v. Farwell*, 58 Mich. 233.

Assignees.—Assignees, in this connection, may be considered in two aspects: assignees of the right of action, and assignees of the right of property. The general rule of the common law is, that rights of action for torts to the person or character are not assignable, but that such as affect property, real or personal, may be transferred—not, however, so as to invest the transferee with all the rights, legal and equitable, of his transferor, but, by the intervention of equity, to enable him to maintain an action on the right thus assigned, in the name of the assignor. In many of the states, however, statutes have been passed enlarging the privileges of the assignee as respects such choses in action as were assignable at common law, so that now, by statute, all such rights of action for torts as would survive to the personal representative of the injured party may be assigned, so as to pass an interest to the assignee which he may enforce at law, and in his own name. See *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Mich. 201; *Brady v. Whitney*, 24 Mich. 154; *Finn v. Corbitt*, 36 Mich. 318; *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Jordan v. Gillen*, 44 N. H. 424.

Little need be said in this connection regarding assignees of rights of property, as contradistinguished from rights of action; *Story, J.*, in the *Brig Sarah Ann*, 2 Sumn. (U. S.) 211, contrasts the two. He says: "There is no principle of law which establishes that a sale of personal property is void because the property was not in the rightful possession of the owner at the time the sale was made. Under such circumstances the sale is not a right of action, but a sale of the thing itself, and is good to pass title against every person not holding the same in good faith for a valuable consideration without notice *à fortiori* against a wrongdoer."

In *Tome v. Dubois*, 6 Wall. (U. S.) 548, it is maintained that the owner of personal property is not obliged to treat every act of a third person who in-

fringes his right of property or possession as constituting a tortious conversion of the property, but may, if he sees fit, waive the tort, and sell the property and convey a good title, and that his vendee may, upon demand and refusal, maintain trover therefor. See *Carpenter v. Hale*, 8 Gray (Mass.) 157; *Zabriske v. Smith*, 13 N. Y. 322; 64 Am. Dec. 557; *Morgan v. Bradley*, 3 Hawks (N. Car.) 559.

An instrument conveying property for the better securing of promissory notes, conveys such title in the property as will authorize the payee of the notes to maintain trover for the conversion of the property. *Johnson v. Osburn*, 85 Ga. 654.

Adverse Possessor.—One in adverse possession cultivating turpentine, though not the owner of the land, is nevertheless the owner of the turpentine gathered, and entitled to support the action of trover against the true owner of the soil for taking it. *Branch v. Campbell*, 7 Jones (N. Car.) 378; *Branch v. Morrison*, 6 Jones (N. Car.) 16. See *Doering v. Kenamore* (Mo.), 1 West 741, as to the insufficiency of title derived by gift, where the chattel is in the adverse possession of the defendant. See also in this connection *Stedman v. Riddick*, 4 Hawks (N. Car.) 29; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663.

To maintain trover, there must be either a taking from the owner without his consent, an assumption of ownership, an illegal use or abuse, or proof of demand and refusal. *Kennet v. Robinson*, 2 J. J. Marsh. (Ky.) 84.

Right to Specific Chattels.—Where the plaintiff in an action of trover is out of possession, the invariable legal requirement is that in connection with a property, absolute or special, in the chattels in controversy, he must have had, at the time of the conversion, a right to the immediate possession. This makes it necessary that the plaintiff should have title to specific chattels, or to a specific portion of specific chattels, for were this not the case, his right to the possession would not be strictly immediate, but must await a subdivision, identification, or designation. In *Orton v. Butler*, 5 B. & Ald. 652, it was decided that a count in the declaration stating that the defendant had and received to the use of the plaintiff a certain sum of money, and that the defendant "converted and disposed thereof" to his own use, was bad upon demurrer,

that the absolute title should be in him; it is enough if he stands in such a relation to the property that he is entitled to the pos-

for, as Abbott, C. J., said: "This is a count in trover, now, the action of trover is only maintainable for specific property. . . . In this case the defendant might redeem himself by returning to the plaintiff an equal sum of money." *Little v. Gibbs*, 4 N. J. L. 211, is to the same effect. "If money or cash be lost or stolen," says the court, "the loser cannot maintain trover to recover it, because it cannot be distinguished."

In *Stott v. Alexander*, 2 Sneed (Tenn.) 650, an administrator *de bonis non* sought to bring an action of trover against the personal representative of the former administrator, for a sum of money collected by such former administrator and belonging to the plaintiff's intestate. The court held that the action of trover lay not, inasmuch as, under the circumstances, there was nothing to specifically designate and identify the money sought to be recovered.

In *Holmes v. Bailey*, 16 Neb. 300, the circumstances were as follows: the plaintiff purchased seventy-five tons out of one hundred tons of hay standing on the field in stacks; no part of the hay being designated or specified as his portion. The vendor delivered to the purchaser only twenty tons, and the plaintiff sought to recover the remainder in trover. The court maintained that he had no such title as would enable him to bring trover therefor.

In *Hill v. Robison*, 3 Jones (N. Car.) 501, ten sacks of salt were bought and paid for with the means of A, and five others were bought and paid for with the means of B. They were all delivered to B unmarked, and without any separation or distinct appropriation of any particular sacks to either. C, having received the whole from B, converted them, and A sought to maintain an action of trover. The court held that such an action, under the circumstances, could not be maintained, and in an opinion used the following language: "In an action of trover, the plaintiff must show title to the specific property converted, at the time of the conversion, or of his then present right to the possession. In this case no portion of the salt has been so set apart as the property of the plaintiff; no specific part, therefore, vested in him."

See also *Jones v. Morris*, 7 Ired. (N. Car.) 370.

This necessity for the right to the specific chattels is also illustrated in the case of parties to a contract for the sale of goods, by the application of the original proposition, as regards title in the plaintiff, where the vendee, in a contract for the sale of chattels, seeks to maintain trover while there yet remains to be done before delivery, some material act by the vendor, such as setting apart, designating, weighing, and counting. For, so long as such acts remain to be done, the property in the goods does not pass to the vendee. See *SALES*, vol. 21, p. 476. Hence, no action of trover can be maintained by him. *White v. Wilks*, 5 Taunt. 176; 1 Chit. Pl. (16th Am. ed. 166); 2 Greenl. on Ev. (14th ed.), § 6.

Plaintiff Must Be Interested at Time of Suit.—The great weight of authority is in favor of requiring an interest in the plaintiff at the time of suit, though *Barton v. Dunning*, 6 Blackf. (Ind.) 209, lays down an opposite doctrine. This was an action of trover; on appeal, the lower court was sustained in refusing the instruction that it was necessary that the plaintiff should be interested, as well at the time of the commencement of the suit, as at the time of the conversion. The supreme court maintained that the right of action was founded on the conversion and would not be defeated by the subsequent transfer of the right of property. The contrary doctrine is maintained by many adjudications. *Brady v. Whitney*, 24 Mich. 154, holds that title must be in the plaintiff, not only at the time of institution of the suit, but at the time of the verdict. A transfer of property during the pendency of the suit would defeat the plaintiff's right to recover. The defendant in trover gets title to the property by the judgment itself or by its payment, and no one is entitled to full damages unless he is in such a position that title will thus pass from him at the time of trial and judgment. *Clapp v. Glidden*, 39 Me. 448, was a case adjudicating directly this question. Said the court: "The question will remain whether the plaintiffs, when their suit was commenced, had any legal title to the vessel; for if they had not, the action cannot be maintained."

session of it, and will be liable ultimately to the true owner for its value, unless it is returned to him.¹

Prior actual possession is sufficient to sustain an action of trover against one who afterwards comes into possession without title, or who receives the possession from one who came into possession without title.² Possession is *prima facie* proof of ownership of a chattel not unlawfully acquired, and, whatever the interest of the possessor in the thing may be, is sufficient to enable trover to be maintained, as against all the world except the rightful owner, for a conversion committed in respect to it.³

1. *Gillett v. Fairchild*, 4 Den. (N. Y.) 80; *Dyer v. Vanderbergh*, 11 Johns. (N. Y.) 149; *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362; *Phillips v. McNab* (C. Pl.), 9 N. Y. Supp. 526; *Wallis v. Osteen*, 38 Ga. 250; *Ripley v. Dolbler*, 18 Me. 382; *Bryant v. Clifford*, 13 Met. (Mass.) 138; *Hardy v. Reed*, 6 Cush. (Mass.) 252; *Morgan v. Ide*, 8 Cush. (Mass.) 420; *Chamberlain v. Clemence*, 8 Gray (Mass.) 389; *Horn v. Davis*, 155 Pa. St. 57; *Baldwin v. McKay*, 41 Miss. 358; *Colby v. Cressey*, 5 N. H. 237; *Bartlett v. Hoyt*, 29 N. H. 317; *Lewis v. Mobley*, 4 Dev. & B. (N. Car.) 323; 34 Am. Dec. 379; *Buckmaster v. Mower*, 21 Vt. 204; Texas, etc., R. Co. v. Beard, 68 Tex. 265.

If A has in his possession goods belonging to B, upon which A has a lien, he may maintain trover against any person who wrongfully takes and withholds the goods from his possession. *Van Bokkellin v. Ingersoll*, 5 Wend. (N. Y.) 515.

The sheriff seized goods under an attachment, and delivered them to the plaintiff in attachment to be taken out of the district and sold, an agent of the plaintiff having before the delivery given the sheriff a bond of indemnity. It was held that, although the delivery by the sheriff to the plaintiff was irregular, yet the plaintiff might obtain trover against a wrongdoer who took the goods out of his possession. *Bank of Kentucky v. Shier*, 4 Rich. (S. Car.) 233.

2. *Cook v. Patterson*, 35 Ala. 102; *Brown v. Beason*, 24 Ala. 466; *Lowermore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Hare v. Fuller*, 7 Ala. 717; *Miller v. Jones*, 26 Ala. 247; *Reese v. Harris*, 27 Ala. 301; *Donnell v. Thompson*, 13 Ala. 440; *Carter v. Bennett*, 4 Fla. 283; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Knapp v. Winchester*, 11

Vt. 351; *Batchelder v. Warren*, 19 Vt. 371; *Ashmead v. Kellogg*, 23 Conn. 70; *Smith v. Davis*, 8 Ired. (N. Car.) 508; *Black v. Eason*, 10 Ired. (N. Car.) 308; *Brazier v. Ausley*, 11 Ired. (N. Car.) 12; 2 Am. Dec. 408; *Craig v. Miller*, 12 Ired. (N. Car.) 375; *Herring v. Tilghman*, 13 Ired. (N. Car.) 392; *Vining v. Baker*, 53 Me. 544; *Parkhurst v. Jacobs*, 17 Mich. 302; *Burt v. Dutcher*, 34 N. Y. 493.

Possession is evidence enough of title to maintain trover against one who shows no right or title in himself. *Grand Island Banking Co. v. First Nat. Bank*, 34 Neb. 93; *Goodrich v. Houghton*, 55 Hun (N. Y.) 526; *DeLand v. Van Stone*, 26 Mo. App. 297; *Lapp v. Pinover*, 27 Ill. App. 169; *Robinson v. Hardy*, 22 Ill. App. 512; *Montgomery v. Brush* 121 Ill. 513.

In *Fairbanks v. Pickering*, 22 Pick. (Mass.) 535, it was held that trover could be maintained if the plaintiff had a right to possession against the defendant. See also *Grady v. Newby*, 6 Blackf. (Ind.) 442; *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262.

One who has piled manure in the street, the fee of which is in the borough, may maintain trover against any one carrying it away. *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350.

Prior possession obtained by a purchaser of chattels sold under a void execution, enables the purchaser to maintain trover against a stranger. *Duncan v. Spear*, 11 Wend. (N. Y.) 54. Compare *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48, where it is held that this rule is not applicable to a husband suing individually, and not as personal representative of deceased wife, to recover property belonging to her, but seized by the sheriff on execution against him.

3. In *Burton v. Hughes*, 2 Bing. 173; 11 E. C. L. 368, it was decided that

If the possessor holds in the right of someone else, as a servant for a master, or a trustee for a *cestui qui trust*, the proof of such fact negatives the presumption of personal right arising from mere possession, and controls the application of the general principle.¹ The character of the plaintiff's possession need not necessarily be lawful.² It may even be wrongful as against others coming into the title by higher right.³ It is sufficient if it is higher than that of the defendant, and the latter cannot be heard to set up the weakness of his adversary's title in bar of the action.⁴

The possession must have been rightfully acquired,⁵ since the possession of a chattel may be lawful with respect to the right to hold against others, while the possessor may have failed to

where property was lent to the plaintiff under a written agreement, trover could be maintained for it without producing the agreement; for though it had been necessary to prove the nature of his interest in it, the rules of evidence therefor rendered the production of the writing indispensable. Still, its possession is sufficient title against a wrongdoer. It was sufficient to show his possession without inquiring into the terms of it. See also *Final v. Backus*, 18 Mich. 218; *Brown v. Ware*, 25 Me. 411; *Adams v. McGlinchy*, 66 Me. 474; *Cook v. Patterson*, 35 Ala. 102; *Gilson v. Wood*, 20 Ill. 37; *Cheney v. Dallett*, 1 Del. Co. Rep. (Pa.) 225; *Jones v. Sinclair*, 2 N. H. 319; *Demick v. Chapman*, 11 Johns. (N. Y.) 132; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Cook v. Howard*, 13 Johns. (N. Y.) 276.

1. In *Linscott v. Trask*, 35 Me. 150, where a wife gave the administrator of her husband one hundred dollars in gold, and he afterward claimed that it belonged to the estate, it was held to be a question for the jury whether she held in her own right or the right of her husband, and that her possession under the circumstances raised no presumption of property in her favor. *Webb v. Fox*, 7 T. R. 395; *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154; *Burrows v. Stoddard*, 3 Conn. 160.

2. In *Carter v. Bennett*, 4 Fla. 283, it was decided that possession, whether rightfully or wrongfully acquired, was sufficient as against a mere stranger. See also *Knapp v. Winchester*, 11 Vt. 351.

3. *Newham v. Stephenson*, 10 C. B. 713; 70 E. C. L. 713; *Bourne v. Fosbrook*, 18 C. B. N. S. 515; 114 E. C. L. 515; *Buckley v. Gross*, 32 L. J. Q. B. 131.

4. *Kemp v. Thompson*, 17 Ala. 9; *Craig v. Miller*, 12 Ired. (N. Car.) 375; *Gillispie v. Chastain*, 57 Ga. 218; *Brown v. Ware*, 25 Me. 411; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Bartlett v. Hoyt*, 29 N. H. 317; *White v. Bascom*, 28 Vt. 268.

In *Ingersoll v. Emmerson*, 1 Ind. 76, it was held that, as between the plaintiff, the owner of a chattel, and the defendant, a *bona fide* purchaser for value from a bailee of the former who had sold in contravention of the purposes of the bailment, the higher title was in the plaintiff. *Kitchel v. Vana-dor*, 1 Blackf. (Ind.) 356. But in *Dyer v. Pearson*, 3 B. & C. 42, it was said that if the real owner of goods suffers another to have possession, he enables such other to hold himself out to the world as having both possession and ownership, and that then, perhaps, a sale by such person might bind the true owner.

A wife, though living apart from her husband, cannot lawfully dispose, by gift, of chattels acquired during coverture. But in an action by the donee against a wrongdoer for the conversion of chattels so given, it is not competent for the defendant to set up the title of the husband. *Bourne v. Fosbrook*, 18 C. B. N. S. 515; 114 E. C. L. 515.

The entering upon land and cutting trees by one's servants under a claim of right, operates to put him into possession of such timber as they sever. *Putnam v. Lewis*, 133 Mass. 264; *Shaw v. Kayler*, 106 Mass. 448; *Burke v. Savage*, 13 Allen (Mass.) 408.

5. *Lake Shore, etc., R. Co. v. Ellsey*, 85 Pa. St. 283; *Booker v. Jones*, 55 Ala. 266; *Owens v. Weedman*, 82 Ill. 409; *Dungan v. Mutual L. Ins. Co.*, 38 Md. 42; *Stevenson v. Fitzgerald*, 47

comply with the statutory regulations imposed for reasons of public policy; and this circumstance cannot be made available by a wrongdoer in bar of the action.¹

The joint owner of a chattel may maintain trespass for a separate interest, and the defendant cannot take advantage at the trial of the nonjoinder of the other parties, but must plead in abatement.² A vested legal interest is sufficient to support trover.³ In trover for property purchased, the plaintiff must show that he is entitled to the property by having performed completely the terms of his contract of purchase.⁴

An officer who attaches goods in the mode designated by statute acquires therein a special property, which will enable him to maintain trover, as well against the defendant in the attachment as against a stranger, for any unlawful meddling with the property.⁵ A legal seizure, even though unaccompanied by actual

Mich. 166; Buck v. Payne, 52 Miss. 271; Cross v. Hulett, 53 Mo. 397; Lisenby v. Phelps, 71 Mo. 522; Hardman v. Willcock, 9 Bing. 382; 23 E. C. L. 312; Buckley v. Gross, 3 B. & S. 566; Turley v. Tucker, 6 Mo. 583.

A, without B's permission, put upon a tree on B's land, an empty box for bees to hive in; the box had remained there for more than two years when C took it down, took out the swarm of bees, and replaced the box. It was held that A could not maintain trover against C, since, in obtaining possession of an animal *fera naturæ*, no title is gained by one who, when obtaining possession, is trespassing. Rexroth v. Coon, 15 R. I. 35; 2 Am. St. Rep. 863.

1. In Sutton v. Buck, 2 Taunt. 301, the plaintiff bought and paid for a ship, which was stranded. The transfer was not regular, being void for non-compliance with the registry act. The plaintiff tried to save her, but she went to pieces. The defendant possessed himself of parts of the wreck which drifted on his farm. It was held that the plaintiff's possession would enable him to recover in trover. See also Bartlett v. Hoyt, 29 N. H. 317.

2. Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471; 3 Am. Dec. 345; Rooks v. Moore, Busby (N. Car.) 1; 47 Am. Dec. 569.

One who is part owner of personal property and has possession and control of it, with power to sell, may maintain trover for its conversion by a wrongdoer. Hyde v. Noble, 13 N. H. 494; 38 Am. Dec. 508.

One tenant in common may maintain trover against another, if the latter

sells the whole property held in common, although it is not removed beyond the reach of the plaintiff. White v. Osborn, 21 Wend. (N. Y.) 72.

One tenant in common of a chattel may maintain trover against his co-tenant, who has converted the chattel to his own use; and such conversion may be proved by such an act of appropriation as will, by its nature, finally preclude the other party from any future enjoyment of it. Delaney v. Root, 99 Mass. 546; 97 Am. Dec. 52; Daniels v. Daniels, 7 Mass. 135; Weld v. Oliver, 21 Pick. (Mass.) 559; Burbank v. Crooker, 7 Gray (Mass.) 158; 66 Am. Dec. 470.

3. Pope v. Tucker, 23 Ga. 484.

In Taylor v. Jones, 52 Ala. 78, it was held that a complaint in trover to recover damages for the conversion of the wife's separate estate, when brought in the name of the husband alone, disclosed no cause of action. See also, as to a wife maintaining trover against an officer who attaches personalty belonging to her husband, when she has purchased a valid outstanding mortgage on such personalty, Duggan v. Wright, 157 Mass. 228.

4. Farmers' Bank v. McKee, 2 Pa. St. 318; Collins v. Manning (Supreme Ct.), 8 N. Y. Supp. 927.

The purchaser of a chattel at an auction sale may, after offering to comply with the terms of the sale, maintain trover if the vendor refuses to make delivery. Simmons v. Anderson, 7 Rich. (S. Car.) 67. See also McGinn v. Worden, 3 E. D. Smith (N. Y.) 355.

5. Blodgett v. Adams, 24 Vt. 23;

possession, is sufficient, and serves to invest the officer with constructive possession.¹ But a person to whom the goods are delivered for safe keeping by the sheriff, as for instance a receiptor, has no such legal interest as will support trover for their conversion by a wrongdoer.² The right to sue in such a case is never

Lowry *v.* Walker, 5 Vt. 181; Huntley *v.* Bacon, 15 Conn. 267; Johnson *v.* Grand Trunk R. Co., 44 N. H. 626; Kittredge *v.* Warren, 14 N. H. 509; Lathrop *v.* Blake, 23 N. H. 46; Lockwood *v.* Brewer, 1 Cow. (N. Y.) 192; Norton *v.* People, 8 Cow. (N. Y.) 137; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322; 13 Am. Dec. 539; Gibbs *v.* Chase, 10 Mass. 125.

Seizing goods on execution gives an officer such a right to their immediate possession as will enable him to maintain trover for their conversion. Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32; Barker *v.* Miller, 6 Johns. (N. Y.) 195; Tuttle *v.* Jackson, 4 N. J. L. 115.

If property seized on a distress warrant is converted by a stranger, only the officer making the distress can maintain trover for its conversion. Van Rensselaer *v.* Quackenboss, 17 Wend. (N. Y.) 34.

Trover cannot be maintained by an officer for an execution which has been paid and satisfied, for upon payment and satisfaction, the execution has served its mission, and the special property of the officer therein ceases. Little *v.* Gibbs, 4 N. J. L. 211.

No joint right can exist in two constables levying on the same property by virtue of separate executions. Hence they cannot maintain jointly an action of trover. Warne *v.* Rose, 5 N. J. L. 809.

1. Mulheisen *v.* Lane, 82 Ill. 117; Holt *v.* Burbank, 47 N. H. 164.

Where a receiptor of goods attached in *mesne* process gave the officer a written undertaking to deliver the same, or the value thereof, on demand, it was held that trover would lie by the officer if, upon demand, the goods were not delivered, or the value paid. Sibley *v.* Story, 8 Vt. 15; Brown *v.* Gleed, 33 Vt. 147; Webster *v.* Coffin, 14 Mass. 196; Parker *v.* Warren, 2 Allen (Mass.) 189; Plaisted *v.* Hoar, 45 Me. 380; Holt *v.* Burbank, 47 N. H. 164; Dezell *v.* O'Dell, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; Hankins *v.* Kingsland, 2 Hall (N. Y.) 425.

An officer does not lose that special property in goods he has attached

which enables him to bring trover for their conversion, by taking them into another state and there delivering them to the bailee, nor as against the owner by the bailee delivering them to the owner. Brownell *v.* Manchester, 1 Pick. (Mass.) 232; Bond *v.* Padelford, 13 Mass. 394. But he does, as against another attachment, or by a person claiming under the debtor, by doing anything which invalidates his attachment. Bagley *v.* White, 4 Pick. (Mass.) 395; Caldwell *v.* Eaton, 5 Mass. 399. He may also maintain trover against a sheriff who takes goods he has attached out of his possession on other executions. Penland *v.* Leatherwood, 101 N. Car. 509.

The executor of a deputy sheriff may maintain trover against one who converts property attached by the deputy sheriff on *mesne* process. Badlam *v.* Tucker, 1 Pick. (Mass.) 284; 11 Am. Dec. 202.

A sheriff, after the *teste* of a *feri facias*, but before an actual levy, has not such a property in the goods of the defendant as will enable him to maintain trover against a person who tortiously takes them away and converts them. Hotchkiss *v.* McVickar, 12 Johns. (N. Y.) 403.

2. Hamilton *v.* Hamilton, 25 N. J. L. 544; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217. But see Waterman *v.* Robinson, 5 Mass. 303; Poole *v.* Symonds, 1 N. H. 289; 8 Am. Dec. 71.

In Dennie *v.* Harris, 9 Pick. (Mass.) 364, a sheriff made a supposed attachment for goods on which the duties had not been paid nor secured, and offered to pay the duties, which offer the collector declined, and the goods being put into the custom-house stores, the public store-keeper gave the sheriff a certificate that he held them subject to the sheriff's order. It was decided that the sheriff could not maintain trover against a person who subsequently took them, the certificate of the store-keeper being illegal and void, and the sheriff having no actual possession. See also Polly *v.* Lenox Iron Works, 15 Gray

in him in whose favor the writ is issued, but in the officer alone.¹ But, to enable an officer in any case to maintain trover, he must have made an actual and effectual levy.²

In the *United States*, by the weight of authority, trover is maintainable by the owner of goods stolen, when the action is brought against the thief before his acquittal or conviction.³

The action is, also, maintainable by a purchaser at an execution sale, when the goods were converted before the sale;⁴ by a tenant on half-shares against an officer levying on the whole crop on execution against the landowner;⁵ by an administrator for the conversion of a certificate of stock against one who received it from the heir as a security for a debt and sold it;⁶ by a donee against the administrator, where the gift was made a short time before the testator's death, and the property is not necessary for

(Mass.) 513; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484; 54 Am. Dec. 551.

1. *Baker v. Beers*, 64 N. H. 102.

What Constitutes a Seizure.—In *Richardson v. Rardin*, 88 Ill. 125, a constable in actual view of the property levied upon a large crib of corn, indorsing the levy on the execution, the defendant in execution being present at the time. The constable notified him of the levy and forbade his further interfering with the corn, and at the time nailed boards across the crib to secure the property, and then gave notice in the hearing of several persons near by that he had levied on the corn and that it must not be disturbed. It was held that, as his act, but for the writ, would have been a trespass, the levy was good, and sufficient publicity given to it. See also *Minor v. Herriford*, 25 Ill. 344; *Harely v. Lowry*, 30 Ill. 446; *Winteringham v. Lafoy*, 7 Cow. (N. Y.) 735; *Phillips v. Hall*, 8 Wend. (N. Y.) 610; 24 Am. Dec. 108; *Connah v. Hale*, 23 Wend. (N. Y.) 466.

2. *Brian v. Straitt, Dudley* (S. Car.) 19.

3. *Pettingill v. Rideout*, 6 N. H. 454. This is clearly according to the weight of authority in the *United States*; that a civil action may be maintained for goods feloniously taken, before the institution of criminal proceedings against the wrongdoer. *Boston, etc., R. Co. v. Dance*, 1 Gray (Mass.) 83; *Allison v. Farmers' Bank of Virginia*, 6 Rand. (Va.) 226; *Story v. Hammond*, 4 Ohio 376; *Blassingame v. Graves*, 6 B. Mon. (Ky.) 38; *Ballew v. Alexander*, 6 Humph. (Tenn.) 433. In some of the states, where the contrary rule had been established by decisions of the courts,

it has been abrogated by statutes. *New York Rev. St.*, pt. 3, ch. 4, § 2; *Maine Statute of 1844*, ch. 102.

But in *Pennsylvania* it is held that the civil action is suspended until the public prosecution for the offense has been duly prosecuted and ended. *Hutchinson v. Bank of Wheeling*, 41 Pa. St. 44; 80 Am. Dec. 584. The injured party may, however, institute his suit, pending the prosecution; the civil suit is only suspended. *Keyser v. Rodgers*, 50 Pa. St. 275.

And in *England* a party injured by a felony could obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, and it is the settled rule at this day that all civil remedies are suspended until after the termination of a criminal prosecution against the offender. *Markham v. Cob*, Latch 144; *Dawhes v. Coveleigh*, Style 346; *Cooper v. Wiltham*, 1 Sid. 375; *White v. Spettigue*, 13 M. & W. 603; *Crosby v. Leng*, 12 East 413.

4. *Jewett v. Partridge*, 12 Me. 243; 27 Am. Dec. 173.

5. *White v. Morton*, 22 Vt. 15; 52 Am. Dec. 75.

A tenant working a farm on shares may maintain trover for his share of the crop of which the landlord has possession and refuses to divide, provided he makes a written demand, as required by *Wisconsin Rev. Sts.*, § 4257. *Wood v. Noack*, 84 Wis. 398. See also *Stafford v. Ames*, 9 Pa. St. 343.

6. *Morton v. Preston*, 18 Mich. 60; 100 Am. Dec. 146.

An administrator unable, by reason of the conversion of property which was in an action of replevin adjudged to belong to other parties, to deliver

the payment of debts;¹ or by one whose game, while exposed for sale, was seized illegally, notwithstanding the fact that the exposure for sale was unlawful.² The owner of grain deposited in a public warehouse may maintain trover for its conversion, if it is sold on an execution issued against the warehouseman;³ so can one whose property is levied upon by mistake,⁴ or whose property is illegally detained by an officer,⁵ or lost by a bailee,⁶ or whose life estate or joint interest in a chattel is converted.⁷

One to whom a letter sent by mail is addressed may maintain trover, in a state court, against the postmaster who unlawfully refuses to deliver it.⁸ So one enjoined against moving property may maintain trover for a conversion of it.⁹ The owner of a note, although he cannot maintain an action thereon in his own name, may bring trover for its conversion.¹⁰ Beneficiaries entitled to

the property to those entitled, and who pays the judgment out of his own pocket, succeeds by subrogation to the rights of the estate and may maintain trover for the conversion. *McFaddon v. Schroeder*, 4 Ind. App. 305.

A bequeathed slaves to his wife during her life, which after her death were to be sold and the proceeds equally divided amongst her children. After her death B converted the property to his own use. It was held that the executors of A could maintain trover for the conversion. *Allen v. Watson*, 1 Murph. (N. Car.) 189.

A widow may maintain trover for personal property belonging to the estate of her deceased husband, of which she had possession several years after his death, where no letters of administration had been granted on the estate. *Brown v. Beason*, 24 Ala. 466.

An administrator may maintain trover for the conversion of property converted in the lifetime of his intestate. *Parrott v. Dubignon*, T. U. P. Charlt. (Ga.) 261; *Kirby v. Clark*, 1 Root (Conn.) 389; *Towle v. Lovett*, 6 Mass. 394; *Cheek v. Wheatley*, 3 Sneed (Tenn.) 484.

An administrator who has not obtained possession of goods may bring trover. *Kirby v. Quinn*, 1 Rice (S. Car.) 264; *Hill v. Brennan*, 1 Rice (S. Car.) 285. So he may sue in trover for a deed, though the declaration does not set forth the names of the parties or the nature or boundaries of the estate. *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537.

An administrator cannot maintain trover for a chattel, which, though appraised as the property of his intestate,

was claimed adversely, and had never been in the administrator's possession. See also *Kenyon v. Olney* (Supreme Ct.), 15 N. Y. Supp. 416.

Where one sues in trover as administrator, he must show title in his representative, not in his individual capacity. *Hoover v. Wells*, 39 Miss. 445.

Trover will lie by a son entitled to succeed to the possession of personal estate on the decease of his father, where it is shown that administration has not been granted to anyone, especially where the right of the plaintiff to the property claimed has been admitted. *Hyde v. Stone*, 7 Wend. (N. Y.) 354; 22 Am. Dec. 582.

1. *Marsh v. Fuller*, 18 N. H. 360.

2. *Averill v. Chadwick*, 153 Mass. 171.

3. *National Bank v. Langan*, 28 Ill. App. 401; *Johnson v. Farr*, 60 N. H. 426.

4. *Schluter v. Jacobs*, 10 Colo. 449. The same principle applies to property sold by mistake. *Lahner v. Hertzog*, 23 Ill. App. 308.

5. *Thatcher v. Weeks*, 79 Me. 547.

6. The proprietor of a skating rink is liable for the loss of skates checked by him for the convenience of his patrons. *Donlin v. McQuade*, 61 Mich. 276.

7. *Logan v. Hartford City, etc., Coal Co.*, 9 Heisk. (Tenn.) 689.

8. *Teal v. Felton*, 12 How. (U. S.) 284.

9. *McGowen v. Young*, 2 Stew. (Ala.) 276.

10. *Donnell v. Thompson*, 13 Ala. 440. The action is maintainable by one who has right and title to a note, though it has never been actually delivered to him. *Nininger v. Banning*, 7 Minn. 274.

the possession of the trust property may maintain trover.¹ A purchaser of property in the hands of a third person may, if his demand for possession is refused, bring trover for such conversion.² So, a bailor whose cattle is converted by a bailee, may bring the action, even against a vendee or lessee in good faith and without notice.³

The part owner of a vessel sent to sea by the other owner and lost, may bring trover for his share.⁴ An agent who has received the property of another, to which he has a title cast upon him by law for the benefit of others, may maintain trover to recover the property.⁵ The owner of hogs running at large may bring trover for their conversion, notwithstanding the fact that they are mortgaged.⁶ An assignee may bring trover for the property of an insolvent debtor who refuses to deliver it.⁷

b. BAILEES.—A bailee may maintain trover for the conversion of goods intrusted to his care.⁸ Under a simple or gratuitous

1. Howard *v.* Snelling, 28 Ga. 69.
2. Cartland *v.* Morrison, 32 Me. 190.
3. Crocker *v.* Gullifer, 44 Me. 491.
4. Lowthorp *v.* Smith, 1 Hayw. (N. Car.) 255.

5. Burnett *v.* Roberts, 4 Dev. (N. Car.) 81.

6. Middleworth *v.* Robinson, Wright (Ohio) 552. An agister may bring trover for cattle taken from his possession. Betts *v.* Mouser, Wright (Ohio) 744.

Where A turned cattle into the woods, and B, thinking one of them to be his, took possession of it, after which A, in ignorance of B's possession, sold it to C, who was also ignorant of such possession, it was held that C, in his own name, might maintain trover against B. Morgan *v.* Bradley, 3 Hawks (N. Car.) 559.

7. McLeish *v.* Tylee, 4 Strobb. (S. Car.) 287.

8. Story on Bail. (9th ed.), § 422a; 2 Bl. Com. 453; Bacon Abr. "Trover" (C); Waterman *v.* Robinson, 5 Mass. 303; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217; Hurd *v.* West, 7 Cow. (N. Y.) 752; Barker *v.* Miller, 6 Johns. (N. Y.) 195; Ely *v.* Ehle, 3 N. Y. 506; Root *v.* Chandler, 10 Wend. (N. Y.) 110; 25 Am. Dec. 546; Thorp *v.* Burling, 11 Johns. (N. Y.) 285; Smith *v.* James, 7 Cow. (N. Y.) 329; Everett *v.* Saltus, 15 Wend. (N. Y.) 474; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Hard *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Hopper *v.* Miller, 76 N. Car. 402; Burton *v.* Hughes, 2 Bing. 173; 9 E. C. L. 368; Gordon *v.* Harper, 7 T. R. 9; Sutton *v.*

Buck, 2 Taunt. 302; Booth *v.* Ferrell, 16 Ga. 20; Morgan *v.* Ide, 8 Cush. (Mass.) 420; Strong *v.* Adams, 30 Vt. 321; 73 Am. Dec. 305; Downer *v.* Rowell, 2 Vt. 347; Spence *v.* Mitchell, 9 Ala. 744; Hart *v.* Hyde, 5 Vt. 330; Drake *v.* Redington, 9 N. H. 243; Bryant *v.* Clifford, 13 Met. (Mass.) 138; Nicolls *v.* Bastard, 2 C. M. & R. 659; Swire *v.* Leach, 18 C. B. N. S. 479; 114 E. C. L. 479; Brown *v.* Dempsey, 95 Pa. St. 243; Overby *v.* McGee, 15 Ark. 459; Clark *v.* Bell, 61 Ga. 147; Bird *v.* Womack, 69 Ala. 390; Steamboat "Farmer" *v.* McCraw, 26 Ala. 189; 62 Am. Dec. 718; Nations *v.* Hawkins, 11 Ala. 859; Vincent *v.* Cornell, 13 Pick. (Mass.) 294; 23 Am. Dec. 683; Fairbanks *v.* Phelps, 22 Pick. (Mass.) 535; Gordon *v.* Harper, 7 T. R. 9; Hughes *v.* Giles, 1 Hayw. (N. Car.) 26.

If a chattel, while in possession of a bailee for hire, is injured by the negligence of a third person, and is repaired by the bailor and the cost of repairs is charged to the bailee at his request, the latter, although he is not paid such cost, may maintain an action of tort against the person causing the damage. Brewster *v.* Warner, 136 Mass. 57; 49 Am. Rep. 5. See also Fisher *v.* Cobb, 6 Vt. 624; Burton *v.* Hughes, 2 Bing. 173; 9 E. C. L. 368; Oughton *v.* Sippings, 1 B. & Ad. 241; 20 E. C. L. 380; Giles *v.* Grover, 6 Bligh N. S. 277. Compare the Massachusetts doctrine as laid down in Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Com. *v.* Morse, 14 Mass. 217. The cases in New York following the Massachusetts doctrine are: Dillenback *v.*

bailment, either the bailee or bailor may sue; ¹ as where goods are lent to a friend,² or intrusted to a carrier for transportation,³ or left in the custody of a warehouseman or wharfinger for safe-keeping,⁴ or given to an agent or factor to sell.⁵ Both cannot sue, since in law the possession of one is the possession of the other, and a judgment recovered by one may be pleaded in bar to an action by the other.⁶ Where, however, the absolute owner parts with his right of immediate possession to another for a limited time under a bailment for hire, the bailee acquires a qualified right of property which is good even against a bailor,⁷ and the

Jerome, 7 Cow. (N. Y.) 294; Barker v. Miller, 6 Johns. (N. Y.) 196; Norton v. People, 8 Cow. (N. Y.) 137. But it would seem that they are overruled by Bowen v. Fenner, 40 Barb. (N. Y.) 383.

A depositary may maintain trover. Waterman v. Robinson, 5 Mass. 303; Burton v. Hughes, 2 Bing. 173; 9 E. C. L. 368; Hyde v. Noble, 13 N. H. 494; 38 Am. Dec. 508; Sutton v. Buck, 2 Taunt. 302.

A person who is entitled to the temporary possession of a chattel and delivers it back to the owner for any special purpose, may, after that purpose is satisfied and during his temporary right, maintain trover for it against the owner. Roberts v. Wyatt, 2 Taunt. 268.

1. A gratuitous bailment for an undefined term does not prevent the owner from maintaining trover. Nicolls v. Bastard, 1 Gale 295; Hall v. Pickard, 3 Camp. 187; Lotan v. Cross, 2 Camp. 464; Ward v. Macauley, 4 T. R. 489; Bloxam v. Sanders, 4 B. & C. 949; 10 E. C. L. 477; Rooth v. Wilson, 1 B. & Ald. 59; Miles v. Cattle, 6 Bing. 743; 19 E. C. L. 219; Bowen v. Fenner, 40 Barb. (N. Y.) 383; Russell v. Butterfield, 21 Wend. (N. Y.) 300; Mechanics, etc., Bank v. National Bank, 60 N. Y. 40; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Kellogg v. Sweeney, 1 Lans. (N. Y.) 397; 46 N. Y. 291; 17 Am. Rep. 333; Chamberlain v. West, 37 Minn. 54; Jellett v. St. Paul, etc., R. Co., 30 Minn. 265; Atkins v. Moore, 82 Ill. 240; Falohn v. Manning, 35 Mo. 271; Moran v. Portland Steam Packet Co., 35 Me. 55; Finn v. Western R. Co., 112 Mass. 524; 17 Am. Rep. 128; Thayer v. Hutchinson, 13 Vt. 504; 37 Am. Dec. 607; Poole v. Symonds, 1 N. H. 289; 8 Am. Dec. 71.

2. Croft v. Alison, 4 B. & Ald. 590; Moran v. Portland Steam Packet Co., 35 Me. 55.

3. Harker v. Dement, 9 Gill (Md.)

7; 52 Am. Dec. 670; White v. Bascom, 28 Vt. 268.

4. Bartels v. Arms, 3 Colo. 72; Jowers v. Blandy, 58 Ga. 379; Little v. Fossett, 34 Me. 345; 56 Am. Rep. 671.

A bailee has no such control over the property that if he consents to the larceny of it, the act ceases to be criminal. Oakley v. State, 40 Ala. 372.

5. A factor may maintain trover for goods taken from his possession by a wrongdoer. Gorum v. Carey, 1 Abb. Pr. (N. Y. C. Pl.) 285. See also Rex v. Wymer, 4 C. & P. 391; 19 E. C. L. 436; State v. Somerville, 21 Me. 14; 38 Am. Dec. 248; Harker v. Dement, 9 Gill (Md.) 7; 52 Am. Dec. 670; Ingersoll v. Van Bokkellin, 7 Cow. (N. Y.) 680; Harlan v. Harlan, 15 Pa. St. 507; 53 Am. Dec. 612; Bass v. Pierce, 16 Barb. (N. Y.) 595; Hickok v. Buck, 22 Vt. 149; Hays v. Riddle, 1 Sandf. (N. Y.) 248; Bowen v. Coker, 2 Rich. (S. Car.) 13; Tyler v. Freeman, 3 Cush. (Mass.) 31; Beyer v. Bush, 50 Ala. 19; Hollenback v. Todd, 19 Ill. App. 452; Chamberlain v. West, 37 Minn. 54; Taber v. Lawrence, 134 Mass. 94; Easter v. Fleming, 78 Ind. 116; Smith v. McNeal, 68 Pa. St. 164.

6. Wheeler v. Train, 3 Pick. (Mass.) 255; Bryant v. Wardell, 2 Ex. Ch. 479; Cooper v. Willomatt, 1 C. B. 672; 50 E. C. L. 672; Collins v. Evans, 15 Pick. (Mass.) 63; Britt v. Aylett, 11 Ark. 475; Smith v. James, 7 Cow. (N. Y.) 328; Hughes v. Giles, 1 Hayw. (N. Car.) 26; Thorp v. Burling, 11 Johns. (N. Y.) 285; Everett v. Saltus, 15 Wend. (N. Y.) 474.

7. Where the general owner, although receiving compensation for its hiring, preserves the right to resume possession of the property at his pleasure, he may maintain trover or replevin against a third person who interferes with it while in the lessee's possession. Drake v. Redington, 9 N. H. 243; Batchelder v.

latter is left to his action on the case for any permanent injury he may suffer with respect to his reversion.¹

c. LESSEES.—If the owner of property leases it for a term, converting his present possessory right into a reversion, he cannot maintain trover for any conversion of it by a third person.² He is left to his action on the case for any permanent damage done to the reversion.³ A lessee may, however, maintain trover for any conversion committed with respect to the property.⁴

d. LIENEES.—A lien, whether arising by common law,⁵ statute,⁶ or contract,⁷ is the right of the person in possession of goods to retain them until the debt due is paid.⁸ And hence, a lienee has such a special property as will enable him to maintain trover.⁹ And it is immaterial for the purposes of the action that the person, whose act furnished the occasion for the attachment of the

Warren, 19 Vt. 371. Compare *Andrews v. Shaw*, 4 Dev. (N. Car.) 70; *Lewis v. Mobley*, 4 Dev. & B. (N. Car.) 323; 34 Am. Dec. 379; *Downer v. Rowell*, 22 Vt. 347.

The bailee of goods may maintain trover or trespass against everyone but the legal owner. And a bailee whose possession is coupled with an interest, may maintain his action against one tortiously taking the goods out of his possession. *Jones v. McNeil*, 2 Bailey (S. Car.) 466.

For the possession of property fraudulently obtained from a bailee, by the general owner, the bailee may maintain trover for the property, either against the owner or a subsequent vendee. *O'Connell v. Maxwell*, 3 Blackf. (Ind.) 419.

Where a bailee sues his bailor in trover, he can only recover the value of his special property in the goods. But where he sues a stranger, he can recover their whole value and hold the balance above a special interest in trust for the bailor. *Benjamin v. Strengle*, 13 Ill. 467.

1. In *Mears v. London, etc.*, R. Co., 11 C. B. N. S. 849, Williams, J., said: "It is fully established that in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed. But in the case of a hiring, the owner cannot bring trover because he has temporarily parted with the possession. It seems to me, however, clear that though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that where there is a permanent injury, the owner can maintain an action against the person whose wrongful act

caused the injury." See also *Fancred v. Allgood*, 4 H. & N. 438; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 403; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352; *Glaze v. McMillion*, 7 Port. (Ala.) 279; *Taylor v. Horrall*, 4 Blackf. (Ind.) 317; *Barton v. Dunning*, 6 Blackf. (Ind.) 209.

2. *Corfield v. Corgell*, 4 Wash. (U. S.) 37; *Lewis v. Carsaw*, 15 Pa. St. 31; *Lunk v. Brown*, 13 Me. 236; *Muggridge v. Eveleth*, 9 Met. (Mass.) 233; *Fitler v. Shotwell*, 7 W. & S. (Pa.) 14; *Wheeler v. Train*, 3 Pick. (Mass.) 255; *Collins v. Evans*, 15 Pick. (Mass.) 63.

3. *Mears v. London, etc.*, R. Co., 11 C. B. N. S. 849; 103 E. C. L. 850.

4. *Ayer v. Bartlett*, 9 Pick. (Mass.) 156.

One who leases a house and furniture, agreeing to board the lessor and allow him to use the furniture in return for a fixed weekly compensation, may maintain trover against the lessor for any conversion of the furniture, although he has refused to board the lessor, when it appears that the lessor failed to pay the sum agreed upon for board. *Chamberlain v. Neale*, 9 Allen (Mass.) 410. See also *Roberts v. Wyatt*, 2 Taunt. 268; *Spoor v. Holland*, 8 Wend. (N. Y.) 445; 24 Am. Dec. 37.

5. *Grinnell v. Cook*, 3 Hill (N. Y.) 490; 38 Am. Dec. 663; *Hollingsworth v. Dow*, 19 Pick. (Mass.) 230; *Townsend v. Newell*, 14 Pick. (Mass.) 332.

6. Darl. on Per. Prop., p. 45.

7. *Ridgely v. Ingelhart*, 3 Bland Ch. (Md.) 528.

8. Darl. on Per. Prop. 40; *Smith's Comp. on Com. Law* (5th ed.) 534. *Hammonds v. Barclay*, 2 East 235; *Ex p. Heywood*, 2 Rose 357.

9. *Legg v. Evans*, 6 M. & W. 36.

lien, acquired the property by theft or fraud from the rightful owner.¹ But since the right depends upon possession, with the loss of possession the right is lost,² and immediately reverts to the general owner.³ Hence, a sale by the lienee, or a delivery to the general owner, destroys his right of action.⁴ A party having goods, however, may transfer the possession, subject to the lien of a third person, who may lawfully hold the property until the lien is paid. But if the transferees sell the goods, the owner is remitted to his original right freed from the lien, and may bring trover against him.⁵

c. MORTGAGEES.—Under a mortgage of personal property, the whole legal title being vested in the mortgagee, he is entitled to maintain trover for its conversion, although he has never had possession and has never foreclosed.⁶ He may maintain the ac-

1. In *York v. Grenaugh*, 2 Ld. Raym. 866, it was held that where a traveler had stolen a horse and left him at an inn, the innkeeper might have a lien for his keep as against the true owner, for since the innkeeper is obliged to accept the horse, he should have a remedy for payment which was by retainer. So, where A. stole goods and delivered them to the Exeter carrier to be carried to Exeter, the real owner, finding them in possession of the carrier, demanded them of him, upon which the carrier refused to deliver without being paid for his carriage. In trover by the real owner, it was held that the carrier might be justified for detaining them against the rightful owner for the carriage. *Exeter Carrier's Case*, cited in 2 Ld. Raym. 867; *Johnson v. Hill*, 3 Stark. 172; *King v. Richards*, 6 Whart. (Pa.) 419; 37 Am. Dec. 420; *Grinnell v. Cook*, 3 Hill (N. Y.) 490; 38 Am. Dec. 663; *Sweet v. Pym*, 1 East 4; *Jones v. Thurlow*, 8 Mod. 172; *Jones v. Pearle*, 1 Str. 556; *Black v. Brennan*, 5 Dana (Ky.) 312.

In *Hollingsworth v. Dow*, 19 Pick. (Mass.) 230, it was held that a person, even though a wrongdoer, who puts up at an inn, shall be deemed the agent of the owner, and upon this principle the innkeeper shall be deemed to have his lien for the horses keep. See also *Cook v. Cain*, 19 Oregon 482.

A landlord having a lien on a tenant's crop, of which he has received one third as rent, has not, before the third is set apart, such special property, accompanied with right of possession, as will support his action of trover against a purchaser from the tenant. *Frink v. Pratt*, 26 Ill. App. 222.

In *Corbitt v. Reynolds*, 68 Ala. 378,

the court declares that a landlord, simply by virtue of his lien on a tenant's crop, cannot maintain trover against a wrongdoer who has converted it. "For such a lien," says the court, "conveys to the landlord no element of property in the crop; under it he has neither a *jus in re* nor a *jus ad rem*." See also *Anderson v. Bowles*, 44 Ark. 108; *Holmes v. Bailey*, 16 Neb. 300.

2. *Kruger v. Wilcox*, Ambl. 254; *U. S. v. Barney*, 3 Am. L. J. 128; *Ex p. Foster*, 2 Story (U. S.) 131; *Packard v. Louisa*, 2 Woodb. & M. (U. S.) 48; *Struckney v. Allen*, 10 Gray (Mass.) 356; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467.

3. *Sweet v. Pym*, 1 East 4.

4. *Lovett v. Brown*, 40 N. H. 511; *Jones v. Pearle*, 1 Str. 557; *Pothonier v. Dawson*, Holt. N. P. 383; *Lickbarrow v. Mason*, 6 East 21, note; *Smith's L. Cas.* (9th Am. ed.) 1045; *Cortelyou v. Lansing*, 2 Cal. Cas. (N. Y.) 200; *Doane v. Russell*, 3 Gray (Mass.) 382; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246; 83 Am. Dec. 625.

5. *Nash v. Mosher*, 19 Wend. (N. Y.) 431; *Urguhart v. McIver*, 4 Johns. (N. Y.) 103; *Bull. N. P.* (Old ed.) 81; *Six Carpenters' Case*, 8 Rep. 290; *Smith's L. Cas.*, vol. 1, p. 190, note.

6. *Harvey v. McAdams*, 32 Mich. 473; *Wright v. Starks*, 77 Mich. 221; *Grove v. Wise*, 39 Mich. 161; *Cary v. Hewitt*, 26 Mich. 229; *Leonard v. Hair*, 133 Mass. 455; *Wells v. Connable*, 138 Mass. 513; *Alden v. Lincoln*, 13 Met. (Mass.) 204; *Landon v. Emmons*, 97 Mass. 37; *Rigg v. Barnes*, 2 Cush. (Mass.) 591; *Goodrich v. Willard*, 2 Gray (Mass.) 203; *Ring v. Neale*, 114 Mass. 112; *McClure v. Hill*, 36 Ark. 268; *Treat v. Gilmore*, 49 Me. 34;

tion, without proof of a demand and refusal, against an officer who sells the mortgaged property on execution against the mortgagor, although the latter was the purchaser at the sale, and has the present actual possession of the property.¹ The rights of the mortgagee are the same whether the action is against the mortgagor or a third person.² The holder of the senior mortgage may join the junior mortgagee with him in an action against a third person; the principle being that a first mortgagee has the right to waive his priority and allow a second mortgagee to stand upon the same footing as himself.³

f. PLEDGEES.—By virtue of the pledge, the pledgee at common law acquires a special property in the thing pledged,⁴ and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If the owner should wrongfully repossess himself of the pledge, the pledgee may, at his election, maintain an action for the restitution of the thing itself, or for damages.⁵ If it should be taken from his possession by a stranger,

Dunning v. Fitch, 66 Ill. 51; *Brookover v. Esterly*, 12 Kan. 149; *Evington v. Smith*, 66 Ala. 398; *Mervine v. White*, 50 Ala. 388; *Ellington v. Charleston*, 51 Ala. 166; *Corbitt v. Reynolds*, 68 Ala. 378; *Elmore v. Simon*, 67 Ala. 526; *Nabring v. Bank of Mobile*, 58 Ala. 204; *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, 65 Ala. 256; *Collier v. Faulk*, 69 Ala. 58; *Cook v. Corthell*, 11 R. I. 482; 23 Am. Rep. 518; *Wood v. Weimar*, 104 U. S. 779; *The Nestor*, 1 Sumn. (U. S.) 73; *Mulliner v. Florence*, 3 Q. B. Div. 485; *Hall v. Simpson*, 39 How. Pr. (N. Y.) 274; *Ford v. Ransom*, 39 How. Pr. (N. Y. Super. Ct.) 429; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574; *Hall v. Sampson*, 35 N. Y. 277; 91 Am. Dec. 56; *Smith v. Beattie*, 31 N. Y. 542; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Wolff v. Farrel*, 1 Treadw. Const. (S. Car.) 68; *Snyder v. Hitt*, 2 Dana (Ky.) 204; *Cotton v. Marsh*, 3 Wis. 221; *Cotton v. Watkins*, 6 Wis. 629; *Bates v. Wilbur*, 10 Wis. 415.

1. *Leonard v. Hair*, 133 Mass. 455; *Goulding v. Hare*, 133 Mass. 80; *Hayward v. George*, 13 Allen (Mass.) 66; *Gimself v. McDonnell*, 67 Iowa 522; *Landon v. Emmons*, 97 Mass. 37; *Ring v. Neale*, 114 Mass. 111; 19 Am. Rep. 316; *Clapp v. Campbell*, 124 Mass. 50; *Bigelow v. Capen*, 145 Mass. 270; *Eddy v. McCall*, 77 Mich. 242; *Tallman v. Jones*, 13 Kan. 438.

The grantee in a second mortgage of a chattel may maintain an action of trover against an officer who, before the title of the first mortgagee becomes

absolute, attaches and sells the goods mortgaged; such grantee being, by the act of the officer, deprived of his right of redemption. *Treat v. Gilmore*, 49 Me. 34.

An equitable assignee of a mortgage of personal property may obtain an action of trover for the conversion of such property in the name of the assignor. *Crain v. Paine*, 4 Cush. (Mass.) 483.

2. *Leonard v. Hair*, 133 Mass. 455; *Clapp v. Campbell*, 124 Mass. 50; *Bigelow v. Capen*, 145 Mass. 270; *Earl v. Strumpf*, 56 Wis. 50; *Bradley v. Boynton*, 22 Me. 287; 39 Am. Dec. 582; *Bucknam v. Brett*, 35 Barb. (N. Y.) 596; *Gock v. Keneda*, 29 Barb. (N. Y.) 120; *Norris v. McCanna*, 29 Fed. Rep. 757; *Syffers v. Bradley*, 115 Ind. 345; *Slifer v. State*, 114 Ind. 291; *Jones v. Webster*, 48 Ala. 109; *Holman v. Lock*, 51 Ala. 287; *Broughton v. Atchison*, 52 Ala. 62.

3. *Densmore v. Mathews*, 58 Mich. 616; *Bradshaw v. McLoughlin*, 39 Mich. 480; *Welch v. Sackett*, 12 Wis. 270; *Howard v. Chase*, 104 Mass. 250; *Phillips v. Cumming*, 11 Cush. (Mass.) 460; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; 22 Am. Dec. 410.

4. *Cortelyou v. Lansing*, 2 Cai. Cas. (N. Y.) 202; *Garlick v. James*, 12 Johns. (N. Y.) 146; 7 Am. Dec. 294; *Moore v. Conhem*, Owen 123; *Ratcliff v. Davis*, 1 Bulst. 29; *Coggs v. Bernard*, 2 Ld. Raym. 209; *Whittaker v. Sumner*, 20 Pick. (Mass.) 329; *Jones v. Baldwin*, 12 Pick. (Mass.) 316.

5. *Gibson v. Boyd*, 1 Kerr N. B. 150;

he may sue the stranger in like manner.¹ The title of the pledgee is good against all the world, and, before tender and payment, even as against the pledgor for a conversion with respect to the property.²

g. TRUSTEES.—Trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the possession of their *cestui que trust*, and although the title may be liable to be defeated by the claim of some third person. Yet the wrongdoer cannot set up the title of that third person as a defense to an action against him for the recovery of the goods.³ An action for the conversion of trust property should be brought in the name of the trustee.⁴

h. FINDERS OF LOST PROPERTY.—A finder of a lost article, though he does not by such finding acquire an absolute property or ownership, acquires such a property as will enable him to keep it against all but the rightful owner, and he may maintain trover against a wrongdoer converting it.⁵ The defendant in such an

Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

1. *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; 19 Am. Dec. 329; *Gibson v. Boyd*, 1 Kerr N. B. 150; *Ayers v. South Australian Banking Co.*, L. R., 3 P. C. 548; *Noles v. Marable*, 50 Ala. 366; *Bromwell v. Hawkins*, 4 Barb. (N. Y.) 491; *Southworth v. Sebring*, 2 Hill (S. Car.) 587.

The pledgee may, after making demand, maintain trover against an express company for goods stolen from him and delivered to the company for transportation. *U. S. Express Co. v. Meints*, 72 Ill. 293.

2. *Taylor v. Turner*, 87 Ill. 296; *Baldwin v. Bradley*, 69 Ill. 32; *Benjamin v. Stremple*, 13 Ill. 467; *Black v. Bogert*, 65 N. Y. 601; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Coleman v. Shelton*, 2 McCord Eq. (S. Car.) 126; *Hurst v. Coley*, 15 Fed. Rep. 645; *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770; *Pickard v. Sears*, 6 Ad. & El. 475; 33 E. C. L. 115; *Freeman v. Cooke*, 2 Exch. 654; 18 L. J. 114; *Anonymous*, 12 Md. 564.

3. *Barker v. Furlong* (1891), 2 Ch. 172; *Coleson v. Blanton*, 3 Hayw. (Tenn.) 152; *Thompson v. Ford*, 7 Ired. (N. Car.) 418.

4. *Richardson v. Means*, 22 Mo. 495; *Myers v. Hale*, 17 Mo. App. 204.

5. In *Armory v. Delamirie*, 1 Str. 504, it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer. See also *McAvoy v. Medina*, 11 Allen (Mass.) 548.

In *Bridges v. Hawksworth*, 7 Eng. L. & Eq. 424, the plaintiff having picked up from the floor of the shop of the defendant a parcel containing banknotes, handed them over to the defendant for safe-keeping until the owner should claim them. After a lapse of three years, no one appearing to claim the money, the plaintiff requested the defendant to return it. It was held upon the defendant's refusal that the plaintiff could maintain trover for its conversion.

In *Tatum v. Sharpless*, 6 Phila. (Pa.) 18, a conductor of a street car who found a pocketbook in his car was held entitled to keep it against everyone save the real owner. And consequently the railroad company was not entitled to its possession. See also *Rex v. Wynne*, 1 Leach 460; *Rex v. Seers*, note to *Rex v. Wynne*, 1 Leach C. C. 460; *Cartwright v. Green*, 8 Ves. 409; *Rex v. Pope*, 6 C. & P. 346; 25 E. C. L. 432; *State v. Weston*, 9 Conn. 527; 25 Am. Dec. 46.

In *Mathews v. Harsell*, 1 E. D. Smith (N. Y.) 393, the plaintiff, a servant, found certain *Texas* notes in the house of her employer, who assumed their custody for her benefit and intrusted them to the defendant for

action can never set up as a defense the weakness of the plaintiff's title,¹ unless he shows that he has at first come into the rightful possession of the chattels, as in case of a seizure by a sheriff, or where goods have been placed in the hands of a bailee,² and then only when such third person has made a demand upon the defendant for the goods.³ The rule, however, does not apply to the finder of a lost chose in action, for example, a promissory note.⁴

2. **BANKRUPTS—AS TO AFTER-ACQUIRED PROPERTY.**—The title of a bankrupt to after-acquired property, while liable to be defeated by the intervention of the trustee or assignee in bankruptcy, is, until that event occurs, sufficient to maintain trover, trespass, or replevin, for any unauthorized taking or assumption of dominion over his property.⁵ And this conditional right of property passes to the administrator of the bankrupt.⁶

2. **Absolute and Special Property Compared.**—One has absolute property in a chattel, where not only the possession, actual or constructive, but the exclusive right to enjoy it, is vested in the so-called absolute owner;—a possession and a right so absolute and exclusive as to be paramount to the claims of all others and such as can only be defeated by some act or default of his own.⁷ The person in whom the general property in a personal chattel is, may maintain an action of trover for the conversion thereof, although he may never have been in actual possession; because the general property, in the case of a personal chattel, draws to it a possession, in construction of law, and such possession is, by reason of the transitory nature of a personal chattel, sufficient to found this action upon.⁸

the purpose of ascertaining their value, apprising him that he was acting for the servant and held the notes for her. The defendant sold them and appropriated them to his own use. It was held that he was liable for their value and interest from the time of their sale by him. See also *M'Loughlin v. Waite*, 9 Cow. (N. Y.) 670; *Pinkham v. Gear*, 3 N. H. 484; *Poole v. Symonds*, 1 N. H. 289; 8 Am. Dec. 71; *Magee v. Scott*, 9 Cush. (Mass.) 148; 55 Am. Dec. 49; *Clark v. Malony*, 3 Harr. (Del.) 68.

1. In *Harker v. Dement*, 9 Gill (Md.) 7; 52 Am. Dec. 670, it was held that the defendant in trover could not be permitted to prove that the title was not in the plaintiff but was, at the time of the conversion, outstanding in a third party. See also *Duncan v. Spear*, 11 Wend. (N. Y.) 54.

2. *Hostler v. Skull*, 1 Am. Dec. 589, note.

3. *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618; 93 E. C. L. 616.

4. *M'Loughlin v. Waite*, 9 Cow. (N.

Y.) 670; *Brandon v. Huntsville Bank*, 1 Stew. (Ala.) 320; 28 Am. Dec. 48.

5. In *Webb v. Fox*, 7 T. R. 391, the defendant in an action of trover pleaded the bankruptcy of the plaintiff and a subsequent transfer to the assignee of all the interest in the goods in suit, and the plaintiff replied, that subsequently after the bankruptcy he became lawfully possessed of the goods and continued so possessed down to the time of suit brought. It was held that the replication was a good answer to the plea and sustained the declaration. See also *Herbert v. Sayer*, 5 Q. B. 965; 48 E. C. L. 965; *Matson v. Cook*, 4 Bing. N. Cas. 392; 33 E. C. L. 388; *Newham v. Stevenson*, 10 C. B. 713; 70 E. C. L. 713; *Tuson v. Chambers*, 9 M. & W. 460.

6. *Giles v. Glover*, 6 Bligh 293; *Wilbraham v. Snow*, 2 Saund. 47.

7. See opinion of Lawrence, J., in *Webb v. Fox*, 7 T. R. 395; 2 Bl. Com. 389; 1 Chit. Pl. (16 Am. ed.) 167.

8. Bacon's Abr., "Trover" (C) 214; *Hudson v. Hudson*, 2 Buls. 268; *Gordon*

Special property, in this connection,¹ may be either a qualified right or interest in the thing itself, or one annexed to or connected with it, such as that of a carrier, factor, or bailee; or, on the other hand, it may be that of a mere gratuitous loanee or simple custodian of the property.² When a special owner has a *jus in re* or a *jus ad rem*, his interest in the chattel is not necessarily subservient to the claims of the general owner, but an action of trover may be maintained as readily against such general or absolute owner as against a stranger, when the rights of the special owner are infringed.³ The special property in a gratuitous loanee or naked depository is, more accurately, only a "possessory interest,"⁴

v. Harper, 7 T. R. 12; 2 Saund. 47, A.; *Fowler v. Down*, 1 B. & P. 44; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Foster v. Gorton*, 5 Pick. (Mass.) 185; *Van Brunt v. Schenck*, per Van Ness, J., 11 Johns. (N. Y.) 377; *Smith v. James*, 7 Cow. (N. Y.) 329; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Bird v. Clark*, 3 Day (Conn.) 272; 3 Am. Dec. 269; *Buckley v. Dolbeare*, 7 Conn. 232.

Where one has raked manure scattered in a public street into heaps preparatory to its removal, he may maintain trover against one who, twenty-four hours after it is gathered, carts it off. *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350.

If a testator has bequeathed specific goods, the legatee may maintain an action of trover for the conversion thereof by a stranger, although they have not been delivered to him by the executor, because a general property in the goods was vested in him immediately upon the death of the testator. *Bacon Abr.*, "Trover" 642.

In *Pope v. Tucker*, 23 Ga. 484, it was decided that since a husband has an absolute right to the wife's chattel personally in possession, he might maintain trover for an injury committed while they were in her actual custody.

A plaintiff, in ejectment, after the title to the land had been determined in his favor, may maintain an action of trover for logs cut by the defendant from standing timber and moved from the land during the pendency of the suit, and while in possession of the land under a *bona fide* claim of title adverse to the plaintiff. *Willson v. Hoffman*, 93 Mich. 72.

1. In *Turley v. Tucker*, 6 Mo. 583, *Napton, J.*, says: "The special property spoken of by the books as sufficient to maintain the action of trover is of two kinds, and of two kinds only; the first is, the property which is

founded on a mere possession held subject to the claims of the absolute owner; the second is, a temporary property without possession, only one instance of which I have seen recorded in the books. *Roberts v. Wyatt*, 2 Taunt. 268." This was a case of trover for the recovery of the value of an abstract of title to which the plaintiff had a temporary right, and which was delivered by the plaintiff to the defendant for certain purposes; after their accomplishment and during the continuance of the plaintiff's temporary right, upon a demand for its return, the defendant refused to comply, and detained the abstract. The plaintiff recovered in trover.

2. See Story on Bailments, par. 93.

3. A person who has a temporary property in goods, delivering them to the general owner for special purposes, may, after the accomplishment of that purpose, upon demand and refusal to deliver, maintain trover for them. *Roberts v. Wyatt*, 2 Taunt. 268; *O'Connell v. Maxwell*, 3 Blackf. (Ind.) 419; *Jones v. McNeil*, 2 Bailey (S. Car.) 466.

A party having a general interest is allowed to recover in trover against the general owner, but only to the extent of such special interest; though as against a mere wrongdoer, the whole value of the converted property may be recovered, the special owner being accountable over to the general owner. See *infra*, this title, *Measure of Damages*.

4. The term special property is often used in a very qualified sense, excluding every notion of interest; thus, a mere depository has what is more accurately called a "possessory interest." He cannot be said to have any special property in the goods. He has no *jus in re*. He has only their rightful custody and possession, which is enough to support an action of trover against

but, as such, will prevail against all without claim of title.¹ Where only a special property exists, there must be evidence of actual possession.² Both the person in whom the general property in the goods is, and the person in whom the special property therein is, may maintain an action of trover for the conversion thereof, but a recovery by one is a bar to a recovery by the other.³ The absolute and special property cannot exist as distinct rights in the same person.⁴

3. Trover and Trespass Compared.—Trover and trespass are to this extent concurrent remedies; wherever trespass for the unlawful taking and conversion of personal property will lie, trover also may be maintained.⁵ The converse of this proposition, however,

a wrongdoer. 2 Black. Com. 452; Story on Bailments (6th ed.), par. 93; *infra*, this title, *Who May Maintain Trover*.

The possession of chattels, however, may be looked upon as presumptive evidence of property and it becomes a conclusive presumption against a stranger. "In a certain sense one always shows a right of property when he shows that he has gained an apparently rightful possession; such a possession is evidence of property and whoever, by force or fraud, intercepts it without being able to show any right in himself is liable to this action (trover). Indeed, the possession gained is not only evidence of right against such a person, but it is conclusive evidence, unless he is able in some manner to so connect himself with the right of the real owner as to be actually able to defend such owner's interest." Cooley on Torts 521.

And indeed it seems that there may be possession without even this transitory interest and *a fortiori*, without property special or general; a servant, for instance, in possession of his master's goods, cannot bring trover for their conversion; the possession of the servant being in the eye of the law regarded as the possession of the master. *Lehigh Co. v. Field*, 8 W. & S. (Pa.) 232; *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362.

1. See *supra*, this title, *Who May Maintain Trover—In General*.

2. *Coxe v. Harden*, 4 East 211; *Dennie v. Harris*, 9 Pick. (Mass.) 364; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 407; *Sheldon v. Soper*, 14 Johns. (N. Y.) 452.

It seems that there is an exception to the rule that in the case of a special property, it must have been accom-

panied with possession in order to support trover. A factor, for instance, to whom goods have been consigned and who has never received them, may, nevertheless, maintain trover for their conversion. *Fowler v. Down*, 1 B. & P. 44; 2 Saund. 47 D.; *Stirling v. Vaughan*, 11 East 626; *Smith v. James*, 7 Cow. (N. Y.) 329; *Everett v. Saltus*, 15 Wend. (N. Y.) 474.

This apparent inconsistency may perhaps be reconciled on the ground that the possession of the carrier is the possession of the factor; the carrier being the servant of the factor for the purpose of transportation. *Bull N. P. 36*; *Dutton v. Solomonson*, 3 B. & P. 584; *Dawes v. Peck*, 8 T. R. 330; *Chitt. on Contr.* (11 Am. ed.) 316; *Story on Contracts* (5th ed.) 436-509; *CARRIERS OF GOODS*, vol. 2, p. 902.

3. Bacon Abr., "Trover" 648; *CARRIERS OF GOODS*, vol. 2, p. 903.

4. *O'Connell v. Maxwell*, 3 Blackf. (Ind.) 419.

5. Wherever trespass for taking goods will lie, that is, when they are taken wrongfully, trover also will lie, for one may qualify but not increase a tort. *Cro. Eliz. 824*; *Bishop v. Montague*, *Cro. Jac. 50*; *Raym. 472*; *Putt v. Rawsterne*, *Bou. 31*.

"It may be laid down as a general proposition that where trespass *de bonis asportatis* lies, trover also will lie." 1 Arch. Pr. 451; *Haines v. Briggs*, 9 Ark. 46; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396; *Wadleigh v. Janvrin*, 41 N. H. 503; *Woods v. Banks*, 14 N. H. 101; *Drew v. Spaulding*, 45 N. H. 472; *Meade v. Smith*, 10 Conn. 345; *Glenn v. Garrison*, 17 N. J. L. 1. And see *Farrant v. Thompson*, 5 B. & Ald. 826; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; 19 Am. Dec. 329; *Lyford v. Putnam*, 35 N. H. 563;

does not hold good,¹ for, to use the quaint language of Saunder's Reports, "One may *qualify* but not *increase* a tort."² It will readily be seen that, though every tortious taking of personal chattels is itself a conversion,³ every act of conversion is not a tortious taking for which trespass will lie;⁴ for in trover the taking, or original acquisition of possession, is, by the fictitious form of the action, assumed to have been lawful.⁵

The gist of the action of trespass is wrong to the possession,⁶ actual or constructive;⁷ the gist of the action of trover, wrong to property by illegal assumption of ownership, or some act of appropriation inconsistent with the rights of the owner.⁸ Hence, anciently it was said that "In trover the plaintiff sues in respect of his property, while in trespass he sues in respect of his possession."⁹ It was owing to this distinction that a title acquired by relation was deemed sufficient to support the action of trover,¹⁰

Forbes v. Marsh, 15 Conn. 385; O'Neill J., in Jones v. McNeil, 2 Bailey (S. Car.) 466.

1. But the converse of this proposition does not hold, for trover may often be brought where trespass cannot; as, where goods are lent or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but the proper remedy is trover. Sir T. Raym. 472; 2 Vent. 170. So, where the taking is lawful, or, at least, excusable, trespass cannot be supported, but the owner may bring trover. Cooper v. Chitty, 1 Burr. 20; 2 Saund. 47 K.; Smith v. Milles, 1 T. R. 475; Wyatt v. Blades, 3 Camp. 396.

Trespass will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell. Smith v. Milles, 1 T. R. 475.

2. 2 Saund. Rep. 47 K.

3. Pierce v. Benjamin, 14 Pick. (Mass.) 356; 25 Am. Dec. 396; Farrington v. Payne, 15 Johns. (N. Y.) 431.

4. *Supra*, this title, *Trover and Trespass Compared*.

5. Lord Mansfield in Cooper v. Chitty, 1 Burr. 20, says, regarding the nature of the action of trover: "In form, it is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods."

6. Says Lord Kenyon, C. J., in Ward v. Macauley, 4 T. R. 487: "The distinction between trespass and trover was well settled; the former is founded on possession, the latter on property. Here, in the case under consideration, the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods." Smith v. Milles, 1 T. R. 475; Balme v. Hutton, 9 Bing. 471; 23 E. C. L. 338; Holmes v. Doane, 3 Gray (Mass.) 328.

7. In Smith v. Milles, 1 T. R. 475. Amherst, J., in delivering the opinion of the court, said: "To entitle a man to bring trespass, he must, at the time when the act was done which constitutes trespass, either have an actual possession in the thing which is the object of the trespass, or he must have a constructive possession in respect of the right actually vested in him."

If the owner of a chattel which is in York, gives it to J. S. who is in London, and it is taken or injured by a stranger, J. S. may maintain trespass. Bacon's Abr., "Trespass" C. Holmes v. Doane, 3 Gray (Mass.) 328; Woodruff v. Halsey, 8 Pick. (Mass.) 333; 19 Am. Dec. 329; Burrows v. Stoddard, 3 Conn. 160; Clark v. Skinner, 20 Johns. (N. Y.) 469; 11 Am. Dec. 302.

8. Cooper v. Chitty, 1 Burr. 20; Hunt v. Holton, 13 Pick. (Mass.) 216; Foster v. Gorton, 5 Pick. (Mass.) 185.

9. Patterson, J., in Balme v. Hutton, 9 Bing. 471; 23 E. C. L. 338.

10. Thus, an administrator or executor, may maintain trover for the conversion of the goods of the decedent, committed after the death of the decedent, but before the grant of administration or the probate of the will. Y. B. 36 H.

though not that of trespass.¹ The more modern authorities, however, hold that a title which relates back suffices to maintain either trespass or trover subject to the qualification that, if the act of the defendant was lawful at the time it was done, trover only can be maintained.² "The only distinction," says a learned judge, "between trover and trespass *de bonis asportatis* appears to be, that the one is founded on mere possession, while the other rests on right as evidenced by possession."³ In trespass, no proof of right of action in a third person will defeat the plaintiff's right of action, unless the defendant connects himself with the title so set up in such manner as to justify his apparent wrong.⁴

In trover, the plaintiff's right of recovery may be annihilated by evidence on the part of the defendant, merely showing the title to be in a stranger;⁵ though it seems that if the plaintiff was in possession of the property at the time of the alleged wrong-

8 fo. 6; Roelle's Abr. tit., "Trespass" (T), pl. 2 Fitz. Abr. tit., "Adm.," pl. 2; Com. Dig., tit., "Administration." See also Administrators; Clerk & Lindsell on Torts, p. 188; Carlisle v. Garland, 9 Cl. & Fin. 189.

So the assignee of a bankrupt may sue for an injury committed after the act of bankruptcy but before the issuing of the commission. Balme v. Hut-ton, 9 Bing. 471; 23 E. C. L. 338; Cooper v. Chitty, 1 Burr. 20; Lazarus v. Waithman, 5 Moore 313; Bailey v. Bunning, 1 Lev. 173; Price v. Helyar, 4 Bing. 597; 15 E. C. L. 87; 1 Mo. & P. 541; Potter v. Starkie, 4 M. & S. 260.

1. For example, a writ commands a sheriff to take the goods of A. He takes goods which had been the property of A, and are still in his possession, though in point of law they have ceased to be his property, if certain contingent events happen. The sheriff, in this case, is not liable to be sued in trespass by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure. If he takes the proceeds, he is liable in trover to render the value of the goods to the person whose property they turn out to be.

2. The rule that a man could not be made a trespasser by relation, was explained by Creswell, J., to apply where the act complained of was lawful at the time. The reason for such a rule is, that in trespass the damages are unlimited; in trover they are limited to the value of the property. See Tharpe v. Stallwood, 5 M. & G. 760.

3. Hare, J., in Armory v. Delamirie, Smith L. Cas. (8th ed.) 691.

4. In Kissam v. Roberts, 6 Bosw. (N. Y.) 153, Hoffman, J., says: "If it were held that in an action of trover for the wrongful conversion of goods, the defendant might show property in a third person, it would by no means follow that such a defense was admissible in trespass for the wrongful taking. An action of trover is consistent with the idea that the goods came into the possession of the defendant without wrong and that the only wrong on his part may be that he has converted them to his own use. If, in such case, it were held that the owner of the goods could alone recover their value as damages, still it would be true that for a wrongful taking from the lawful possession of another, it is no defense that a third party owns the goods, unless the defendant also shows that he took them by authority of the owner, or by virtue of process under which he had a right to take the goods from the owner. It would be dealing with great and unreasonable indulgence with a tort-feasor if, when sued for illegally, forcibly, and wrongfully taking the goods from the lawful possession of another, the plea that some stranger was in fact the owner of the goods were held a justification."

Demick v. Chapman, 11 Johns. (N. Y.) 132; Cook v. Howard, 13 Johns. (N. Y.) 276; Aikin v. Buck, 1 Wend. (N. Y.) 466. See opinion of Chancellor in Miller v. Adsit, 16 Wend. (N. Y.) 332.

5. Leake v. Loveday, 4 M. & G. 972; 43 E. C. L. 972; Coffin v. Anderson, 4 Blackf. (Ind.) 395; Swope v. Paul, 4 Ind. App. 463; Gerard v. Jones, 78 Ind.

ful taking, the defendant must establish such connection with, or right under, such title as to authorize his act.¹

IV. SUBJECTS OF CONVERSION—1. In General.—Trover may be brought for the recovery of damages for the conversion of every species of personal property which has value.² Chattels, which by statute or the common law it is unlawful to possess, such, for

378; *Ford v. Griffin*, 100 Ind. 85; *Eureka Iron Works v. Bresnahan*, 66 Mich. 493; *Ribble v. Lawrence*, 51 Mich. 569; *Jones v. Rahilly*, 16 Minn. 320; *Kenney v. Goergen*, 36 Minn. 190; *Johnson v. Oswald*, 38 Minn. 550; 8 Am. St. Rep. 698; *Brevoort v. Brevoort*, 40 N. Y. Super. Ct. 211; *Fenlason v. Rackliff*, 50 Me. 362; *O'Connell v. Kilpatrick*, 64 Md. 122; *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Demick v. Chapman*, 11 Johns. (N. Y.) 132; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Cook v. Howard*, 13 Johns. (N. Y.) 276; *Rottan v. Fletcher*, 15 Johns. (N. Y.) 207; *Aikin v. Buck*, 1 Wend. (N. Y.) 466; *Davis v. Hoppock*, 6 Duer (N. Y.) 254; *Griffin v. Long Island R. Co.*, 101 N. Y. 348; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352; *Clapp v. Glidden*, 39 Me. 448.

1. *Jeffries v. Great Western R. Co.*, 5 E. & B. 802; 85 E. C. L. 802; *Wheeler v. Lawson*, 103 N. Y. 40; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Hurat v. Cook*, 19 Wend. (N. Y.) 463; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Eureka Iron Works v. Bresnahan*, 66 Mich. 494; *Brotherton v. Goldman*, 90 Mich. 340; *Harker v. Dement*, 9 Gill. (Md.) 7; 52 Am. Dec. 670. "The defendant," says the court in *Harker v. Dement*, "having failed to connect himself with the estate of Richard Dement, occupied the position of a mere tort-feasor, who had invaded the possession of the plaintiff without authority, and under such circumstances, it is very clear that he could not be permitted to prove that the title to the property in dispute was not in the plaintiff, but was at the time of conversion, outstanding in a third party with whom he had no connection or privity, to defeat the action or in mitigation of the damages." *Bourne v. Fosbrooke*, 18 C. B. N. S. 514; 114 E. C. L. 515; *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 567; 84 Am. Dec. 763; *Barwick v. Wood*, 3 Jones (N. Car.) 306; *O'Brien v. Hilburn*, 22 Tex. 616; *Davis v. Loftin*, 6 Tex. 489; *Carter v. Bennett*, 4 Fla. 283.

2. 7 *Lawson's Rights, Rem. & Pr.*, p. 5674; *Cooley on Torts* 447; 6 *Wait's Actions & Defenses*, p. 155.

Trover lies for wild geese which have been tamed, but which, without having regained their natural liberty, have strayed away. *Amory v. Flynn*, 10 Johns. (N. Y.) 102; 6 Am. Dec. 316. So also for domestic fowls that have wandered into a neighbor's flock, and he refuses to turn them at large to be identified. *Leonard v. Belknap*, 47 Vt. 603.

In *Cummings v. Perham*, 1 Met. (Mass.) 555, it was held that trover lay for a dog, which, by statute, the defendant had a right to kill because it had no collar on, but which he converted to his own use. See *Binstead v. Buck*, 1 W. Bl. 1117.

Trover may be maintained upon the refusal to deliver a letter, *Teal v. Felton*, 12 How. (U. S.) 284; for a whale which has been killed and anchored with marks of appropriation, *Taber v. Jenny, Sprague* (U. S.) 315; for a cow wrongfully impounded, *Drew v. Spaulding*, 45 N. H. 472; for the recovery of copies of a creditor's accounts, if the creditor obtains possession thereof and refuses to deliver them to the debtor, *Fullan v. Cummings*, 16 Vt. 698.

Oysters.—It has been held that trover cannot be maintained for taking and converting oysters planted in a public river where oysters usually are found, although no oysters were to be found where they were planted at the time of the planting. *Shepard v. Levenson*, 2 N. J. L. 369. And in *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248, where the plaintiff had planted oysters in a navigable stream opposite the defendant's land, and the latter took them and carried them away, it was held that oysters being *fera natura*, the plaintiff could not maintain an action therefor unless he had them under his immediate control.

Derelict Goods.—Trover will not lie by the owners of derelict goods to recover the same from the first finder. *Wyman v. Hurlburt*, 12 Ohio 81; 40 Am. Dec. 461.

example, as counterfeit coins,¹ instruments for counterfeiting, or burglars' tools,² cannot be made the subject of this action.

2. **Money.**—Trover lies for the conversion of money, when there is an obligation on the part of the defendant to return specific coin or notes intrusted to his care.³ So the action will lie for money

1. *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68. See *Cox v. Cook*, 14 Allen (Mass.) 165.

2. *Morrill v. Goodenow*, 65 Me. 178.

3. The question whether money can, in any case, be the subject-matter of an action of trover, is open to many difficulties of a technical nature. The obligation to pay money to another is primarily within the confines of the action of debt, and it seems to have been originally the law, that there must be some special quality attached to coins in order to make them proper subjects of an action of tort. Thus, in *Hall v. Dean*, Cro. Eliz. 841, it was said that the money must be in a bag. See *Draycot v. Plot*, Cro. Eliz. 818. But in both these cases the money was "out of a bag," yet the plaintiff was successful. The test seems to be: is there any obligation on the part of the defendant to deliver specific money to the plaintiff. A servant who receives a sum of money for his master, which he converts, is liable in this form of action, because the law imposes upon him the duty of returning the money in specie. Of course the action is always maintainable where the defendant unlawfully took the money in dispute out of the possession of the plaintiff. See generally, upon this subject, *Kinaston v. Moor*, Cro. Car. 89; *Orton v. Butler*, 5 B. & Ald. 652; 7 E. C. L. 224; *Foster v. Green*, 7 H. & N. 881. A recent text writer makes the question depend upon whether the same state of facts would also support a charge of larceny—if so, there is also a conversion. Clerk & Lindsell on Torts, p. 187, citing *Reg. v. Hassal*, 30 L. J. M. C. 175; *Reg. v. Eden*, 12 Cox 512; *Reg. v. De Banks*, 13 Q. B. Div. 29. *Abbott, C. J.*, in *Orton v. Butler*, 5 B. & Ald. 652; 5 E. C. L. 224, sums up the law upon this subject: "The law has provided certain specific forms of actions for particular cases and it is of importance that they should be preserved; we ought, therefore, to look with great jealousy upon an innovation of this sort. The present count states, that the defendant had and received to the use of the plaintiff, a certain sum of money, to wit, ten

shillings, to be paid to the plaintiff, but which the defendant converted to his own use. It is contended that this is a count in trover. Now the action of trover is only maintainable for specific property. It will lie for so many pieces of gold and silver, and in that case a defendant can only redeem himself by tendering to the plaintiff the same specific pieces. But in this case he clearly might do so by returning an equal sum of money. There is, therefore, not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer must, therefore, be allowed."

In *Muskegon Booming Co. v. Hendricks*, 89 Mich. 172, it was held that where the plaintiff owed the defendant \$108.86, and by mistake gave him a draft for \$198.86, which was negotiated and afterwards paid by the plaintiff before discovering the error, that trover did not lie for the recovery of the \$90 excess paid.

The plaintiffs' agent, intending to be absent on the arrival of a certain package of money belonging to the plaintiffs, requested the defendant to receive it from the express company, for the purpose of safely keeping it until his return, and the defendant consented. The money was delivered to him on the written order of the agent. It was held that the defendant's refusal to deliver the money upon demand was a conversion. *Jones v. Hunt*, 74 Tex. 657.

The plaintiff, in an action of ejectment for the specific performance of a contract for the sale of lands, obtained a verdict in his favor and paid the purchase-money in gold into court, to be taken by the defendant on his filing his deed. The prothonotary deposited the money with reliable bankers to his own credit. They employed the money without profit. The defendant filed his deed after the passage of the legal tender acts, and the prothonotary offered to pay him the money in court in legal tender which he refused, and brought trover for the gold. It was held that he could not recover, as the prothonotary was an involuntary bailee, whose duty it was to take that care of a de-

received by the defendant, and not paid over as requested,¹ or for money paid by mistake to the wrong person.² Where the money can be identified, as specie on special deposit, or bank bills by proof of denomination, trover will lie.³ So bank bills deposited in pledge may be recovered in this form of action; and the rights of the plaintiff are not prejudiced by the fact that the subject-matter of the action is money, or the bills of the bank itself, but the same principle is to govern as if the article deposited had been a watch or a jewel.⁴

3. Symbols of Property.—Trover lies for promissory notes.⁵

posit which prudent men usually exercise. *Aurentz v. Porter*, 56 Pa. St. 115.

Trover does not lie for money due on a lottery ticket, unless it has been set apart in kind. *Pitt v. Bonju*, 1 Mo. 64.

1. *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 162; *Worley v. Moore*, 97 Ind. 15. One refusing to pay over money received by him for another, until the payment of a debt due to him by that other, is liable for the conversion of such money. *Richmond v. Soportos* (N. Y. City Ct.), 18 N. Y. Supp. 433.

2. *Chapman v. Cole*, 12 Gray (Mass.) 141; 71 Am. Dec. 739.

3. *Graves v. Dudley*, 20 N. Y. 76; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395. As for bank notes sealed in a letter, see *Moody v. Keener*, 7 Port. (Ala.) 218; or sent to the bank for a special purpose, see *Norton v. Kidder*, 54 Me. 189; *Farrand v. Hurlburt*, 7 Minn. 477.

Trover will lie where a bank treats a special deposit as general assets. *First Nat. Bank v. Dunbar*, 19 Ill. App. 558.

4. *Boyle v. Levings*, 28 Ill. 314.

During the civil war, a customer of a bank in *South Carolina* left \$4,000 of his own bills with the bank as security for the return of a like sum of Confederate treasury notes borrowed for a limited time. Within this time he tendered this sum in treasury notes and demanded a return of the bank bills; and upon the refusal of the bank to deliver them, brought trover for their conversion. It was held that his right to recover was not taken away by the fact that the property pledged was money or bills of the bank itself, but that the same principle was to govern as if the article deposited had been a watch or a jewel. *Abrahams v. Southwestern, etc., Bank*, 1 S. Car. 441.

But where the plaintiff alleged that she deposited with the defendant money, by handing him a check drawn in her favor which she had collected,

and that he had refused to turn over the proceeds of the check on demand, it was held that the action was to recover a deposit, and not for a conversion. *Moore v. Craig* (B'klyn City Ct.), 4 N. Y. Supp. 339. Compare *Security Bank v. Fogg*, 148 Mass. 273; *Borland v. Stokes*, 120 Pa. St. 278; *Davis v. Thompson* (Pa. 1888), 14 Atl. Rep. 169.

5. *Alsager v. Close*, 10 M. & W. 576; *Watson v. McLean*, Ec. Bl. & El. 75; *McLeod v. McGhie*, 2 M. & G. 326; 40 E. C. L. 394; notes to *Miller v. Race*, 1 Smith's L. Cas. 840; *Morley v. Clark*, 4 Bro. 77; *Kingman v. Pierce*, 17 Mass. 247; *Day v. Whitney*, 1 Pick. (Mass.) 502; *Jarvis v. Rogers*, 15 Mass. 389; *Tucker v. Jewett*, 32 Conn. 563; *Seago v. Pomeroy*, 46 Ga. 227; *Allison v. King*, 25 Iowa 56; *Fell v. McHenry*, 42 Pa. St. 41; *Hughes v. Lumsden*, 8 Ill. App. 185.

"The principle is well settled that when a bill or note is diverted from the object for which it was intended, an action will lie against the person who unlawfully diverts the same, for the conversion thereof." *Hynes v. Patterson*, 95 N. Y. 1.

An administrator is liable in trover if he uses a note for any other purpose than that connected with the estates. *State v. Berning*, 74 Mo. 87.

If one purchases a note with knowledge that it belongs to a third person, trover will lie. *Allison v. King*, 25 Iowa 56.

The action lies against a promisor for his note, which he obtained through the fraud of a third person, *Nettleton v. Riggs*, 1 Root (Conn.) 125; or for the recovery of a note, although the plaintiff and defendant were jointly interested in the note, *Boyle v. Levings*, 28 Ill. 314.

In *Brickhouse v. Brickhouse*, 11 Ired. (N. Car.) 404, it was held that trover would lie by the administrator of an intestate to recover notes of which the

So it lies in case of the conversion of checks,¹ or of bills of exchange,²

intestate had made an oral gift, but which were transferable only by indorsement.

A bailee of a note who gives it up without authority, to be destroyed, is liable for its conversion. *Hicks v. Lyle*, 46 Mich. 488.

Trover will not lie for a note which has been equitably assigned. Nor for a note payable to A, to collect and apply the proceeds to the payment of a note which he held against the plaintiff. *Canfield v. Monger*, 12 Johns. (N. Y.) 347.

In an action to recover certain notes, or their proceeds, executed by the plaintiff and delivered to the defendant for the purpose of being discounted, the complaint alleged that the defendant had them discounted and converted the proceeds to his own use, except as to \$901 paid by the defendant to the plaintiff as a pretended loan or advance, and on the representation that the defendant had not been able to discount the notes. It was held that the action for conversion of the notes would not lie until the plaintiff paid to the defendant the \$901 which he had already received. *Genin v. Schwenk*, 62 Hun (N. Y.) 574.

1. *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, 2 Dougl. 636; *Wookey v. Pole*, 4 B. & Ald. 9; 6 E. C. L. 368. So for a check surreptitiously obtained. *Krager v. Pierce*, 73 Iowa 359.

The state has such a title in a draft indorsed to the state treasurer, that an action may be maintained in the name of the people for its conversion. *People v. Bank of N. A.*, 75 N. Y. 547.

2. *Donnell v. Thompson*, 13 Ala. 440; *Stephenson v. Feezer*, 55 Ind. 416; *Nininger v. Baming*, 7 Minn. 274; *Seago v. Pomeroy*, 46 Ga. 227; *Spencer v. Dearth*, 43 Vt. 98; *Stewart v. Martin*, 49 Vt. 266; *Kingman v. Pierce*, 17 Mass. 247; *Griswold v. Judd*, 1 Root (Conn.) 221; *Park v. McDaniels*, 37 Vt. 594.

Since it is the regular and usual course of business in commercial transactions, to deliver out a bill of exchange left for acceptance, to any person who mentions the amount and describes any private mark or number upon it, and if the clerk of the party leaving it, by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party

leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 6 C. & P. 20; 25 E. C. L. 258. See *De Lizardi v. Pennell*, 25 L. J. Q. B. 387.

In *Brind v. Hampshire*, 1 M. & W. 365, A, resident abroad, remitted a bill to B, his agent in London, drawn by A and specifically indorsed by him to C, with whom A's children were at school, in payment of C's account for their board and lodging. B got the bill accepted by the drawees and sent a letter by post to C, stating that he had got a commission from A to pay her some money on account of his children, and desired to be informed when and how it should be delivered. B subsequently was instructed by A not to pay the bill to C until an investigation of A's accounts should take place. The investigation never took place. It was held that C could not recover it in trover.

In *Buck v. Kent*, 3 Vt. 99, the plaintiff gave his note to the defendant, to whose order it was payable, in exchange for two horses, upon the understanding that if the plaintiff should elect to rescind the contract, the note was to be returned. The plaintiff did rescind, but the defendant transferred the note to a third person, who recovered its value against the plaintiff. It was held that trover was maintainable for the note, the measure of damages being its face value. *Murray v. Burling*, 10 Johns. (N. Y.) 172.

Where the plaintiff indorsed bills to A. B., specially in this form: "Pay A. B. or order for account of the plaintiffs," and A. B. pledged the bills with the defendant for his private debt, it was held that the defendant took them with sufficient notice that they did not belong to A. B., and the defendant was liable to the plaintiffs in an action of trover. *Byles on Bills* (Wood's ed.), p. 84; *Treuttell v. Barandon*, 8 Taunt. 100; 4 E. C. L. 33; 1 Moo. 5.

Where the plaintiff, the holder of a bill of exchange made payable at the defendant's banking house, lost it before maturity, and both the acceptor and the plaintiff notified the defendant not to discount it, nevertheless he did discount it, and afterwards debited his customer with the amount of the bill, wrote a discharge on it and delivered it up to the customer as the banker's voucher of his account, it was held

muniments of title to real estate,¹ policies of insurance,² or other evidences of ownership in property,³ where the act of the defendant amounts to a conversion according to the tests heretofore given. The maker of a note may maintain the action against one who wrongfully retains possession and refuses to deliver it up on demand.⁴ Trover lies against a payee who has wrongfully dis-

that the defendant was guilty of an actual conversion. *Byles* (Wood's ed.), p. 549; *Down v. Halling*, 4 B. & C. 330; 10 E. C. L. 347; *Lovell v. Martin*, 4 Taunt. 799.

In *Wilkinson v. Whalley*, 5 M. & G. 590; 44 E. C. L. 311, A, to whom B was indebted, received a bill from B to get discounted, or return to A on demand. A sent the bill to C with directions to place it to A's account with C, which C did, minus the discount. It was held in trover by B against A, that this was substantially a discounting of the bill; and that A was entitled to a verdict under a plea of not possessed. *Aikens v. Owen*, 4 A. & E. 819; 31 E. C. L. 191; *Roberts v. Wyatt*, 2 Taunt. 268; *Perry v. Frame*, 2 Bos. & P. 451.

1. *Ayres v. French*, 41 Conn. 151; *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537.

The action will lie by an administrator against a stranger for the conversion of a title deed of the plaintiff's intestate. *Towle v. Lovet*, 6 Mass. 394.

In *Gleason v. Owen*, 35 Vt. 588, the action was allowed for the recovery of parish records. *Sawyer v. Baldwin*, 11 Pick. (Mass.) 492; *Stebbins v. Jennings*, 10 Pick. (Mass.) 172.

Land scrip may be recovered in an action of trover. *Nelson v. King*, 25 Tex. 655.

In *Gleason v. Owen*, 35 Vt. 588, where two notes and a mortgage to secure the same were executed, the notes transferred, and the mortgage deed delivered to the defendant, and the defendant afterwards, but before a written assignment of the mortgage had been made to him, sold and transferred the notes to the plaintiff and agreed to get the mortgage deed, which was then in the hands of another person, and delivered it to the plaintiff, which he afterwards refused to do, it was held that the plaintiff could maintain trover for the deed.

Title Deeds.—Where A sold an estate to B, who paid part of the purchase-money, and it was agreed that the title deeds should be deposited with C, and delivered up to B, when he paid the

residue, and subsequently A got possession of them again and pledged them to a third party for a valuable consideration, it was held that B, on tendering the remainder of the purchase-money, might recover the deeds from such party. *Cooper v. Ramsbottom*, 2 Taunt. 12.

In an action for the conversion of a title deed, it is not necessary to give the defendant notice to produce the deed to be given in evidence at the trial; and parol evidence of the existence and contents of the deed is admissible, unless it is produced without notice. *Aswald v. King*, 2 Brev. (S. Car.) 471.

2. *Harding v. Carter*, 1 Park. on Ins. 4; *Scott v. Jones*, 4 Taunt. 865; *Luckey v. Gannon*, 37 How. Pr. (N. Y.) 134.

3. *Spencer v. Dearth*, 43 Vt. 98; *Day v. Whitney*, 1 Pick. (Mass.) 503; *Scott v. Jones*, 4 Taunt. 865; *Tilden v. Brown*, 14 Vt. 164; *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71; *Bullock v. Rogers*, 16 Vt. 294; *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *Hudspeth v. Wilson*, 2 Dev. (N. Car.) 372; *Comparet v. Burr*, 5 Blackf. (Ind.) 419; *Ayres v. French*, 41 Conn. 151; *Tucker v. Jewett*, 32 Conn. 563.

Bonds.—*Snow v. Alley*, 144 Mass. 546; 59 Am. Rep. 119; *Clowes v. Hawley*, 12 Johns. (N. Y.) 484; *Carver v. Creque*, 46 Barb. (N. Y.) 507.

The owner of a non-negotiable bond may maintain the action of trover against a person who obtained it through an unauthorized transfer by his agent. *Blackman v. Lehman*, 63 Ala. 547; 35 Am. Rep. 57.

Upon the sale or transfer of a vessel from one person to another, the certificates of the registry pass to the purchaser, and the seller cannot recover anything for them in trover against a third person, they being of no value to him. *Barnes v. Taylor*, 31 Me. 329.

4. *Groggerly v. Cuthbert*, 5 B. & P. 170; *Evans v. Kymer*, 1 B. & Ad. 528; *Hicks v. Lyle*, 46 Mich. 488; *Neal v. Hanson*, 60 Me. 84; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Decker v. Matthews*, 12 N. Y. 313; *Robbins v. Packard*, 21 Vt. 570; 76 Am. Dec. 134.

posed of, or refused to hand over, a paid note.¹ On the other hand, the action may be maintained by the payee against the maker for a wrongful conversion.²

But it is held that the action cannot be maintained for the conversion of a judgment, or for a note on which judgment has been recovered.³

4. Shares of Stock.—Certificates of corporate stock, of which the owner has been wrongfully deprived, may be the subject of an action of trover.⁴ And it seems that whenever there is a conversion of shares by means of a wrongful use of a certificate, the owner

1. *Pierce v. Gilson*, 9 Vt. 216; *Spencer v. Dearth*, 43 Vt. 98; *Stone v. Clough*, 41 N. H. 290; *Todd v. Crookshanks*, 3 Johns. (N. Y.) 432. But see *Besherer v. Swisher*, 3 N. J. L. 748; *Lowremore v. Berry*, 19 Ala. 130. In *Otisfield v. Mayberry*, 63 Me. 197, it was said: "The maker of a note has a right to its possession upon payment. In his hand it is evidence of such payment. In the hands of a stranger it is *prima facie* evidence of indebtedness. If a suit is brought, it imposes upon the maker the necessity of a defense, the procurement of testimony, the employment of counsel, and the delay, expense and vexatious litigation. The possession of it by the maker is of importance. See *Neal v. Hanson*, 60 Me. 84.

Trover will lie for a note which has been paid and left by mistake in the hands of the holder. *Pierce v. Gilson*, 9 Vt. 216.

Where the plaintiff gave a note for accommodation to the defendant, who was to pay and take care of it and save the defendant from liability, and the defendant paid and took up the note, after using it for the purpose designed, and then claimed to hold it as a valid instrument and refused to give it up, it was held that the plaintiff had a right to maintain trover for it. *Park v. McDaniels*, 37 Vt. 594.

Where notes were deposited with the defendant to be held as security until a piece of land conveyed by the plaintiff to a third person, and by him to the defendant, should be relieved of certain mortgages, and the plaintiff took up the mortgaged note procured by the mortgage to be discharged against the other, the mortgagee being dead, he tendered to the defendant, together with the mortgaged notes and indemnifying bond, which was accepted, it was held that the plaintiff was entitled to have them back and

maintain trover for them against the defendant, having sufficiently complied with the condition on which they were given. *Robbins v. Packard*, 31 Vt. 570; 76 Am. Dec. 134.

Trover, however, will not lie for a paid note by the maker against a holder or payee, where the latter denies the payment, since it is undesirable to litigate a question of payment in such an action. *Pierce v. Gilson*, 9 Vt. 216.

2. *Alexander v. Rundle*, 75 Ill. 85. But to enable the payee to maintain the action, a wrongful taking must be shown, or a refusal to deliver the same when demanded by the plaintiff.

3. *Platt v. Potts*, 11 Ired. (N. Car.) 266; 53 Am. Dec. 412; *Cobb v. Connagay*, 6 Ired. (N. Car.) 358; 45 Am. Dec. 497.

But in *Kuhn v. Fassett*, 21 Vt. 539, it was held that a judgment creditor may sustain trover for a writ of execution which he has sued out upon his judgment.

4. *Seymour v. Ives*, 46 Conn. 109; *Stewart v. Bright*, 6 Houst. (Del.) 344; *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80; *Edwards v. Sonoma Valley Bank*, 59 Cal. 136; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; *Salisbury Mills v. Townsend*, 109 Mass. 121; *Fisher v. Brown*, 104 Mass. 259; *Sergeant v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Cummock v. Savings Inst.*, 142 Mass. 342; *Smith v. Thompson*, 94 Mich. 381; *Boylan v. Hugnet*, 8 Nev. 353; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 234; *West Branch, etc., Canal Co.'s Appeal*, 81 Pa. St. 19; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; 14 Am. Rep. 526; *Gilbert v. Manchester Iron Co.*, 11 Wend. (N. Y.) 628; *Kortright v. Buffalo Com. Bank*, 20 Wend. (N. Y.) 91; *Barry v. Calder*, 48 Hun (N. Y.) 449; *Barrowcliffe v. Cummins*, 66 Hun (N. Y.) 1; *Mechanics' Bank v. New York, etc., R. Co.*, 14 N. Y. 633; *Anderson v.*

may count either upon the conversion of the certificate, or the shares themselves without mention of the certificate, since the one is merely symbolical of the other.¹

Nichoals, 28 N. Y. 600; New York, etc., R. Co. v. Schuyler, 34 N. Y. 80; Markham v. Jaudon, 41 N. Y. 235; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 368; 32 Am. Rep. 315; Barker v. Wasson, 53 Tex. 155; Kuhn v. McAllister, 1 Utah 273.

In *Ayres v. French*, 41 Conn. 150, Parke, C. J., said: "There is really no difference in any important respect between shares of stock and other kinds of personal property. A man purchases a share of stock and pays \$100 for it; he afterwards purchases a horse and pays the same price. The one was purchased in the market as readily as the other, and can be sold and delivered as readily; the one can be pledged as collateral security as easily as the other; as easily attached to secure a debt, and its value as easily estimated. The one enriches a man as much as the other, and fills as important a place in the inventory of his estate. It is considered personal property, as substantial as the other, both in law and in the transactions of men. It is, therefore, as great a moral wrong to convert the one to his own use as it would be the other, and it ought to be as great a legal wrong. . . . What matters it whether the thing itself is capable of being taken into hand and carried away, so long as it is personal property of as substantial value as any other; and in no case can the thing itself be recovered in this form of action, but only its value. There was force in the claim originally when trover was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained, but the allegation has long since ceased to be substantial, and there is no longer any reason for requiring that the property should be tangible. . . . If a certificate of stock is unlawfully retained, when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock which it represents. No one would say that the paper alone had been converted—that the conversion of the paper constituted the entire wrong. The real act done in such case is precisely the same as done here,

no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction, where there is really no difference. Conversion is the gist of the action of trover . . . and we think that in these days, when the tendency of courts is to do away with technicalities not based on reason, a technical distinction of this character should no longer be sustained."

It seems difficult to understand why a share of stock cannot be made the subject of an action of trover when it is remembered that, in every jurisdiction where that section of the statute of frauds is in force, which declares that no contract for the sale of any goods, wares and merchandise, for the price of £10 or upwards, shall be allowed to be good unless, etc., it has been held that a share of stock comes within the scope of the word "goods." See *Ayres v. French*, 41 Conn. 151; *North v. Forest*, 15 Conn. 400; *Reed on Statute of Frauds*, vol. 3; *Cook on Stock*, § 566; *Biddle on Stock Brokers*, p. 349.

Where certificates of stock are purchased from one who has wrongfully taken them from the owner, and the purchaser has reason to suspect this, as where the shares are purchased from a youth of sixteen years for one-third of their value, the purchaser may be liable for conversion. *Anderson v. Nicholas*, 28 N. Y. 600.

Budd v. Multnomah St. R. Co., 12 Oregon 271; 53 Am. Rep. 355; *Connor v. Hillier*, 11 Rich. (S. Car.) 193; 73 Am. Dec. 105.

1. In *McAllister v. Kuhn*, 96 U. S. 89, Waite, C. J., said: "It is true that a certificate of stock is not stock itself, but it is documentary evidence of title to stock and may be used for the purpose of symbolical delivery, as the stock itself is incapable of actual delivery. A blank indorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed. In this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock."

In *Pennsylvania*,¹ however, it is held that while trover may be maintained for the wrongful use of a certificate,² yet it will not lie for the conversion of the shares, as shares.

It is not every wrongful dealing with a certificate which will amount to a conversion of the shares; trover will not lie where the title of the shares has been divested.³ An unlawful retention of a certificate of stock which can be transferred only by the indorsement of the owner, while amounting to a technical conversion of the certificate, will not work a conversion of the shares.⁴

In *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91, it was said: "We see no reason why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either. The shares are the property converted, but the certificate itself is also property; standing as it does as the representative of the shares from the owner, it seems to be as proper to count upon its conversion as upon the conversion of money or any chattel." See also *Morton v. Preston*, 18 Mich. 60; 100 Am. Dec. 146.

In *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80, it was held that in an action for the conversion of shares of stock of a corporation, it is the "shares of stock" which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the shares of stock which the certificate represents, as well as that of the certificate.

A conversion of the certificate by the corporation amounts to conversion of the stock. *Condouris v. Imperial Tobacco, etc., Co.* (C. Pl.), 22 N. Y. Supp. 655; *Ryman v. Gerlach*, 153 Pa. St. 197.

An action will lie, although the plaintiff used the terms "shares of stock" and "certificates of stock" interchangeably. *Godfrey v. Pell*, 49 N. Y. Super. Ct. 226.

A stockholder whose stock has been canceled on the books of a company, and new stock has been issued to one not entitled thereto, may abandon his claim to the stock and pursue his remedy for its value against anyone who has illegally converted it. *Baker v. Wasson*, 59 Tex. 140.

1. In *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285, it was said: "Though trover might lie for a certificate of stock, as it does for a bond or a deed, yet it will not lie for one hundred shares of bank stock, any more than it

would for a debt due on a right of entry." In *Neiler v. Kelley*, 69 Pa. St. 407, where there was a declaration of a single count in trover for seventy shares of stock of the value of \$100 each, and for four bonds of \$1,000 each, it was held on demurrer, that the declaration was defective as to the stock, but not as to the bonds, and a demurrer to the whole declaration was properly overruled. *Sharswood, J.*, said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive meantime, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a partnership firm. The two cases are precisely analogous. But the document or writing which is the evidence of ownership is a tangible corporeal thing—the subject not only of property but of possession—the right to which is essential in trover."

2. *Biddle v. Bayard*, 13 Pa. St. 150.

3. *Broadbent v. Varley*, 12 C. B. N. S. 214; 104 E. C. L. 214.

In *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28, it was held that where a party authorized to sell certain stocks, who violates his instructions, or in any manner abuses his authority to the injury of his principal, his wrongful acts in that regard will not constitute a conversion so as to support trover.

The action will not lie to recover stock which the plaintiff has placed in the defendant's hands to be used in his business. *Borland v. Stokes*, 120 Pa. St. 278.

4. In *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91, where a certificate of stock accidentally became mixed with some papers of the defendant, the certificate could avail the defendant nothing,

A corporation is liable if it refuses to register a transfer in the name of one entitled to the stock. And the same is true with respect to the assignee who sues the corporation for refusing the transfer or issue of a certificate of stock, it being immaterial that the assignment was not made on its books in pursuance of its charter and by-laws. The right of the assignee to sue becomes perfected when he makes his right known to the corporation, and requires the transfer to be entered upon its books.¹ But the corporation is not liable for a conversion upon a refusal to transfer stock pending a contest between several claimants therefor.² Where stock is put up as collateral security for a debt, trover may be maintained if, after payment, the pledgee fraudulently sells the stock.³ In general, if anyone standing in a fiduciary relation to another, violates any rule of law defining that relation, which has the effect of depriving the owner of his property, the latter may elect to treat that act as tortious, and sue in trover. Thus, if a bailee of stock vested with a power of sale, upon the

because, being in the name of the plaintiff, it could be transferred only by his indorsement. It was held that while there was a technical conversion of the certificate, there was no conversion of the stock itself. The measure of damages here was the inconvenience occasioned by the unlawful act of the defendant.

The above is to be compared with *Morton v. Preston*, 18 Mich. 60; 10 Am. Dec. 146, where the widow and heirs of a stockholder in a corporation, thinking to avoid the expense of administration, took his certificate of shares, indorsed their names upon it and then left it with one of their number to be sold for the benefit of all. This one, instead of selling it, pledged it for his own debt and the pledgee was recognized by the corporation as the owner of the stock, and disposed of it as owner. An administrator upon the original shareholder's estate having been appointed, he brought suit against the pledgee, and it was held that trover was maintainable, and that the damage sustained was the value of the stock.

1. *Rex v. Bank of England*, 2 Dougl. 526; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 624; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 80; *Gilbert v. Manchester Iron Co.*, 11 Wend. (N. Y.) 628; *Kortright v. Buffalo Com. Bank*, 20 Wend. (N. Y.) 91; *Edwards v. Sonoma Valley Bank*, 59 Cal. 136; *Bank*

of America v. McNeil, 10 Bush (Ky.) 54; *Baltimore, etc., R. Co. v. Sewell*, 35 Md. 253; *West Branch, etc., Canal Co.'s Appeal*, 81 Pa. St. 29; *North America, etc., Assoc. v. Sutton*, 35 Pa. St. 463; *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369.

In *McMurrach v. Bond Head Harbour Co.*, 9 U. C. Q. B. 333, where the president of the defendant corporation assigned certain shares of stock in the same to the plaintiff, and upon application to the secretary of the company to register the assignment, the latter refused the registry; it was held that the plaintiff could recover even though his assignor, as president of the company, might have perfected the transfer to himself.

2. *National Bank v. Lake Shore, etc., R. Co.*, 21 Ohio St. 221.

3. *Freeman v. Harwood*, 49 Me. 195; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Rep. 720; *Neiler v. Kelley*, 69 Pa. St. 403; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235.

Where the defendants, stock brokers, at the request of the plaintiff and for him, but in their own names and with their own funds, purchased certain stocks, he depositing with them a margin of ten per cent., which was to be kept good, they carrying the stocks for him, it was held that the legal relation created between the parties was necessarily that of pledgor and pledgee, the stock purchased being the property of the plaintiff, and the effect pledged to the defendants as security for the repayment of advances made by them in

noncompliance of a condition by his bailor, purchases at his own sale, either in person or through the agency of a broker, the bailor may waive his right to sue for breach of contract and sue for the conversion.¹ And where stock has been wrongfully converted by a trustee, the *cestui que trust* may either compel a redelivery of the stock, or claim the value at the time of the conversion.²

5. Severed Portions of the Realty.—The action of trover, as a rule, will not lie for fixtures, or property which is attached to, and forms a part of, the freehold,³ but if anything attached to the freehold is wrongfully detached therefrom by a trespasser, the property in the thing severed vests immediately in the person entitled to the

the purchase; and that a sale of such stock by them, except in judicial proceedings, or after a demand upon him for the repayment of such advances and commissions and a reasonable personal notice to him of their intention to make such sale in case of default in payment, specifying the time and place of sale, was a wrongful conversion by them of the property of the plaintiff. *Markham v. Jaudon*, 41 N. Y. 235. See also *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80.

Where A held stock of B's as collateral security for a debt due by B, sold it without authority and appropriated the proceeds to his own use, B then demanded the stock and offered to pay his debt, but did not tender any money; but A, without objecting that money was not tendered, refused the demand upon the pretense that he had a right to hold the stock in pledge for the debt of a third person; it was held that B might recover from A the market value of the stock on the day of the demand with interest, less the amount of his debt, without any further demand or tender. *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235. See also *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 234; *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110; 25 Am. Rep. 37; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277; 81 Am. Dec. 701. Under similar circumstances, in an action of trover for the collateral, it was held that the defendant might recoup the balance due him from the damages for the conversion. *Work v. Bennett*, 70 Pa. St. 484. See also *Narbring v. Bank of Mobile*, 58 Ala. 204.

1. In *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779, the plaintiff borrowed money from the defendant, depositing certain stock as collateral. The contract of loan pro-

vided that if the plaintiff should not repay the loan at a certain day, the defendant was authorized to sell the stock without further notice. The loan not being repaid on the day appointed, the defendant sold the collateral in the stock exchange and bought it in himself through the agency of a stock broker. It was held that the sale of the pledge by the defendant to himself was contrary to the faith of the bailment, forbidden by the common law and might have been treated by the bailor as a tortious conversion of the property. No such election being made by the plaintiff, there was no conversion, and the bailment continued.

In *Dean v. Turner*, 31 Md. 52, a bond was lent by the plaintiff to G., who borrowed it at the defendant's suggestion for the purpose of raising money to form a partnership with A. G. hypothecated the bond with the defendant as collateral security for an advance of \$1,000 made by the defendant, the latter agreeing to return the bond when the \$1,000 should be paid. The money was fully paid and the return of the bond demanded, but the defendant refused and sought to hold it as security for another debt due by A. before the formation of the partnership but assumed by the partners who repledged the bond. It was held that trover was maintainable against the defendant; that G. had no authority to repledge the bond for the antecedent indebtedness, of which fact the defendant was well aware.

2. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 117; *Atkins v. Gamble*, 42 Cal. 100. See also *Forrest v. Eleves*, 4 Ves. 797.

3. *Thweat v. Stamps*, 67 Ala. 96; *Overton v. Williston*, 31 Pa. St. 155; *Morrison v. Berry*, 42 Mich. 389; 36 Am. Rep. 446.

So where machinery, although ob-

possession of the land, who may waive the trespass and sue for the value of the property taken in an action of trover;¹ or when attached to the freehold, if the property still continues personal property, as when a house is built upon the lands of another upon an agreement that it may be removed at pleasure, and the owner

tained by fraud, is put in a mill and attached to the realty, the use of it is not a conversion for which trover would lie. *Woodruff Iron Works v. Adams*, 37 Conn. 233.

Salt pans furnished to a mill owner upon his agreement to pay rent therefor, and which by him and a manufacturer were attached to the mill and machinery, cannot be recovered in an action of trover. *Prescott v. Wells*, 3 Nev. 82.

Where a lathe attached to the plaintiffs' homestead is wrongfully levied on and sold, the plaintiffs are not restricted to an action for the recovery of the lathe itself, but could have abandoned their right to have it remain a part of the homestead. *House v. Phelan*, 83 Tex. 595.

Where ties were taken by a contractor in building a railroad, and the road was in use before being delivered to the company, an action of trover could not be maintained against the company for their conversion, as they had become realty. *Detroit, etc., R. Co. v. Busch*, 43 Mich. 571. Nor could the action be maintained against one who, without notice, had purchased real property, a part of which had been sold by his vendor as personalty, with a stipulation that the title should not pass until it was paid for, but which had been allowed to be made a part of the realty. It was so held where a man bought a mill without notice, that the water wheels were subject to such arrangement. *Knowlton v. Johnson*, 37 Mich. 47.

Stone laid in a permanent walk becomes a part of the realty, and cannot be recovered in an action of trover. *Jackson v. Walton*, 28 Vt. 43.

Fixtures which the tenant might have removed during his term, but which he has allowed to remain after its expiration, become a part of the freehold, and he cannot maintain trover for their recovery. *Darrah v. Baird*, 101 Pa. St. 273; *Powell v. Smith*, 2 Watts. (Pa.) 126.

1. *Martin v. Porter*, 5 M. & W. 352; *Morgan v. Powell*, 3 Q. B. 278; 43 E. C. L. 734; *Wood v. Morewood*, 3 Q. B. 440 n; 43 E. C. L. 810; *Hilton v. Woods*, L. R., 3 Eq. 432; *Llynvi Coal*

etc., Co. v. Brogden, L. R., 11 Eq. 188; *Jegon v. Vivian*, L. R., 6 Ch. 742; *Livingstone v. Rawyards Coal Co.*, L. R., 5 App. Cas. 25; *Bly v. U. S.*, 4 Dill. (U. S.) 464; *Sampson v. Hammond*, 4 Cal. 184; *Omaha, etc., R. Co. v. Tabor*, 13 Colo. 41; *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1; *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 661; *Moody v. Whitney*, 34 Me. 563; *Franklin Coal Co. v. McMillan*, 49 Md. 549; 33 Am. Rep. 280; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; *Nelson v. Burt*, 15 Mass. 204; *Winchester v. Craig*, 33 Mich. 205; *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426; *Pierrepoint v. Barnard*, 5 Barb. (N. Y.) 364; *Yates v. French*, 25 Wis. 661; *Noble v. Sylvester*, 42 Vt. 146; *Tobias v. Francis*, 3 Vt. 425; 23 Am. Rep. 217.

Landlord and Tenant.—A tenant who has the use and not the dominion of property demises; and, therefore, when he separates any part of it to convert it from a chattel real to a chattel personal, the property in the thing reverts to the owner of the fee, who has the right to the immediate possession of it. And if the tenant wrongfully uses or disposes of it, or commits any act tantamount to a conversion, he is liable in trover. Property attached to the freehold, such as mill machinery, and demised with the realty, for the purposes of this action, is the same as standing trees or other property attached by nature to the earth. *Farrant v. Thompson*, 5 B. & Ald. 826; 7 E. C. L. 272. See **LANDLORD AND TENANT**, vol. 12, p. 658; **FIXTURES**, vol. 8, p. 41.

In *New York*, it has been held that the right to bring trover for chattels severed from the freehold depends upon whether the severance and the conversion are two distinct acts. If they are, the plaintiff's only remedy is an action of trespass, or its equivalent under the code. In *American Union Tel. Co. v. Middleton*, 80 N. Y. 408, where the defendant had telegraph poles on the highway and carried them to the side fence on the road and there left them, it was held that the proper

of the land resists the removal of such building, or otherwise converts it to his own use, he will be liable in trover, either to the builder or his assignee.¹ Trover may be maintained to recover growing crops illegally converted,² trees and timber when severed,³

form of action was trespass *quare clausum fregit*, and that trover would not lie. Miller, J., said: "It is quite obvious that the cutting of the poles and the removal of them was one continuous and uninterrupted transaction, inseparably connected, which constituted a single cause of action which cannot be divided into two actions—one for the cutting and another for the conversion. The one was a part of the other, and the conversion so coupled with the cutting that they were the same and both of them are thus made local."

1. *Wansbrough v. Maton*, 4 Ad. & El. 884; 31 E. C. L. 217; *Fairburn v. Eastwood*, 6 M. & W. 679; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Smith v. Benson*, 1 Hill (N. Y.) 176; *Osgood v. Howard*, 6 Me. 452; 20 Am. Dec. 322; *Hillborne v. Brown*, 12 Me. 162.

Where one builds a house on the land of another with an express agreement that the builder preserves the ownership of the house, with the right to use, remove, or dispose of it, trover may be maintained for the conversion of the lumber used in the construction thereof. *Powers v. Harris*, 68 Ala. 409.

Where upon a parol agreement to purchase land, one goes thereon and puts up an unfinished dwelling, and the owner of the land refuses to deliver it to the purchaser, and by his acts shows an appropriation to his own use, he is liable in trover. *Pullen v. Bell*, 40 Me. 314.

Where A, having agreed to erect a brick building for B and to furnish all the material, wrongfully took bricks belonging to C without B's direction, and C, thereupon, notified B of the facts, and that he should look to him for payment if the bricks were used in building the house, and they were so used, and B paid A the sum specified in the agreement, it was held that B was liable to C for the conversion of the bricks. *Dawson v. Powell*, 9 Bush (Ky.) 663; 15 Am. Rep. 745.

An action will lie for a sawmill, built by one upon the land of another, by the consent of the latter. *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532.

2. *Farrant v. Thompson*, 5 B. & Ald.

826; 7 E. C. L. 272; *Jackson v. Evans*, 44 Mich. 510.

In *Davis v. Barnes*, 3 Mo. 101, the action of trover was maintained for the recovery of a crop of corn which the defendant had pulled and carried away for his own use. See also *Nelson v. Burt*, 15 Mass. 204.

In *Simpkins v. Rogers*, 15 Ill. 397, it was held that where crops are put upon lands without license or authority, trover may be maintained by the owner of the land for their recovery. But where the plaintiff has sown with the owner's consent, as where under an oral contract of purchase, the plaintiff enters and puts in his crop, but subsequently the defendant refused to perform and ejected him, he may maintain trover therefor. *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep. 318.

Where standing grass was cut by the servant of the defendant by mistake, upon the adjoining premises, and taken away by the defendant, trover could not be maintained against the servant for the conversion. *Donahue v. Shippee*, 15 R. I. 453.

A tenant may recover in an action of trover against his landlord who appropriates his crops. *Miller v. Havens*, 51 Mich. 482.

The action may be maintained against a purchaser of land who takes, with notice of the cropper's right. *Weldon v. Lytle*, 53 Mich. 1.

The mortgagee of a crop may maintain trover against the owner of the land who takes possession of the crop and converts it for rent. *Robinson v. Kruse*, 29 Ark. 575.

Trover cannot be maintained for crops destroyed by cattle straying upon the neighbor's premises. *Smith v. Archer*, 53 Ill. 241.

3. *Northern, etc., R. Co. v. Paine*, 119 U. S. 561; *Samson v. Hammond*, 4 Cal. 184; *Lyon v. Sellev*, 34 Hun (N. Y.) 124; *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364; *Whitman Gold, etc., Min. Co. v. Tittle*, 4 Nev. 494; *Thompson v. Moiles*, 46 Mich. 42; *Gates v. Rifle Boom Co.*, 70 Mich. 309; *Ayres v. Hubbard*, 71 Mich. 594; *Whitney v. Huntington*, 37 Minn. 197; *King v. Merri-man*, 38 Minn. 47; *Heard v. James*,

for coal,¹ or ore, mined and carried away,² for loads of earth taken from the plaintiff's lands,³ and for manure not incorporated with the soil.⁴

The impolicy of litigating in a personal action an issue essentially local, has led to an exception to the general rule stated in those cases where the defendant is in actual adverse possession of the land.⁵ The exception, however, only obtains where the

49 Miss. 236; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Footo v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644; *Ross v. Scott*, 15 Lea (Tenn.) 479; *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769; *Eldred v. Oconto County*, 33 Wis. 133; *Brewer v. Fleming*, 51 Pa. St. 102; *Riddle v. Driver*, 12 Ala. 590.

The mere cutting, without carrying the trees away, has been held conversion. *Sanderson v. Haverstick*, 8 Pa. St. 294.

Where one takes trees and saws them into boards and planks, the owner thereof may take the lumber or bring trover for the conversion. *Brown v. Sax*, 7 Cow. (N. Y.) 95.

A mortgagee can maintain an action for timber severed and sold. *Howe v. Wadsworth*, 59 N. H. 397; *Whedden v. Seelye*, 40 Me. 247; 63 Am. Dec. 661.

In *James v. Shlasar*, 3 Mo. 211, an action was maintained for the recovery of wood cut and corded on public lands which were afterward sold to the defendant.

Measure of Damages.—As to the measure of damages in actions for severed portions of the realty, see *infra*, this title, *Measure of Damages—Value as Affected by Act of Wrongdoer*.

1. *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *Wood v. Morewood*, 3 Q. B. 440; 43 E. C. L. 819.

2. *Northum v. Borden*, 32 Eng. L. & Eq. 559.

And for stone and gravel quarried and taken off. *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663.

3. *Riley v. Boston Water Co.*, 11 Cush. (Mass.) 11.

4. *Pinkham v. Gear*, 3 N. H. 484; *Strong v. Doyle*, 110 Mass. 92; *Stone v. Proctor*, 2 D. Chip. (Vt.) 116.

5. *Brown v. Caldwell*, 10 S. & R. (Pa.) 114; *Berry v. McMullen*, 17 S. & R. (Pa.) 85; *Coldwell v. Peden*, 3 Watts (Pa.) 327; *Grubb v. Guilford*, 4 Watts (Pa.) 241; *Wright v. Guier*, 9 Watts (Pa.) 174; 36 Am. Dec. 108; *Lewis v. Robinson*,

10 Watts (Pa.) 342; *Elliott v. Powell*, 10 Watts (Pa.) 453; 36 Am. Dec. 200; *King v. Richard*, 6 Whart. (Pa.) 424; 37 Am. Dec. 420; *Porter v. McGinnis*, 1 Pa. St. 413; *Stafford v. Ames*, 9 Pa. St. 343; *Heaton v. Findlay*, 12 Pa. St. 304; *Harlan v. Harlan*, 15 Pa. St. 513; 53 Am. Dec. 612; *Hannen v. Ewalt*, 18 Pa. St. 9; *Baker v. King*, 18 Pa. St. 138; *Clark v. Smith*, 25 Pa. St. 137; *Hole v. Rittenhouse*, 25 Pa. St. 491; *Cromelieu v. Brink*, 29 Pa. St. 526; *Forsyth v. Wells*, 41 Pa. St. 294; 80 Am. Dec. 617; *Kier v. Peterson*, 41 Pa. St. 363; *Brewer v. Fleming*, 51 Pa. St. 102; *Green v. Ashand Iron Co.*, 62 Pa. St. 97; *National Transit Co. v. Weston*, 121 Pa. St. 485; *Lehigh Zinc etc., Co. v. New Jersey Zinc etc., Co.* (N. J. 1893), 26 Atl. Rep. 920; *Lehman v. Kellerman*, 65 Pa. St. 489; *Baker v. Howell*, 6 S. & R. (Pa.) 478.

In *Wright v. Guier*, 9 Watts (Pa.) 172; 36 Am. Dec. 108, *Gibson, C. J.*, said: "The true reason why trover or replevin lies not against an actual occupant is not any supposed locality of the question, but the impolicy of suffering him to be harassed with his separate action for each bushel of wheat consumed or stick of firewood burnt on the premises instead of having the matter settled at once by an action to recover the possession."

In *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663, the plaintiffs had for ninety years been in possession of land, a portion of which had not been inclosed, but nevertheless was occupied. Near the boundary line of the land claimed by the plaintiffs was a stone quarry, out of which the defendant dug and carried away the stone and gravel which were the subject of this action of trover. Both the plaintiffs and the defendant claimed to have been in possession of this quarry. The judge charged the jury that, although they should be of opinion that the defendant had the exclusive and adverse possession of the land from which the stones were taken, for any time less than twenty-one years, yet the plaintiff

defendant has the actual occupation, "not a bare solitary trespass, but an actual, visible, notorious, hostile occupation."¹ A mere temporary holding for the purpose of excluding a trespasser, by nature having no right of possession, is not sufficient to defeat the constructive possession which the law casts upon an owner not an actual occupant.²

V. WHO LIABLE IN TROVER—1. In General.—As everyone who interferes with another man's right to the possession of his goods is guilty of a conversion, and as no man can, as a general rule, give to another a better title than he possesses himself, a series of persons may each be guilty of successive acts of conversion of the

might recover in the action of trover, which was held to be error. Tilghman, C. J., said: "This is not the proper form of action to try the title to land, nor have I been able to find any case where it has been sustained for that purpose, although there are many cases where it has been brought for the conversion of wood and coal, when the right of the freehold was not claimed by the defendants. The inconvenience of trover to try the title to land would be great; for being a transitory action, the trial might be transferred to a distant county or even to a distant state, if the defendant should happen to be found there. Neither is the action maintainable when the possession of the land was held adversely to the plaintiff."

The leading case of *Player v. Roberts*, 1 Jones 243 (cited in Viner's Abr. 237, pl. 7), is thus explained by Tilghman, C. J., in *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663: "A, the lord of a manor, leased to B all the coal and coal mines open or to be found in the manor. C was a copyholder of parcel of the manor for term of his life. A entered on the copyhold during C's life and dug coal, which he converted to his own use. B recovered against him in trover, although neither A nor B could enter into the copyhold without being trespassers. But it must be remarked that the title and possession of the copyholder were not adverse to B, because he claimed no right to the coal; so that, although B could not have entered to dig that coal, yet being dug, A did him wrong in converting it to his own use, because A had leased to him all the coal in the manor. There was no contest about the title to the lands, but only about the coal. The title was confessed by both A and B to be in C, so that as between A and B it was proper to consider the possession of the coal as in B."

The *Pennsylvania* Act of May 16th, 1871 (P. L. 268), altered the existing law in so far as it applied to the action of replevin, but in *National Transit Co. v. Weston*, 121 Pa. St. 485, the action of trover was decided to have been unaffected by this legislation. *Renick v. Boyd*, 99 Pa. St. 557; 44 Am. Rep. 124.

1. *Duncan, J.*, in *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; 8 Am. Dec. 663.

A wrong possession from one part of the tract to another, or entries into it to take timber for a sawmill, or wood for an iron-works, is not such an adverse possession as will exempt the defendant from this form of action. *Potts v. Gilbert*, 3 W. N. C. (Pa.) 475; *Sorber v. Willing*, 10 Watts (Pa.) 141; *Adams v. Robinson*, 6 Pa. St. 271; *Hole v. Rittenhouse*, 25 Pa. St. 491.

In *Yates v. French*, 25 Wis. 661, to an action of trover for cutting down and converting three million feet of lumber, the property of the plaintiff, the defendants were justified under a license given them by the plaintiff, in compensation for a trespass committed by the latter upon their land. It was held that since the license was revocable, and hence created no interest in the land, the justification of the defendant raised no question of title to real estate so as to defeat the action on the ground that it was local.

2. The mere temporary occupancy for the purpose of taking off timber by one having no right of possession, is not such an actual possession as defeats the constructive possession which the law casts upon the owner. *Brewer v. Fleming*, 314 Pa. St. 102.

An action of trover will lie by the owner of the legal title to land to recover the value of wood cut upon it by a trespasser; and he who purchased the land at a sheriff's sale as the property of one who had trespassed upon it by cutting timber, and in pursuance of his

same goods, and each therefore be liable to an action of trover by the owner, although there can be but one recovery; the choice of defendants lies with the owner, and his election cannot be hampered by considerations of moral guilt or innocence of any tortfeasor.¹ The fact that an action could be maintained against a carrier who wrongfully delivered goods is no defense to an action against the person to whom they were delivered.² A corporation is responsible in its corporate capacity for a conversion committed by one of its officers or agents, but the injured party may proceed against the agent or officer individually.³

He who intermeddles with personal property not his own must see to it that he is protected by the authority of ownership, or otherwise clothed with the authority he attempts to assert.⁴ So one who assists a wrongdoer, even though he acts as agent, in the execution of his act, is liable regardless of his ignorance of the rights of the owner or his participation in the profits of the illegal enterprise.⁵ But trover will not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful.⁶

purchase continued to cut timber also, at the same time owning and occupying adjoining lands, included in the same deed from the sheriff, has not such a colorable title or possession as will protect him from this form of action. *Wright v. Guier*, 9 Watts (Pa.) 172; 36 Am. Dec. 108.

1. *Wilbraham v. Snow*, 2 Saund. 471; *Cooper v. Willomatt*, 1 C. B. 672; 50 E. C. L. 670; *McCombie v. Davies*, 6 East 540; *Packer v. Gillies*, 2 Camp. 336; *Matthews v. Menedger*, 2 McLean (U. S.) 145; *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459.

Possession in the defendant is not necessary to support the action. *Hall v. Amos*, 5 T. B. Mon. (Ky.) 89; 17 Am. Dec. 42.

2. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

3. *McDonald v. Kinnon*, 92 Mich. 254; 52 N. W. Rep. 303; *In Campau v. Bemis*, 35 Ill. App. 37, it was held that where the president of a corporation instructed the manager to decline to deliver the plaintiff's goods, claiming title in the company, there was sufficient evidence of a conversion.

4. *Spraghts v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452.

The defendant who comes into possession of goods which have been wrongfully taken, is deemed a wrongdoer as much as the original tortious taker, unless he can establish his pos-

session in good faith and for a lawful purpose. *Tallman v. Turck*, 26 Barb. (N. Y.) 167; *Garrard v. Pittsburgh*, etc., R. Co., 29 Pa. St. 154.

5. *Stephens v. Elwall*, 4 M. & S. 259; *Perkins v. Inalte*, 1 Wils. 328; *McPartland v. Read*, 11 Allen (Mass.) 231; *Edgerly v. Whalan*, 106 Mass. 307; *Huffman v. Parsons*, 21 Kan. 467; *Singer Mfg. Co. v. King*, 14 R. I. 511; *Mead v. Jack*, 12 Daly (N. Y.) 65; *Boyce v. Brockway*, 31 N. Y. 490; *Cobb v. Davies*, 9 Barb. (N. Y.) 242; *r'v's'd*. 10 N. Y. 335; *March v. McKoy*, 56 Cal. 85; *Sever v. McLaughlin*, 79 N. Car. 153; *Alexander v. Swackhamer*, 105 Ind. 81; 53 Am. Rep. 180; *Dahl v. Fuller*, 50 Wis. 501; *Camody v. Portlock* (Ala. 1893), 12 So. Rep. 871.

In *Hollins v. Fowler*, L. R., 7 H. L. 757, X procured cotton from A by fraud. X sold it to Y, a cotton broker, who had no knowledge of the wrongful act. Y bought the goods believing his customer, M, would purchase, though M had not in fact ordered any cotton from Y, nor intimated that he would purchase any. The cotton was subsequently converted into yarn and cloth at M's factory. In an action by A against Y, it was held that Y was liable for a conversion and that X, M, and the cotton pickers and spinners at the mill who assisted in the act were likewise liable.

6. *Powell v. Hoyland*, 6 Exch. 67.

One who purchases property from a wrongdoer,¹ or from one

A servant of a purchaser at an illegal sale who merely carries goods from one shop to another, without knowledge of the owner's claim upon the property, is not liable in an action of trover. *Burdilt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289.

The removal and retention of the personal property of a stranger, by an officer acting by the direction of a third person, is a conversion by both. *Calkins v. Lockwood*, 17 Conn. 154; 42 Am. Dec. 729.

An officer of a town who removes a quantity of fencing from the land of its owner, supposing it to belong to the town, is liable in trover for its value. *Smith v. Colby*, 67 Me. 169.

Judgment Creditor.—So one who causes execution on an invalid judgment to be issued and levied, is liable in an action by the owner of the property so seized. *Marks v. Wright*, 81 Wis. 572; *Libby v. Soule*, 13 Me. 310.

If a sheriff at the instance of a creditor unlawfully seizes goods, he and such creditor are joint tort-feasors; but if the sheriff with the creditor's consent tenders back the goods, and the latter afterwards illegally holds them, he alone is responsible. *Gilbert v. Peck*, 43 Mo. App. 577; *Phelps v. Delmore*, 23 N. Y. Supp. 229; 69 Hun (N. Y.) 18.

1. 2 Kent's Com. (6th ed.) 324; *Hollins v. Fowler*, L. R., 7 H. L. 757; *Hardman v. Booth*, 1 H. & C. 803; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599; 86 E. C. L. 597; *Everett v. Coffin*, 6 Wend. (N. Y.) 602; *Miller v. Thompson*, 60 Me. 322; *Levi v. Booth*, 58 Md. 305; 42 Am. Rep. 332; *Robinson v. Skipworth*, 23 Ind. 311; *Field v. Stearns*, 42 Vt. 106; *Poor v. Woodburn*, 25 Vt. 234; *Fitzsimmons v. Joslyn*, 21 Vt. 129; 52 Am. Dec. 46; *McCrillis v. Allen*, 57 Vt. 505; *Dame v. Baldwin*, 8 Mass. 518; *Hecckle v. Lurvey*, 101 Mass. 344; 3 Am. Rep. 366.

In *McCombie v. Davies*, 6 East 540, Lord Ellenborough said: "According to Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self, the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it."

One who innocently buys the goods of a thief is liable for conversion if he mixes the goods with his own, so that they cannot be identified, and sells them. *Shearer v. Evans*, 89 Ind. 400.

When A bought a stolen horse at public auction and after keeping him for several months sold him in good faith, without any notice of the plaintiff's claim, he was responsible for its value. *Robinson v. Skipworth*, 23 Ind. 311.

It is a conversion to buy fruit stolen from a plaintiff's land. *Freeman v. Underwood*, 66 Me. 229.

The action may be maintained against the purchasers from a thief without a prosecution or conviction of the wrongdoer. *Newkirk v. Dalton*, 17 Ill. 413, and by a bailor against one who purchases from his bailee. *Roland v. Gundy*, 5 Ohio 202.

Where A, having *bona fide* purchased a stolen horse at public auction, sent it for sale to a repository for horses kept by B, and the owner of the horse found it there and upon the demand of it of B, in the presence of A, B refused to deliver it, it was held that there was a joint conversion. *Lee v. Bayes*, 18 C. B. 599; 86 E. C. L. 597.

Auctioneer.—In *Hoffman v. Carow*, 22 Wend. (N. Y.) 285, it was held that an auctioneer who, although in the regular course of business, receives and sells stolen goods, is liable to the true owner as for conversion. But this was denied in *Rogers v. Hine*, 2 Cal. 571; 56 Am. Dec. 363.

Where a mortgagor, by false and fraudulent representations, prevailed upon the mortgagee to allow the mortgaged goods to remain in his possession, and for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the auctioneer did not participate in the fraud and had no knowledge of the fact of the mortgage. *Coles v. Clark*, 3 Cush. (Mass.) 399.

Where the owner of a horse lent him to a person, who subsequently exchanged him with the defendant for another horse, and the defendant afterwards loaned him to another person, it was held that the defendant was

who has no power to sell,¹ and disposes of it, or otherwise shows an intent to appropriate it to his own use, although in good faith, may be liable in trover. A purchaser of personal property on which there is a valid lien recorded, is liable in an action of trover if he sells it.² The general rule, however, is not applicable to one who seizes bank bills or other negotiable instruments transferable merely by delivery.³ And a mere naked bailee of stolen goods, although with knowledge that they are stolen, who does no act and has no intent to appropriate the property to his own use, but delivers it up before any demand to the person from whom he received it, is not liable in trover.⁴

2. Carriers and Warehousemen. — Carriers and warehousemen must deliver property at their peril, for if the delivery be to the wrong person, either by an innocent mistake, or through fraud of a third person, as upon a forged order, the wrongful delivery may be treated as a conversion.⁵

liable in an action therefor, and that no demand of the owner was necessary before commencing the action. *Gilmore v. Newton*, 9 Allen (Mass.) 171; 95 Am. Rep. 749.

1. *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Abbott v. May*, 50 Ala. 97; *Parish v. Morey*, 40 Mich. 417; *Moody v. Blake*, 117 Mass. 23; *Hamet v. Letcher*, 37 Ohio St. 357; *Terry v. Bamberger*, 44 Conn. 558; *Peters v. Ballister*, 3 Pick. (Mass.) 495.

If a principal ratifies the unauthorized purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although he had no knowledge of the circumstances which made the sale unlawful. *Hilbery v. Halton*, 2 H. & C. 822; 33 L. J. Exch. 190; *Fowler v. Hollins*, L. R., 7 Q. B. 616.

2. *Church v. McLeod*, 58 Vt. 541.

3. *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491. In this case the action was brought to recover interest coupons against a person who had received them as an agent for exchange, and transferred them by delivery before any demand or notice from the plaintiff.

4. *Loring v. Mulcahy*, 3 Allen (Mass.) 575.

5. The liability of carriers and warehousemen is treated elsewhere in this work. See CARRIERS, vol. 2, p. 884 *et seq.*; BAILMENTS, vol. 2, p. 58 *et seq.*

In addition to the cases in these references, the following may be cited: *Quay v. McMinch*, 2 Neil C. R. 78; *Chandler v. Partin*, 2 Neil C. R. 72; *Hartop v. Hoare*, 2 Str. 1187; *Crouch*

v. Great Northern R. Co., 11 Exch. 756; *Stephenson v. Hart*, 4 Bing. 476; 15 E. C. L. 47; *Lubbock v. Inglis*, 1 Stark. 104; *Mills v. Ball*, 2 Bos. & P. 457; *Youl v. Harbottle*, Peake 49; *Boyce v. Brockway*, 31 N. Y. 490; *Guillaume v. Hamburgh*, etc., Packet Co., 42 N. Y. 212; *Viner v. New York*, etc., S. S. Co., 50 N. Y. 23; *Esmay v. Fanning*, 9 Barb. (N. Y.) 176; *Willard v. Bridge*, 4 Barb. (N. Y.) 361; *Nauuman v. Caldwell*, 2 Sweeney (N. Y.) 212; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39; 8 Am. Dec. 211; *Everett v. Coffin*, 6 Wend. (N. Y.) 603; 22 Am. Dec. 551; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Compton v. Shaw*, 3 Thomp. & C. (N. Y.) 761; *Bush v. Romer*, 2 Thomp. & C. (N. Y.) 597; *Claffin v. Boston*, etc., R. Co., 7 Allen (Mass.) 341; *Gilmore v. Newton*, 9 Allen (Mass.) 171; 95 Am. Rep. 749; *Stanley v. Gaylord*, 1 Cush. (Mass.) 546; 48 Am. Dec. 643; *Erie Dispatch v. Johnson*, 87 Tenn. 490; *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Lovejoy v. Jones*, 30 N. H. 164; *Cooper v. Newman*, 45 N. H. 339; *Cheshire R. Co. v. Foster*, 51 N. H. 491; *Smith v. Bell*, 9 Mo. 873; *Dufour v. Mephram*, 31 Mo. 577; *Pratt v. Bryant*, 20 Vt. 333; *Baltimore*, etc., R. Co. v. *O'Donnell*, 49 Ohio St. 489; *Arnold v. Kelly*, 4 W. Va. 646; *Louisville*, etc., R. Co. v. *Lawson*, 88 Ky. 496; *Illinois*, etc., R. Co. v. *Parks*, 54 Ill. 294; *Graves v. Smith*, 14 Wis. 5; 80 Am. Dec. 762; *Alabama*, etc., R. Co. v. *Kidd*, 35 Ala. 209; *Bullard v. Young*, 3 Stew. (Ala.) 46; *Adams v. Blanken-*

3. Agents.—The general rule is that if an agent sells or otherwise disposes of the property of his principal in a particular way, or for a particular purpose, not authorized, he is liable in trover.¹

stein, 2 Cal. 413; 56 Am. Dec. 350; *Hanna v. Flint*, 14 Cal. 73; *Rosenfield v. Express Co.*, 1 Woods (U. S.) 136.

Warehousemen.—See *McBee v. Ceasar*, 15 Oregon 62; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124; 35 Am. Rep. 137; *Erwin v. Clark*, 13 Mich. 10; *Briggs v. Haycock*, 63 Cal. 343; *Glyn Mills, etc., Co. v. East & West India Dock Co.*, L. R., 7 App. Cas. 591.

Where wheat has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, in the mill, the owner of the wheat may maintain an action of trover, and is entitled to the amount of flour which his wheat would produce. *First Nat. Bank v. Scott*, 36 Neb. 607.

A warehouseman who receives tobacco and sells the same on commission without notice of a claim thereof adverse to that of the consignor, cannot be held liable for a conversion. *Abernathy v. Wheeler*, 92 Ky. 320.

1. *Lavery v. Snethen*, 68 N. Y. 526; *Lindley v. Downing*, 2 Ind. 418; *Marrion v. Yeager*, 2 B. Mon. (Ky.) 339; *Etter v. Bailey*, 8 Pa. St. 442; *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118. See also *Grant v. King*, 14 Vt. 367; *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Melody v. Chandler*, 12 Me. 282.

In *McMorris v. Simpson*, 21 Wend. (N. Y.) 610, *Bronson, J.*, said, the general rule that the action of trover "may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion will be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor."

In *Lavery v. Snethen*, 68 N. Y. 525, *Church, C. J.*, said: "The result of the authorities is that if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion." In this case the plaintiff indorsed and delivered a note to the defendant for negotiation, with

the instruction that the defendant was not to let the note get out of his reach without receiving the money. The defendant delivered the note to F., under a promise by the latter that he would get it discounted and return the proceeds. Where F. took the note, got the proceeds and appropriated them, it was held that, "The act of the defendant in permitting the note to get out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property."

In *Syeds v. Hay*, 4 T. R. 260, where the owner of goods on a vessel moored at a certain wharf, directed the captain not to land them on that wharf, but he did so, supposing the wharfinger had a lien upon them for wharfage, it was held that the captain was liable in trover. See also *Barton v. White*, 1 Har. & J. (Md.) 579; *Coleman v. Pearce*, 26 Minn. 123.

An agent to whom goods are intrusted to be sold upon commission, who afterward claims to have bought them from the principal, and upon that ground refuses to give the principal any account of what he has done, or to return the goods, will be treated as having converted them. *Solomon v. Waas*, 2 Hilt. (N. Y.) 179.

In *Spencer v. Blackman*, 9 Wend. (N. Y.) 167, where a watch was delivered to the defendant to have its value appraised by a watchmaker, and he put it into the possession of a watchmaker, and it was levied upon by virtue of an execution issued against the owner, the act of the defendant was held to be a conversion.

Where a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, his failure to sell or ship on that day, selling it on the day following at the price named, was held to be a conversion. *Scott v. Rogers*, 31 N. Y. 676.

When a wife gave a note to an attorney with instructions to pay it over to her husband when he should obtain a divorce, but the attorney indorsed it over to a bank which collected it from the maker, it was held that he was liable as for the conversion. *Eadger v. Hatch*, 71 Me. 562.

If empowered to sell goods, the agent pledges them,¹ or makes an exchange of the property,² the action may be maintained against him. An agent to whom money is intrusted to be loaned or invested in the name of his principal, is liable for a conversion if he invests it in his own name,³ or makes an investment not authorized.⁴

But if the agent sells in accordance with his authority, although under the fixed price;⁵ fails to take sufficient security therefor;⁶ or misapplies the proceeds of the sale, the action of trover cannot be maintained against him.⁷

1. *Nichols v. Gage*, 10 Oregon 82.

2. *Ainsworth v. Partillo*, 13 Ala. 460; *Haas v. Damon*, 9 Iowa 589.

3. *Farrand v. Hurlburt*, 7 Minn. 477.

In *Comley v. Dazian*, 114 N. Y. 166, plaintiffs executed a bill of sale to F. of certain property which remained in the possession of the plaintiffs. F., at the plaintiffs' direction, transferred the bill of sale to the defendant, under an arrangement by which the defendant should take possession of the goods, and, with the consent and approval of the plaintiffs and not otherwise, sell them and distribute the proceeds to plaintiffs' creditors. Where the defendant sold the goods without such consent, it was held to be a conversion.

In *Galbreath v. Epperson* (Tenn. 1886), 1 S. W. Rep. 157, where cotton was shipped to brokers in Memphis to be held by them for sale on an advance in the price, the shipment of the cotton to a foreign port without the knowledge of the consignor, was held to be a conversion, although the defendants accounted for the cotton as sold in Memphis at the market price there.

4. So where money was placed in the hands of the defendant to invest in good real-estate security, but he retained the money in his possession and caused his wife to assign to the plaintiff a bond not representing an investment of money, but obtained as a part of the consideration expressed in a real estate trade by her, and secured by mortgage on property already fully incumbered, the agent was held liable for its conversion. *King v. Mackellar*, 109 N. Y. 215. See also *Whitney v. Martine*, 88 N. Y. 535.

5. *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Cairnes v. Bleeker*, 12 Johns. (N. Y.) 300; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610.

There is no conversion in such a case, as the purchaser acquires a good title; the agent having full authority

to convert it. *Moore v. McKibbin*, 33 Barb. (N. Y.) 247; *Dufresme v. Hutchinson*, 3 Taunt. 117.

In *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74, an agent who, under authority to sell, sold a watch deposited with him, for three hundred dollars, when told not to sell for less than five hundred dollars, was held to be guilty of a breach of trust, not conversion. In this case, *Spencer, J.*, said: "If every departure from instruction is to expose a party to an action of trover, I should consider it as introducing a new rule which might operate injuriously. There is no need of this refinement. An action on the case is well calculated to redress an injury arising from a breach of instructions. In this case the defendant was authorized to sell the chronometer for a particular price. The complaint is not that he sold it, but that he sold it for a less sum, and thus violated his orders. The selling was not a conversion, but selling for a less price was a breach of duty."

6. In *Cairnes v. Bleeker*, 12 Johns. (N. Y.) 300, where an agent authorized to deliver goods to a third person on receiving sufficient security for the amount, took security which was inadequate, it was held that trover did not lie against the agent, but that the proper remedy was an action on the case.

7. *Greentree v. Rosenstock*, 61 N. Y. 583; *Laverty v. Snethen*, 68 N. Y. 522.

In *Palmer v. Jarman*, 2 M. & W. 282, it was held that one authorized by the holder of a bill of exchange to get it discounted and to apply the proceeds in a particular way, does get it discounted, but misapplies part of the proceeds, cannot be sued in trover, but must be sued for money had and received. See also *Stierneland v. Holden*, 4 B. & C. 5.

Where an agent receives in his name a negotiable note due his principal, he

And, in general, it may be said that the agent will not be liable as for a conversion so long as he acts within the scope of his authority.¹

4. Pledges.—Action for breach of promise or pledge is not the only remedy of the parties to the contract, but whenever there has been a disregard of the property rights of one party by the other, the more efficacious remedy is the action of trover. Upon the performance of the engagement for which the security is given, the lien of the pledgee is at an end, and upon a refusal to return the property, or his wrongful disposition thereof, the action of trover lies.²

5. Mortgages.—A mortgage of personal property passes the whole legal title to the mortgagee conditionally, and upon failure to perform the condition within a stipulated period, the sale or disposition of the property by the mortgagee, subject to the right of redemption, is not a conversion;³ but if he transfer or

cannot be charged in trover for its conversion. *Floyd v. Day*, 3 Mass. 405; 3 Am. Dec. 171. But see *City Council v. Duncan*, 1 Treadw. Const. (S. Car.) 436.

1. *McMorris v. Simpson*, 21 Wend. (N. Y.) 614; *Dickinson v. Dudley*, 17 Hun (N. Y.) 569.

2. See *BAILEMENT*, vol. 2, p. 59; *PLEDGE*, vol. 18, pp. 707-728 *et seq.*, where the liability of the pledgee is fully treated.

3. *Blain v. Foster*, 33 Ill. App. 297; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Burdick v. McVanner*, 2 Den. (N. Y.) 170; *Heyland v. Badger*, 35 Cal. 404; *Wilson v. Brannan*, 27 Cal. 258; *Goodrich v. Willard*, 2 Gray (Mass.) 203. See also *Smith v. Acker*, 23 Wend. (N. Y.) 667; *Case v. Boughton*, 11 Wend. (N. Y.) 107; *Patchin v. Pierce*, 12 Wend. (N. Y.) 62; *Langdon v. Buel*, 9 Wend. (N. Y.) 83; *Dewey v. Bowman*, 8 Cal. 145; *Butler v. Miller*, 1 N. Y. 500; *Leach v. Kimball*, 34 N. H. 568.

In *Holmes v. Bell*, 3 Cush. (Mass.) 322, where personal property mortgaged to secure the payment of a note in six months was immediately delivered to the mortgagee, by whom it was sold on the expiration of sixty days for the breach of condition, it was held that the mortgagor could not maintain trover therefor against the mortgagee by proving that the note was given to indemnify the latter against the liability incurred by him for the mortgagor, which had terminated without damage to the mortgagee, and that the property had been demanded of him

before the commencement of action. In this case the court said, "If the property had been pledged, the action might have been maintained if the defendants had never been damnified, for in that case they would have no right to sell the property, and such sale would have been wrongful and would have been a conversion for which trover would lie, the pledgee's special property having been terminated by their wrongful act and the general property always having remained in the plaintiff. But the law is otherwise in the case of a mortgage. By such a conveyance, the whole legal title passes to the mortgagee conditionally; and in the present case the condition had not been performed at the time of the sale; and at that time the legal title of the property was in the defendant and the plaintiff had no right to the possession. By the sale the legal title was vested in the purchaser, and the subsequent demands on the defendant were of no avail."

In *Wood v. Dudley*, 8 Vt. 435, the difference between a mortgage and pledge is thus stated: "The difference between a mortgage and a pledge is important; the effects of each are widely different. In a mortgage of a personal chattel the general property passed to the mortgagee subject to be redeemed according to the terms of contract; if not redeemed within the time limit, the property becomes absolute in the mortgagee. The consequence is that the mortgagee may sell or dispose of the chattel immediately, but in case of a pledge the general

sell after the condition is fully performed, or tender of payment is duly made;¹ or if he sell or transfer the entire property before default, the mortgagor may maintain an action in trover against him for the conversion,² although it has been held that it makes no difference whether the sale is made before or after default, if the mortgagor does not make tender or payment before the lapse of the time allowed for redemption.³ And it is held, that if a sale is made of part of the mortgaged property, a sufficient amount to pay the debt, the mortgagee becomes bailee of the remainder, and if he deny the mortgagor's title, and assert absolute title thereto in himself, he is liable to an action of trover.⁴ If the mortgagee takes possession before default of the mortgaged property which, by the terms of the mortgage, the mortgagor has a right to retain until default, he is liable in an action of trover by the mortgagor.⁵

6. Fraudulent Vendees.—A sale effected by fraud does not make a change of property, but the true owner may maintain trover against a fraudulent vendee who, as such, has tortiously acquired possession;⁶ so, where a vendee purchases goods on credit by

property does not pass, but remains in the pawnor, the pawnee having only the subject property or lien."

In *Burdick v. McVanner*, 2 Den. (N. Y.) 171, in which the mortgagor, after the day for the performance of the condition had passed, tendered the amount due and demanded the mortgaged property, which the defendant refused to deliver, and thereupon the mortgagee sued for the conversion, the action was held not maintainable. The court said: "At law he had no title whatever against the defendant, and could only redeem in equity, a right which in this case, owing to the small value of the property, could not be enforced in chancery. But this circumstance cannot change the construction of a mortgage, nor give to the plaintiff a right or a remedy which he would not have if the property was of greater value."

But where a party who held a mortgage of chattels took possession of them on a claim that he was the absolute owner, by virtue of the sale by the mortgagor, and converted them to his own use, and denied upon the stand at the trial that he held or claimed them by virtue of the mortgage, he was liable in trover, notwithstanding the mortgage. *Clark v. Rideout*, 39 N. H. 238.

A second mortgagee of a chattel cannot maintain an action for the conversion thereof against a purchaser of the first mortgagee who, having a right to

the possession, has sold the property. *Landon v. Emmons*, 97 Mass. 37.

1. *Rodney, etc., Mach. Co. v. Stewart*, 11 N. Y. Supp. 448; 57 Hun (N. Y.) 545; *Rice v. Kahn*, 70 Wis. 323.

2. *Eslow v. Mitchell*, 26 Mich. 500; *Spaulding v. Barnes*, 4 Gray (Mass.) 330; *Harder v. Hasp*, 69 Wis. 288; *Gravel v. Clough*, 81 Iowa 272.

An unqualified sale by the mortgageor, not merely of his interest in the equity of redemption, but of the entire property, is a wrongful conversion for which trover will lie. *Ashmead v. Kellogg*, 23 Conn. 70.

3. *Brown v. Bement*, 8 Johns. (N. Y.) 96.

4. *Iler v. Baker*, 82 Mich. 226.

If, upon default in payment of an installment of a debt, secured by chattel mortgage, the mortgagee takes possession of all the mortgaged property and sells it to a third person, the mortgagor is entitled to recover the value of the property sold after the first installment has been paid, together with special damages, if any are shown. *Brink v. Freoff*, 44 Mich. 69; *Brink v. Freoff*, 40 Mich. 610.

5. *Jackson v. Hall*, 84 N. Car. 489; *Ford v. Ransom*, 39 How. Pr. (N. Y.) 429; *Pierce v. Hasbrouck*, 49 Ill. 23; *Niven v. Burke*, 82 Ind. 455.

6. See *FRAUDULENT SALES*, vol. 8, p. 786; *Bristol v. Willsmore*, 1 D. & C. 514; 8 E. C. L. 218; *Read v. Hutchinson*, 3 Camp. 352; *Wilkin's Case*, 1

means of false representations and with a preconceived design not to pay for them, the vendor may treat the sale as void and bring an action of trover for the recovery of his property;¹ any exception to this rule is founded upon the fact that there has been some fault in the vendee, or that the property has passed to a *bona fide* purchaser.² But an exception does not maintain where the fraudulent vendee has wrongfully obtained possession of the goods from the defrauded vendor.³ And as against any sub-

Leach 522; Ladd v. Moore, 3 Sandf. (N. Y.) 589; Cary v. Hotailing, 1 Hill (N. Y.) 311; 37 Am. Dec. 323; Hitchcock v. Covil, 20 Wend. (N. Y.) 167; Buffington v. Gerrish, 15 Mass. 166; 8 Am. Dec. 97; Dow v. Sanborn, 3 Allen (Mass.) 181; Root v. French, 13 Wend. (N. Y.) 570; 28 Am. Dec. 482; Farwell v. Hanchett, 120 Ill. 573.

In Ferguson v. Carrington, 9 B. & C. 52; 17 E. C. L. 330, where the defendant purchased goods on credit, fraudulently intending not to pay for them, it was held that while *assumpsit* would not lie for the goods sold before the time for credit expired, yet the plaintiff might treat the contract as void and maintain trover. See also Noble v. Adams, 7 Taunt. 59, per Lord Ellenborough.

In Ayres v. French, 41 Conn. 153, the action of trover was maintained to recover shares of bank stock which it was alleged the plaintiff was induced to part with, inconsideration of a promise which the defendant had no intention of fulfilling.

In Thurston v. Blanchard, 22 Pick. (Mass.) 18; 33 Am. Dec. 700; it was held that where goods were obtained by fraudulent representations upon the sale, demand and refusal to deliver are not necessary to maintain the action. Shaw, C. J., said: "Where goods have been tortiously obtained, that fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title pass to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods." And in Farwell v. Hanchett, 120 Ill. 573, Sheldon, J., said: "It is quite well settled, that when goods have been obtained by fraud by a vendee, or otherwise unlawfully obtained, the vendor, or true owner, may, without previous demand, maintain trover or replevin

for the goods, against any person not holding them as an innocent purchaser for value. . . . The fraudulent vendee is not considered a purchaser of the goods, but as a person who has tortiously gotten possession of them." See also Butters v. Haughwout, 42 Ill. 18; 89 Am. Dec. 401; Hardy v. Keeler, 56 Ill. 152; Moriarty v. Stofseran, 89 Ill. 528.

Measure of Damages.—Where the defendant obtained possession by purchase of the plaintiff when the latter was, by reason of intoxication, unable to make a contract, the measure of damages was held to be the difference between the value of the property delivered and the consideration received. Baird v. Howard (Ohio, 1894), 36 N. E. Rep. 732.

1. Killer v. Wilson, R. & M. 178; *Ex p.* Whittaker, L. R., 10 Ch. App. 446; Taylor v. Mississippi Mills, 47 Ark. 247.

2. See FRAUDULENT SALES, vol. 8, p. 833. See also Thompson v. Rose, 16 Conn. 71; 41 Am. Dec. 121; Williamson v. Russell, 39 Conn. 406; Thompson v. Lee, 3 W. & S. (Pa.) 479.

A contract for the sale of goods obtained by fraud on the part of the purchaser, is void only at the election of the vendor; and it is too late to declare such election after the goods have passed into the hands of a *bona fide* purchaser. White v. Garden, 10 C. B. 919; 70 E. C. L. 918. See also to same effect, Parker v. Patrick, 5 T. R. 175; Wright v. Lawes, 4 Esp. 82.

Attaching Creditor.—But an attaching creditor who has not parted with his property upon the faith of the goods fraudulently purchased, does not stand upon the same ground as a *bona fide* purchaser. Bradley v. Obeare, 10 N. H. 477; Mowry v. Walsh, 8 Cow. (N. Y.) 238.

3. Dean v. Yates, 22 Ohio St. 388. In Sheppard v. Shoolbred, C. & M. 1; 41 E. C. L. 39, Lord Abinger said: "Although a fraudulent vendee may be

vendee with notice of the fraud, the action may be maintained by the owner.¹

7. Co-Owners—*a*. ENGLISH RULE.—One partner or joint tenant of a chattel cannot maintain trover against his co-tenant for any interference with his right of possession, unless there has been a destruction of the chattel or something equivalent thereto.² A sale of a chattel by one of two joint tenants is not a conversion, unless it operates altogether to deprive his co-tenant of his property therein.³

sued in trover, I do not agree that every other person may be subject to such an action into whose hands such goods may have passed. The case proposed is, that where the goods are fraudulently obtained and sold, no property passes to the vendee, and such is undoubtedly the fact; but in *Taylor v. Plummer*, 3 M. & S. 562, it is shown that where the original owner consents to the transfer, that effect does not follow. If the goods in this case were obtained by fraud, yet, if the defendants were not privy to that fraud, I am of the opinion that they are not liable in this action."

1. *Bristol v. Wilsmore*, 1 B. & C. 514; 8 E. C. L. 218; *Dows v. Kidder*, 84 N. Y. 121; *Meacham v. Collignon*, 7 Daly (N. Y.) 402; *Gage v. Epperson*, 2 Head (Tenn.) 669.

If one would avoid a sale of a chattel for fraud practised by the other party to the contract, he must not retain any part of the consideration he has received. *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 230.

2. *Wickham v. Wickham*, 2 K. & J. 496; *Mayhew v. Herricks*, 7 C. D. 229; 62 E. C. L. 929; *Bleaden v. Hancock*, 4 C. & P. 152; *Fennings v. Granville*, 1 Taunt. 241.

By destruction is meant deprivation of one co-owner of all possibility of his companion in title again enjoying the property. *Farrer v. Beswick*, 1 M. & W. 688.

In *Barnardiston v. Chapman*, 4 East 121, a verdict for the plaintiff was not disturbed where it was shown that the plaintiffs and defendants were tenants in common of a ship, which the defendants took to another part of the kingdom, changed the name, altered its appearance, and then delivered it to a third party, who sent it on a voyage where it was lost. Whether the destruction was by means of the tenant in common, was left to the jury.

The conversion of a chattel by a ten-

ant in common, from its general and profitable application, though it changes the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state, and so does not give the right of action. *Fennings v. Granville*, 1 Taunt. 241.

The secret removal of an entire chattel by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling it and applying the proceeds to his own use, was held not to amount to a conversion; nor is it an unlawful act for which a co-tenant can maintain an action, even although the removal has created a lien on the chattel by a third party. *Jones v. Brown*, 25 L. J. Exch. 345.

Tenant in Common Realty.—Trover cannot be brought by one tenant in common against another tenant in common for cutting and selling the hay on the land without his permission. *Jacobs v. Seward*, 17 W. R. 735; 20 L. T. N. S. 448; L. R., 4 C. P. 328.

3. *Williams v. Barton*, 3 Bing. 139; 11 E. C. L. 70; *Brady v. Arnold*, 19 N. C. C. P. 46; *Rathwell v. Rathwell*, 26 N. C. Q. B. 179.

In *Mayhew v. Herrick*, 7 C. D. 249; 62 E. C. L. 29, commenting upon the rule as laid down by Littleton, Co. Litt. p. 200, that, "If two be possessed of chattel property in common, and one take the whole to himself out of the possession of the other, the other has no remedy but to take this from him who has done the wrong, to occupy in common, etc.," Maule, J., said: "That doctrine, as it seems to me, is to be understood thus: that there may be dispositions of the subject-matter which will amount to a conversion if done by a stranger, that are not so by the tenant in common; but I do think it therefore follows that no dealing with a thing by one or two tenants in common that does not amount to an

b. AMERICAN RULE.—The destruction or loss of the property or any act of appropriation by a tenant in common, which will preclude his co-tenant from any future enjoyment thereof, is a conversion for which trover may be maintained;¹ and a sale of the entire property by a tenant in common, in the majority of cases, is held to be a conversion;² although, in some cases, the

annihilation of it, if that be possible, can be a conversion as against his co-tenant; it may be that the co-tenant may, if he sees fit, follow the thing and make title to it notwithstanding its sale, and deliver it to a third person, but it does not follow that where one tenant in common has dealt with the subject to an extent exceeding his authority, as where he sells out and out to a number of purchasers who carry away the articles, it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion."

1. *Goel v. Morse*, 126 Mass. 480; *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52; *Warner v. Abbey*, 112 Mass. 355; *Needham v. Hill*, 127 Mass. 133; *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 583; *Baylis v. Cronkite*, 39 Mich. 413; *Agnew v. Johnson*, 17 Pa. St. 373; 55 Am. Dec. 565; *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39; 15 Am. Dec. 83; *Guyther v. Pettijohn*, 6 Ired. (N. Car.) 388; 45 Am. Dec. 499; *Allen v. Hasper*, 26 Ala. 687; *Lowé v. Miller*, 3 Gratt. (Pa.) 196; 46 Am. Dec. 188; *Oatfield v. Waring*, 14 Johns. (N. Y.) 192; *Tanner v. Hills*, 44 Barb. (N. Y.) 428; *Dinehart v. Wilson*, 15 Barb. (N. Y.) 595; *Green v. Edick*, 66 Barb. (N. Y.) 564; *Hyde v. Stone*, 9 Cow. (N. Y.) 230; 18 Am. Dec. 501; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449; 22 Am. Rep. 592; *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Mumford v. McKay*, 8 Wend. (N. Y.) 442; *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51. See also *JOINT TENANTS*, vol. 11, p. 1152.

Where one party takes raw material belonging to another, to work up and to manufacture articles on shares, and agrees to give the owner security for his share payable at a future time, but before doing so disposes of the property, the owner may maintain trover for his share. *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51. So where the plaintiff carried logs to the defendant's mill to be sawed on shares, and the defendant sold them, trover lay for the plaintiff to recover his share of the

boards. *Vickery v. Taft*, 1 D. Chip. (Vt.) 241. So where the parties raised a crop on shares and the defendant appropriated the whole to his use. *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52.

If a co-tenant mutilate a printing press so as to take from it essential parts, he is liable in trover as for the conversion. *Needham v. Hill*, 127 Mass. 133.

In *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161, the co-tenant was held liable in trover as for the destruction of the property, which he had turned into the street, and which was lost.

A joint owner of a note who takes it and without authority surrenders it to the maker for cancellation, is liable to his co-owner for its conversion. *Winner v. Penniman*, 35 Md. 163; 6 A. R. 385.

Liability to Officer.—When personal property, owned by two tenants, is attached in a suit against one of them, the officer is entitled to the control of the whole, although he can sell only an undivided moiety thereof on execution; and if, pending the attachment, the other co-tenant makes a division of the property and takes one-half of it to himself, he is liable to the officer in an action of trover, though the officer has sold the remaining half on execution and applied the proceeds towards to the satisfaction thereof. *Reed v. Howard*, 2 Met. (Mass.) 36.

2. *Needham v. Hill*, 127 Mass. 133; *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Daniels v. Daniels*, 7 Mass. 135; *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52; *Smyth v. Tankersley*, 20 Ala. 212; 56 Am. Dec. 193; *Permyer v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Sullivan v. Lawler*, 72 Ala. 74; *Williams v. Nolen*, 34 Ala. 169; *Arthur v. Gayle*, 38 Ala. 259; *Steiner v. Trantum* (Ala. 1893), 13 So. Rep. 365; *Coursin's Appeal*, 79 Pa. St. 220; *Rains v. McNairy*, 4 Humph. (Tenn.) 356; 40 Am. Dec. 651; *Mumford v. McKay*, 8 Wend. (N. Y.) 442; *Farr v. Smith*, 9 Wend. (N. Y.) 338; 24 Am. Dec. 162;

English rule is adopted.¹ The mere claim to exclusive ownership and retention of the property by the co-tenant has been held not to amount to conversion,² except where the common property is of a severable character capable of being divided by weight or measurement,³ when a tenant in common may sever and appropriate, or sell his share without being liable to an action of trover.⁴

White v. Osborn, 21 Wend. (N. Y.) 76; *Carr v. Dodge*, 40 N. H. 303; *Yamhill Bridge Co. v. Newby*, 1 Oregon 174; *Wheeler v. Wheeler*, 33 Me. 349; *McCrittis v. Hawes*, 38 Me. 567; *Shepard v. Pettit*, 30 Minn. 119; *Persson v. Wilson*, 25 Minn. 189; *White v. Brooks*, 43 N. H. 402.

Mingling wheat in a common bin, with a knowledge and assent of all parties, makes them tenants in common, and the disposal of the entire mass by one, subjects him to an action of trover. *Nowlen v. Colt*, 6 Hill (N. Y.) 461.

1. *Oviatt v. Sage*, 7 Conn. 95.

In *North Carolina*, one tenant in common of a chattel cannot sue another for a conversion unless the common property is destroyed, carried beyond the limits of the state, or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wicker*, 80 N. Car. 343; *Pit v. Petway*, 12 Ired. (N. Car.) 69; *Lucas v. Wasson*, 3 Dev. (N. Car.) 398; 24 Am. Dec. 266; *Powell v. Hill*, 64 N. Car. 169.

In *Vermont*, the sale of the entire chattel by a tenant in common is held not to be a conversion. *Barton v. Burton*, 27 Vt. 94; *Tubbs v. Richardson*, 6 Vt. 442; *Welsh v. Clark*, 12 Vt. 681; *Sanborn v. Morrill*, 15 Vt. 700; 40 Am. Dec. 701; *Bates v. Marsh*, 33 Vt. 122. Trover may be maintained against a co-tenant for using hay, the common property, but not for selling it. *Lewis v. Clark*, 59 Vt. 363.

2. *Heller v. Hufsmith*, 102 Pa. St. 533; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449; 22 Am. Rep. 592; *Balch v. Jones*, 61 Cal. 234; *Ballou v. Hale*, 47 N. H. 347; 93 Am. Dec. 438; *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Trammell v. McDade*, 29 Tex. 360; *Campbell v. Campbell*, 2 Murph. (N. Car.) 65.

The fact of the possession, in use by one or two tenants in common, of personal property, even though it prevents the possession and use by the other, is not ground for an action of

trover, unless the possession develops into a destruction of the property or such a hostile appropriation as excludes the possibility of beneficial enjoyment, by which a conversion is established. *Osborn v. Schenck*, 83 N. Y. 201.

But in *Michigan* it is held that an assertion of ownership in the entire property by a tenant in common, in possession of the property as against his co-tenant, coupled with a refusal to allow the latter to hold at all, is equivalent to an ouster by him to his co-tenant, and amounts to a conversion. *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Webb v. Mann*, 3 Mich. 139.

3. *Lobdell v. Stowell*, 37 How. Pr. (N. Y.) 88; *aff'd* 51 N. Y. 70; *Burns v. Winchell*, 44 Hun (N. Y.) 261; *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 262. In this last case the common property was a number of logs. So, where a tenant in common of grain, on a claim of exclusive right prevents his co-tenant from obtaining his share of the property, he is liable in trover for a conversion. *Fiquet v. Allison*, 12 Mich. 328; 86 Am. Dec. 54; *Webb v. Mann*, 3 Mich. 138; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Thomas v. Williams*, 32 Hun (N. Y.) 260. But in *Lehr v. Taylor*, 90 Pa. St. 381, where, by the terms of the lease the defendant was to remain in possession until the crops should be divided, the action was maintainable.

4. *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Stall v. Wilbur*, 77 N. Y. 158.

In *Tripp v. Riley*, 15 Barb. (N. Y.) 334, *Johnson, J.*, said: "The common law gave tenants in common, of personal property, no remedy by legal proceedings for partition; they were compelled to resort to equity when they could not agree upon severance of their respective interests, and the common property was not in its nature severable. But I apprehend that the right of severance amongst tenants in common,

The purchaser from a co-tenant is not liable in trover simply by reason of his purchase, for he becomes a co-tenant, entitled to the rights, and subject to the obligations of the tenancy in common;¹ but if he sells the property or otherwise disposes of it, thereby destroying the future enjoyment by his co-tenant, he is liable for conversion.²

8. Public Officers.—An officer, who seizes goods by virtue of an execution or attachment directed to him, legal in all its forms, and issued against the plaintiff, cannot be held liable therefor in an action of trover;³ but, in the absence of statutory protection, a sheriff or other ministerial officer who, by mistake or otherwise, seizes the property of the wrong person,⁴ or makes a seizure un-

by one tenant of his share, existed at common law, as to all property in its nature severable. That partition of personal property held in common, was always a matter of absolute right, both by the civil and common law, and might be called for by either tenant at any time."

In *Kimberly v. Patchin*, 19 N. Y. 330; 75 Am. Dec. 334, Comstock, J., said: "I think each party would have the right of severing the tenancy by his own act, that is, a right of taking a portion of the mass which belonged to him, being accountable only if he invaded a quantity which belonged to the other."

In *Benedict v. Howard*, 31 Barb. (N. Y.) 569, where a tenant in common of certain machinery used in manufacturing lumber, moved the property out of the building in which it was situated, and put it up in a building of his own in another town several miles distant, making it a part of the realty, and used the same there in the manufacture of his own lumber, this was held such destruction of the property as would support an action by the co-tenant for its conversion.

1. *Trammell v. McDade*, 29 Tex. 367; *Kilgore v. Wood*, 56 Me. 150; 94 Am. Dec. 404; *Ruckman v. Decker*, 23 N. J. Eq., 283; *Osborn v. Schenck*, 83 N. Y. 201. So long as he remains in possession of the property, although he claims to be the sole owner, the vendee is not liable in trover to the vendor, his co-tenant. *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585.

2. *Weld v. Oliver*, 21 Pick. (Mass.) 559.

3. *Stewart v. Ray*, 4 Ired. (N. Car.) 269; *Freeman v. Grant*, 132 N. Y. 22. Trover will not lie against a sheriff for a mere neglect to take proper care of

property which he has regularly attached. *Nutt v. Wheeler*, 30 Vt. 436.

4. *Abercrombie v. Bradford*, 16 Ala. 560; *Meade v. Smith*, 16 Conn. 346; *Riley v. Martin*, 35 Ga. 136; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Winttingham v. Lafoy*, 7 Cow. (N. Y.) 735; *State v. McBride*, 81 Mo. 353; *Woodbury v. Long*, 8 Pick. (Mass.) 543; 19 Am. Dec. 345; *Shumway v. Rutter*, 8 Pick. (Mass.) 443; 19 Am. Dec. 340; *St. George v. O'Connell*, 110 Mass. 475; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Bowen v. Sanborn*, 1 Allen (Mass.) 389; *Burgin v. Burgin*, 1 Ired. L. (N. Car.) 453; *Tinker v. Morrill*, 39 Vt. 483; *Dow v. Cheney*, 103 Mass. 181; *Johnson v. Farr*, 60 N. H. 426.

In *Woodbury v. Long*, 8 Pick. (Mass.) 543; 19 Am. Dec. 348, where goods were in the possession of one not the owner, it was held that the action of trover might be maintained against the attaching officer without proving any demand, even when the goods were so situated that the officer might have supposed them to be the property of the party whose goods he was directed to attach. See also *Bowen v. Sanborn*, 1 Allen (Mass.) 389, where it was held that the fact that the goods were consigned to the defendant for the purpose of sale, in boxes marked with his name, which were in his store with his own goods, and it appeared at the time of making the attachment, that the officer was informed that some of the goods in the store did not belong to the defendant, did not protect the attaching officer from liability to the true owner.

But where the owner of chattels suffers them to be so mixed with those of another person that they cannot be distinguished, an officer will not be

der a defective process is liable as for conversion.¹ So, if an officer under an attachment or execution against one co-tenant or partner, seizes and sells the entire interest, he is liable in trover to the other co-tenants.²

He is also liable for conversion if he seizes goods which are by law exempt from attachment or execution.³ To constitute a conversion, it is not necessary that the officer should have taken the

liable for attaching them as the property of such other person. *Shumay v. Rutter*, 8 Pick. (Mass.) 443; 19 Am. Dec. 340.

In *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151, whereby in an agreement entered into between a father and son, the father was to carry on the business in the name and on account of the son, as his agent, the action of trover was maintained by the son against an attaching officer who, in behalf of a separate creditor of the father, attached certain property purchased by the father in the name of the son.

Action by Conditional Vendee. — Where personal property was sold and delivered with a condition precedent to be performed by the vendee, and it was agreed that the absolute ownership and right of property therein, although delivered to the vendee, was to remain in the vendor until such condition be performed, the general owner shall hold the property even as against a creditor of the vendee, who may attach the same in the vendee's possession. But an officer who attaches and sells the same, as the property of the vendee, before the performance of the condition, is liable in trover to the general owner. *McFarland v. Farmer*, 42 N. H. 386. See also *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

1. *Goode v. Langley*, 7 B. & C. 19; *Small v. Pool*, 8 Ired. (N. Car.) 47.

In *Martin v. England*, 5 Yerg. (Tenn.) 313, it was held that trover lay against an officer who had taken property upon an execution issued upon a judgment which was void for want of jurisdiction; or against any person receiving the goods from the officer.

Trover will lie against an officer who, under a writ of execution returnable to the next court, seizes goods after such court has opened on the return day, and adjourned to the next day; if he has begun before the adjournment, he may complete the service afterwards. *Prescott v. Wright*, 6 Mass. 20.

2. *Walsh v. Adams*, 3 Den. (N. Y.)

125; *Wheeler v. McFarland*, 10 Wend. (N. Y.) 318; *White v. Morton*, 22 Vt. 15; 52 Am. Dec. 75; *Melville v. Brown*, 15 Mass. 82; *Smyth v. Tankersley*, 20 Ala. 212; 56 Am. Dec. 193; *Perminster v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Sheppard v. Shelton*, 34 Ala. 652; *Rains v. McNairy*, 4 Humph. (Tenn.) 356; 40 Am. Dec. 651; *Case v. Hart*, 11 Ohio 364; 38 Am. Dec. 735; *Waddell v. Cook*, 2 Hill (N. Y.) 47; 37 Am. Dec. 372.

Where a sheriff attached property under a writ issued against the partnership, and afterwards, while the property was in his possession, returned an attachment against the same property on a writ against one of the partners, it was held that this latter attachment did not render him liable in an action of trover in favor of one who claimed under a sale from the partnership, so long as the attachment subsisted on the demand against the partnership, notwithstanding the partnership debt was afterwards satisfied by the sale of other property attached at the same time. *Page v. Carpenter*, 10 N. H. 77.

3. *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Mandlove v. Burton*, 1 Ind. 39; *McCoy v. Brennan*, 61 Mich. 362; *Howard v. Cooper*, 45 N. H. 339; *Samborn v. Hamilton*, 18 Vt. 589; *Luce v. Hoisington*, 56 Vt. 436; *Waldo v. Peck*, 7 Vt. 434; *Belon v. Robbins*, 76 Wis. 416.

In *Woods v. Keyes*, 14 Allen (Mass.) 236; 92 Am. Dec. 766, it was held that if the exempt property, such as tools, implements, and fixtures are plainly distinguishable as articles which are exempt, the owner may maintain the action against the attaching officer without first demanding the articles or pointing them out. But if the exempt articles are so mingled with other property that the officer cannot distinguish them, neglect to claim them or point them out, when the officer makes the attachment, may be a waiver. *Clapp v. Thomas*, 5 Allen (Mass.) 158.

property into his actual possession;—it is sufficient if he assumes control, either by actual or constructive possession.¹ A sheriff may be liable for conversion if he sells more goods than are sufficient to satisfy the execution;² or if he sells after the time limited for making the sale;³ or purchases at a sale held by himself.⁴

VI. WAIVER OF TORT⁵—1. **When Tort May Be Waived.**—Where the defendant has sold or otherwise disposed of the property, the plaintiff may waive the conversion and sue in *assumpsit*; ⁶ but

1. *Smith v. Plomer*, 15 East 607; *Stuart v. Phelps*, 39 Iowa 14; *Bigelow Co. v. Hintze*, 53 N. J. L. 69; *Morse v. Hurd*, 17 N. H. 246; *Robinson v. Mansfield*, 13 Pick. (Mass.) 139.

Where an officer told the owner of goods, which were in sight, that he had attached them, and forbade him to remove them until the debt was paid, it was held that this was a constructive taking and sufficient evidence to show a conversion by the officer. *St. George v. O'Connell*, 110 Mass. 475.

The wrongful seizure, under an attachment, of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is such a conversion as will support an action of trover by the owner against the sheriff. *Abercrombie v. Bradford*, 16 Ala. 560.

In *Amadon v. Myers*, 6 Vt. 308, where the officer attached property as the property of another, but did not take actual custody or possession, or require a receipt therefor, and the owner had not been disturbed in possession, but had actually used the property himself, and appropriated it, it was held that an action could not be maintained. *Williams, C. J.*, said: "It would be carrying the doctrine of constructive possession to a great length, to say that a man who has the custody of his property, uses and disposes of it without interruption, can maintain an action of trover against another who asserts a claim without taking any measure to enforce the claim."

A declaration by an officer that he has attached personal property, without proof that he has taken possession or exercised any dominion or control over it, does not amount to a conversion. *Fernald v. Chase*, 37 Me. 289.

In *Rand v. Sargeant*, 23 Me. 326; 39 Am. Dec. 625, where an officer, with a writ in his hands, went to the door and found the owner in actual possession of goods, and informed him that he was go-

ing to make an attachment, but did not, in fact, interfere with the goods or take them into his custody, and the debtor informed the officer that the goods belonged to a third person and not to him, but procured one other than the owner to give a receipt for them, it was held that there was no conversion.

2. *Aldred v. Constable*, 6 Ad. & El. 370, 6 Q. B. 370; 51 E. C. L. 369.

A sheriff, who sells the entire property on execution against the mortgagor, is liable in trover to the mortgagee. *McConeghy v. McCaw*, 31 Ala. 447. See also *Christopher v. Smith*, 2 B. Mon. (Ky.) 357.

3. In *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396, it was held that by a wrongful act at a sale, the sheriff becomes a trespasser *ab initio*.

4. *Perkins v. Thompson*, 3 N. H. 144.

5. See *ASSUMPSIT*, vol. 1, p. 888; *ELECTION*, vol. 6, p. 247; *TORTS*, vol. 26, p. 73; *WAIVER*.

6. *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; 22 Am. Rep. 410; *Lamb v. Clark*, 5 Pick. (Mass.) 193; *Miller v. Miller*, 7 Pick. (Mass.) 133; 19 Am. Dec. 264; *Cushman v. Jewell*, 7 Hun (N. Y.) 525; *Putnam v. Wise*, 1 Hill (N. Y.) 234; 37 Am. Dec. 309; *Berly v. Taylor*, 5 Hill (N. Y.) 577; *O'Conley v. Natchez*, 1 Smed. & M. (Miss.) 46; 40 Am. Dec. 87; *Jamison v. Moon*, 43 Miss. 598; *Balch v. Patten*, 45 Me. 41; 71 Am. Dec. 526; *Simpson v. Bowden*, 33 Me. 549; *Richardson v. Kimball*, 28 Me. 463; *Hall v. Huckins*, 41 Me. 574; *Howe v. Russell*, 41 Me. 446; *Emerson v. McNamara*, 41 Me. 565; *Budd v. Hiler*, 27 N. J. L. 43; *Carleton v. Heywood*, 49 N. H. 314; *Hill v. Davis*, 3 N. H. 384; *Chauncey v. Yeaton*, 1 N. H. 151; *Hudson v. Gilliland*, 25 Ark. 100; *Bowman v. Browning*, 17 Ark. 599; *Hutton v. Wetherald*, 5 Harr. (Del.) 38; *Upchurch v. Norsworthy*, 15 Ala. 705; *Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 83; *Hall v. Peckham*, 8

only when it has been sold or disposed of,¹ and he can recover only

R. I. 370; *Stockett v. Watkins*, 2 Gill & J. (Md.) 343; 20 Am. Dec. 438; *Dickinson v. Whitney*, 9 Ill. 406; *Staat v. Evans*, 35 Ill. 455; *Lamine v. Bonell*, Ld. Raym. 1216; *Lindon v. Hooper*, Cowp. 419; *Hitchin v. Campbell*, 2 W. Bl. 827; *Rodgers v. Maw*, 15 M. & W. 448; *Young v. Marshall*, 8 Bing. 43; 21 E. C. L. 215; *Oughton v. Seppings*, 1 B. & Ad. 241. And see *Centre Turnpike Co. v. Smith*, 12 Vt. 212; *O'Reer v. Strong*, 13 Ill. 688.

1. But the plaintiff can waive the tort and sue on the implied contract only where the defendant has sold or otherwise disposed of the property. See *Lightly v. Clouston*, 1 Taunt. 112; *Bennett v. Francis*, 2 Bos. & P. 554; *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555; *Mann v. Locke*, 11 N. H. 246; *Smith v. Smith*, 43 N. H. 536; *Cushman v. Jewell*, 7 Hun (N. Y.) 525; *Barlow v. Statworth*, 27 Ga. 517; *Rogers v. Greenbush*, 57 Me. 441; *Balch v. Patten*, 45 Me. 41; 71 Am. Dec. 526; *Hopkins v. Meguire*, 35 Me. 78; *Schweizer v. Weiber*, 6 Rich. (S. Car.) 159; *Randolph Iron Co. v. Elliott*, 34 N. J. L., 184; *Elliott v. Jackson*, 3 Wis. 649; *Kelty v. Owens*, 4 Chand. (Wis.) 166; *Berkshire Glass Co. v. Wolcott*, 2 Allen (Mass.) 327; 79 Am. Dec. 787; *Brown v. Holbrook*, 4 Gray (Mass.) 102; *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Allen v. Ford*, 19 Pick. (Mass.) 217; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Pearson v. Chapin*, 44 Pa. St. 9; *Willett v. Willett*, 3 Watts (Pa.) 277; *Stearns v. Dillingham*, 22 Vt. 624; *Saville v. Welch*, 58 Vt. 683; *Scott v. Lance*, 21 Vt. 507; *Smith v. Jernigan*, 83 Ala. 256; *Pike v. Bright*, 29 Ala. 332; *Miller v. King*, 67 Ala. 575; *Crow v. Boyd*, 17 Ala. 51; *Strother v. Butler*, 17 Ala. 733; *Pritchard v. Ford*, 1 J. J. Marsh. (Ky.) 543; *Moses v. Arnold*, 43 Iowa 187; 22 Am. Rep. 239; *Watson v. Stever*, 25 Mich. 386; *Tolan v. Hodgeboom*, 38 Mich. 624; or there has been a subsequent promise to pay. *Morrison v. Rogers*, 3 Ill. 317; *Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 83.

Some benefit must have actually accrued to the defendant. *Webster v. Drinkwater*, 5 Me. 319; 17 Am. Dec. 238. It must appear that he has actually received money or what he considers its equivalent, as a promissory note. *Saville v. Welch*, 58 Vt. 683.

"Where property has been received in satisfaction of a money demand, it is equivalent to money." *Per Prout, J.*, in *Kidney v. Persons*, 41 Vt. 86; 98 Am. Dec. 595. As where a converted note is used to pay a debt, it being "the same thing as though he had paid his debt with the plaintiff's money." *Doon v. Ravey*, 49 Vt. 293. And see *Miller v. King*, 67 Ala. 575. So where school-district orders are used as money. *Bowen v. School Dist.*, 36 Mich. 149. "If the property has been sold, it makes no difference whether the price is received in money or in a chattel at any estimated price for money." *Fuller v. Duven*, 36 Ala. 73; 78 Am. Dec. 318.

In *Miller v. Miller*, 7 Pick. (Mass.) 136; 19 Am. Dec. 264, *Parker, C. J.*, said: "In regard to the objection that the price of some of the wood was received in real estate, we think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that real estate shall be substituted. Suppose after selling the wood for money to be paid at a future day, the defendant had set off a debt which he owed the purchaser, for the price; he would virtually have received the money. So he has by taking the real estate." In *Budd v. Hiler*, 27 N. J. L. 48, it is said that the taking of a note is not sufficient.

Where the defendant traded the chattel for a set of harnesses, it was held that *assumpsit* would not lie. *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595. And see *Fuller v. Duren*, 36 Ala. 73; 76 Am. Dec. 318, where it is said that this principle does not apply where the defendant has simply exchanged the property, and has not sold, or otherwise disposed of the property obtained in the exchange.

If it is money that has been converted, *assumpsit* will lie. *McDonald v. Brown*, 16 Ill. 31. And see *Western Assurance Co. v. Towle*, 65 Wis. 247; *Brown v. Brown*, 40 Hun (N. Y.) 418.

In *Jones v. Hoar*, 5 Pick. (Mass.) 290, *Parker, C. J.*, thus sums up the doctrine: "The whole extent of the doctrine, as gathered from the books,

seems to be, that one whose goods have been taken from him, or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sells the goods and receives the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds."

A postmaster, if through his carelessness a letter containing money is lost, is not liable to an action for money had and received, unless he puts it to his own use. *Danforth v. Grant*, 14 Vt. 283; 39 Am. Dec. 224.

In *Bennett v. Francis*, 2 Bos. & P. 555, Lord Alvanley says: "All that can be collected from the case is this, that if the goods be converted into money, the court will allow the plaintiff to waive the tort and bring an action in which he can recover nothing more than the sum actually received; but if it were competent for the plaintiff, in a case like this, to waive the tort and convert the transaction into a contract, it might involve the defendant in great difficulties. The goods are demanded of a person who claims them as his own and insists on keeping them. Now, if the party demanding the goods be at liberty to convert this into an action for goods sold and delivered, the consequence would be that on proving his property in the goods, the other party would be obliged to pay the value of them, possibly to his utter ruin; whereas, if the former had declared in trover, nominal damages only would probably be given and the goods would be restored."

The proceeds of the sale of stolen goods may be recovered. *Boston, etc., R. Co. v. Dana*, 1 Gray (Mass.) 83; *Shaw v. Coffin*, 58 Me. 254; 9 Am. Rep. 290; *Howe v. Clancey*, 53 Me. 130. But see *Foster v. Tucker*, 3 Me. 458; 14 Am. Dec. 243. So where bills of exchange, see *Buchanan v. Findlay*, 9 B. & C. 738; 17 E. C. L. 486; *Arnold v. Cheque Bank, L. R.*, 1 C. P. 578; or stock of the Bank of England, see *Stone v. Marsh*, 6 B. & C. 551; 13 E. C. L. 249; *Marsh v. Keating*, 1 Bing. N. Cas. 198; 27 E. C. L. 354, or where post-office orders have been wrongfully converted into money, the owner may claim the proceeds, as money had and received, to his use. *Fine Arts Soc. v. Union Bank*, 17 Q. B. Div. 705.

If an action is brought for goods sold and delivered, the defendant, by paying money into court, will be con-

sidered as consenting to have the transaction treated as a contract of sale. *Bennett v. Francis*, 2 Bos. & P. 550; *Yate v. Willan*, 2 East 128.

Recovery by Tenant in Common.—One tenant in common may bring *assumpsit* against his co-tenant who has sold the common property and received all the money. *Gardiner Mfg. Co. v. Heald*, 5 Me. 381; *Miller v. Miller*, 7 Pick. (Mass.) 133; 19 Am. Dec. 264.

In *Loomis v. O'Neal*, 73 Mich. 582, it was held that the refusal of a tenant in common of crops to recognize the rights of his co-tenant amounted to a conversion, and that the co-tenant could waive the tort and sue in *assumpsit*, a distinction being drawn between such case and a case of tenants in common of a chattel, where one has as good a right to the possession as the other. And see to the same effect, *McLaughlin v. Salley*, 46 Mich. 219; *Coe v. Wager*, 42 Mich. 49; *Fiquet v. Allison*, 12 Mich. 328; 86 Am. Dec. 54.

Recovery for Use of Chattel.—*Assumpsit* will not lie where the defendant has neither sold the chattel nor had any benefit from it, save in its use. *Balch v. Patten*, 45 Me. 41; 71 Am. Dec. 526.

In *Crow v. Boyd*, 17 Ala. 51, it was held that the owner of the slave could not maintain *assumpsit* for the value of its services against one who had converted it, but who had neither sold it nor received money for its labor.

But in *Stockett v. Watkins*, 2 Gill & J. (Md.) 326; 20 Am. Dec. 438, an administrator was held liable for the hire received for certain negroes during the time that he had them. And see *Ford v. Caldwell*, 3 Hill (S. Car.) 248, where Richardson, J., said: "The admission that if the trespasser should have hired out the negro and received money for his services, then you may recover such money, yields the whole principle. Money received and money's worth afford the same cause of action. The amount of money received of the hirer serves no other purpose but as a measure of the benefit which springs to the trespasser by employing the negro; and whether the benefit accrued from the services of the negro to the trespasser personally, or came to him indirectly in the sum of his wages, still, money is the measure of the loss to the owner and of the benefit to the trespasser. He has received in the one case a spe-

the amount actually received by the defendant.¹ The count should be for money had and received.² There are two exceptions to the above rule: *first*, where, by the death of the wrongdoer, the right to sue in trover is lost, *assumpsit* will lie against his executor or administrator;³ and *second*, where the goods were obtained fraudulently under color of sale, the defendant may be sued in *assumpsit* for goods sold and delivered.⁴

cific benefit measured by wages received in money; in the other he has received equal benefit in money's worth, but which the jury must assess because the case affords not the same specific measure as the money would." And see *James v. Buzzard*, Hempst. (U. S.) 240.

Proof of Amount Received for the Goods.—Whether or not the defendant received money for the goods need not be proved beyond doubt, and it is sufficient if the testimony presents a reasonable presumption that the defendant did receive the proceeds, and, like all other facts, must be determined on the weight of the evidence. *Declercq v. Mungin*, 46 Ill. 112. There need be no positive proof as to the amount received. *Smith v. Jernigan*, 83 Ala. 256.

Effect of Judgment.—Where *assumpsit* is brought for the value of goods where the action should have been in tort, and no objection is made, the judgment will determine the matter at issue as conclusively as though the proper action had been brought. *Jennings v. Sheldon*, 44 Mich. 92.

1. *Howell v. Graves*, 27 Ark. 365; *Rand v. Nesmith*, 61 Me. 111; *DeClerq v. Mungin*, 46 Ill. 114; *Cushman v. Hayes*, 46 Ill. 145; *McDonald v. Brown*, 16 Ill. 32; *King v. Leith*, 2 T. R. 144; *Lindon v. Hooper*, Cowp. 419; *Bennett v. Francis*, 2 Bos. & P. 555, *per* Lord Alvanley.

The plaintiff waives all torts and special damages, and can recover only the money received; and in most cases he so far confirms the defendant's acts that he cannot deny his right to receive them. *Wilder v. Aldrich*, 2 R. I. 518.

Where there is no positive proof as to the amount received, the jury usually gives as damages such sum as they are reasonably satisfied that the defendant received, and no more. *Smith v. Jernigan*, 83 Ala. 256.

2. The action should be for money had and received, and not for goods sold and delivered. *Brown v. Holbrook*, 4 Gray (Mass.) 103; *Berkshire Glass Co. v. Wolcott*, 2 Allen (Mass.)

227; 79 Am. Dec. 787; *Gray v. Griffith*, 10 Watts (Pa.) 431.

3. *Hambly v. Trott*, Cowp. 375; *Hill v. Davis*, 3 N. H. 385; *Ford v. Caldwell*, 3 Hill (S. Car.) 248. And see *Stockett v. Watkins*, 2 Gill & J. (Md.) 343; 20 Am. Dec. 438; *Osborn v. Bell*, 5 Den. (N. Y.) 374; 49 Am. Dec. 275; *Cravath v. Plympton*, 13 Mass. 454; *Wilbur v. Gilmore*, 21 Pick. (Mass.) 254; *Powell v. Reese*, 7 Ad. & El. 426; 34 E. C. L. 136; *Foster v. Stewart*, 3 M. & S. 191.

In *Jones v. Hoar*, 5 Pick. (Mass.) 290, *Parker, C. J.*, said: "No case can be shown where *assumpsit* for goods sold lay in such case, except it be against an executor of the wrongdoer, the tort being extinguished by the death, and no other remedy but *assumpsit* against the executor remaining."

4. *Hill v. Perrott*, 3 Taunt. 274; *Edmeads v. Newman*, 1 B. & C. 418; 8 E. C. L. 178; *Clarke v. Shee*, Cowp. 334; *Wigand v. Sichel*, 3 Keyes (N. Y.) 120. And see *Hambly v. Trott*, Cowp. 375; *Allen v. Ford*, 19 Pick. (Mass.) 219.

In *Hill v. Perrott*, 3 Taunt. 274, it was held that *assumpsit* would lie for goods sold and delivered which the defendant had, by fraud, procured the plaintiff to sell to an insolvent person, and which the defendant had afterward gotten into his possession, the reason being that the defendant could not be permitted to set up a sale procured by his own fraud, and that his mere possession of the goods unaccounted for, raised an implied promise to pay. See to the same effect, *Abbotts v. Barry*, 2 Brod. & Bing. 369, a case similar in its facts to *Hill v. Perrott*, 3 Taunt. 274, except that the goods had been sold by the third person and the proceeds handed over to the defendant.

"It is not to be understood that an action of trover can be converted into an action for goods sold and delivered at the option of the plaintiff; the rule seems to be principally applicable to cases where the plaintiff has been induced, by an act on the part of the defendant, to make a contract with a

nominal person, of which the defendant derived the whole benefit." 2 Phillips on Evidence (7th ed.) 111.

In *Tuttle v. Campbell*, 74 Mich. 652, Champlin, J., said: "The general rule is that before a party can waive a tort for the conversion of personal property and bring *assumpsit*, the property in the hands of the tort-feasor must have been sold and converted into money, upon the theory that the money has been received for the plaintiff's use. There is, however, another class of cases, where the property has been converted, but not sold, where the tort may be waived and *assumpsit* brought for the value of the goods converted. This class belongs to those relations where a contract may exist and at the same time a duty is superimposed or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort. In such cases the tort may be waived and *assumpsit* be maintained, for the reason that the relation of the parties out of which the duty violated grew, had its inception in contract. These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor. When an owner in common of personalty has the exclusive possession of the property he is a bailee of his co-owner's share. In such case there is a contract of bailment implied between the parties, the law implying a delivery from the nature of the case and the peculiar rights which one owner in common has to such property when reduced to his possession. He takes it and holds it upon the trust and confidence that he will care for it, and use it, if he uses it, in an ordinarily careful manner, and will not sell or convert his co-owner's share to his own use. If he violates this trust and confidence by converting the property to his own use, his co-owner may bring trover for the conversion, or, waiving the tort, may sue in *assumpsit* to recover its value."

In *Russell v. Bell*, 10 M. & W. 340, the assignees of a bankrupt recovered on a count for goods sold and delivered, for goods fraudulently sold by the bankrupt to the defendants. Lord Abinger, C. B., said: "Here the bankrupt is selling goods under false colors, in order to cover up transactions he knew he could not otherwise cover; and he has no right to set up his own fraud-

ulent contract. But the action being brought for goods sold and delivered by the assignees, and not by the bankrupt, the assignees have a right to waive the tort and bring an action of *assumpsit* for goods sold and delivered."

Sales on Credit Induced by Fraud.—Where the plaintiff has sold goods to the defendant on credit, but claimed the right to sue on a count for goods sold and delivered before the maturity of the credit, on the ground that the defendant had obtained the goods with the preconceived design of not paying for them, it was held that the action would not lie, on the ground that, while he might have brought trover and treated the contract as a nullity, by bringing *assumpsit* he had affirmed the contract, which was a sale on credit. *Ferguson v. Carrington*, 9 B. & C. 59; 17 E. C. L. 330. And see *Read v. Hutchinson*, 3 Camp. 352; *Strutt v. Smith*, 1 C. M. & R. 312; *Allen v. Ford*, 19 Pick. (Mass.) 217. But see, *contra*, *Dietz v. Sutcliffe*, 80 Ky. 650. See also *FRAUDULENT SALES*, vol. 8, pp. 845, 850.

So, it has been held that one who has been induced to enter into a contract to perform certain work at a certain price, by false representations as to the amount of work to be done, cannot recover on a count for work and labor for the value of the work performed, irrespective of the contract price, on the ground that, having chosen to treat the defendant as a party who has contracted with him, he must be bound by the only contract made between the parties. *Selway v. Fogg*, 5 M. & W. 83.

The opinion of Pryor, J., in *Dietz v. Sutcliffe*, 80 Ky. 650, is worthy of quotation as a statement of what would seem to be the correct principle of law upon this point. "Can a vendor, from whom goods have been purchased on a credit by means of fraudulent representations, upon discovering the fraud, and before the expiration of the time of credit, sue in contract for either the stipulated price or the reasonable value of the goods? It is well settled that where the vendor has been defrauded by his vendee, the former may elect to treat the contract as a nullity and bring his actions for the recovery of the specific property, or trover for their value, and this doctrine proceeds upon the idea that the contract of sale having been rescinded at the election of the vendor, he is still vested with the title.

The above rule is not without conflict, however, a number of cases, especially among the earlier decisions, holding that, even where the defendant has not disposed of the property, he may be sued in *assumpsit* for goods sold and delivered; but the rule as stated in the text seems to be supported by the decided weight of authority.¹

Nor do we see how, after the repeated adjudications of this court on the question, it is possible to say that the plaintiffs, on repudiating the contract for fraud, had not their election between contract and tort as to the form of action. The remaining question is, what is the effect of a waiver of the tort? Does it restore the express contract which has been repudiated for the fraud, or does it leave the parties in the same condition as if no express contract had been made—to such relations as result by implication of law from the delivery of goods by the plaintiff and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from the delivery and possession of the goods. If the express contract is void, and can be treated as such by the appellees, how is it that the fraudulent vendee or his assignee can rely upon its terms to defeat the action for goods sold and delivered? The vendee will not be allowed to set up his own fraudulent act to defeat a recovery by his vendor. The assignee of this fraudulent vendee is relying on the special contract as a bar to the recovery, because by its terms the debts were not due at the time the several actions were instituted. In order to avoid this defense, a state of fact is presented in the reply that, if true, renders that contract, as to the appellees, a nullity, and if void, it is no obstacle in the way of the action for goods sold and delivered."

1. See, as supporting the proposition that the defendant may be sued for goods sold and delivered, where he has not disposed of the property, *Gordon v. Bruner*, 49 Mo. 570; *Floyd v. Wiley*, 1 Mo. 430; *Johnson v. Strader*, 3 Mo. 251; *Barker v. Cory*, 15 Ohio 9; *Norden v. Jones*, 33 Wis. 604, opinion of Dixon, C. J.; *Stockett v. Watkins*, 2 Gill & J. (Md.) 342; 20 Am. Dec. 438; *Ford v. Caldwell*, 3 Hill (S. Car.) 248 (Evans, J., *dissenting*); *Eversole v. Moore*, 3 Bush (Ky.) 49; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454;

Janes v. Buzzard, Hempst. (U. S.) 240; *Tightmeyer v. Mongold*, 20 Kan. 90 (*dicta*). And see *Osborn v. Bell*, 5 Den. (N. Y.) 374; 49 Am. Dec. 275; *Chambers v. Lewis*, 2 Hilt. (N. Y.) 591; *Cummings v. Vorce*, 3 Hill (N. Y.) 282; *Butts v. Collins*, 13 Wend. (N. Y.) 154 (opinion of Mason, Senator); *Russell v. Bell*, 10 M. & W. 340; *Lee v. Shore*, 1 B. & C. 94; 8 E. C. L. 41; *Hull v. Long*, 6 Price 159.

In *McGoldrick v. Willits*, 52 N. Y. 612, *Peckham, J.*, said: "The plaintiff may waive the tort and have *assumpsit* where the party has appropriated the property," but in this case the defendant had sold the goods. And see *Goodenow v. Snyder*, 3 Greene (Iowa) 599; *Fratt v. Clark*, 12 Cal. 89; *Berly v. Taylor*, 5 Hill (N. Y.) 577. In *Hawk v. Thorn*, 54 Barb. (N. Y.) 164, where similar language was used, the property had been converted into money. *Terry v. Munger*, 121 N. Y. 161, however, seems to settle the rule in *New York* as agreeing with the *dictum* of *Peckham, J.*, above. *Hill v. Davis*, 3 N. H. 384, and *Cummings v. Noyes*, 10 Mass. 433, which seem to support the rule that an action for goods sold and delivered will lie, have been very much qualified by later decisions in those states.

In *Johnson v. Reed*, 8 Ark. 202, where the goods came into the defendant's possession peaceably, and he converted them to his own use, it was held that *assumpsit* would lie, the court distinguishing the case from *Jones v. Hoar*, 5 Pick. (Mass.) 285, on the ground that in the latter case a trespass had been committed.

In *Evans v. Miller*, 58 Miss. 120; 38 Am. Rep. 313, it is said that so long as the trespasser retains the property taken in its original shape, he may legally deny that he holds it under a contract; but when he has parted with it, either for money or other property, or where he has mingled it with his own, or consumed it in its use, or changed its form, he should not be permitted to deny the *assumpsit* to pay its value, which the law imputes from its method of dealing with it.

It is unnecessary to allege in the declaration that the plaintiff waives the tort.¹

2. **Choice Between Trover and Assumpsit.**—The plaintiff, by waiving the tort and suing in *assumpsit*, subjects himself to a set-off or counterclaim, or to the law of mutual credits in the case of bankruptcy, all of which would be avoided by suing in trover.² But, on the other hand, it may be advisable to proceed upon the implied contract in order to use it as a counterclaim in an action,³ or to avoid the effect of the Statute of Limitations.⁴ As we have seen, the plaintiff, where *assumpsit* is brought, can recover only the amount actually received for the goods.⁵

3. **Infancy No Defense.**—Where the plaintiff waives the tort and sues in *assumpsit*, the plea of infancy is no defense.⁶

And in *Abbott v. Blossom*, 66 Barb. (N. Y.) 353, it was held that where the defendant had used the property for his own use, changing its condition and character, the plaintiff could waive the tort and sue in *assumpsit* for goods sold and delivered; and the court was of the opinion that he could do so in any event, but this last was a mere *dictum*.

So in *Toledo, etc., R. Co. v. Chew*, 67 Ill. 378, where the railroad company had taken cross ties and used them in laying its track, and in *Walker v. Duncan*, 68 Wis. 624, where saw logs had been converted into lumber and used by the defendant, it was held that *assumpsit* would lie.

1. *McDonald v. McDonald*, 67 Mich. 122; *Elwell v. Martin*, 32 Vt. 220.

2. *Smith v. Hodgson*, 4 T. R. 211; 1 Chitt. Pl. 112. And see *Hunter v. Prinsep*, 10 East 378. A counterclaim founded on contract cannot be interposed as a defense to an action of trover. *Chambers v. Lewis*, 2 Hilt. (N. Y.) 591. Where *assumpsit* is brought, the defendant is entitled to an allowance for a note taken in part payment which turned out to be worthless. *Budd v. Hiler*, 27 N. J. L. 43.

3. *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105.

4. In the case of *Lamb v. Clark*, 5 Pick. (Mass.) 193, the defendant obtained possession of divers promissory notes without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before the commencement of the action, and it was held that he was liable in *assumpsit* for the sums received within the six years, and that he was estopped to show that the notes were obtained

by fraud and that therefore, an action of trover would have been barred by the statute. *Parker, C. J.*, in delivering the opinion of the court said: "And if he choose the latter mode of redress—that is, to bring *assumpsit*—the tortfeasor cannot, we think, allege his own wrong for the purpose of carrying back the injury to a time which let in the Statute of Limitations."

5. See *supra*, this title, *When Tort May Be Waived*.

6. *Elwell v. Martin*, 32 Vt. 217; *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290; *Bristow v. Eastman*, 1 Esp. 172. And see *Peigne v. Sutcliffe*, 4 McCord (S. Car.) 387; *Munger v. Hess*, 28 Barb. (N. Y.) 75; *Oliver v. McClellan*, 21 Ala. 675; 2 Greenl. on Ev., § 368. In *Bristow v. Eastman*, 1 Esp. 172, it was held that an action for money had and received, would lie against an infant to recover money which he had embezzled. Lord Kenyon said, that though the action was in its form an action *ex contractu*, yet it was an action *ex delicto* in substance; that if the assignees had brought an action of trover for any part of the property embezzled, or an action grounded on fraud, infancy would unquestionably have been no defense, and as the object of the action of *assumpsit* was precisely the same, his opinion was that the same rule of law would apply, and that infancy was no bar. In *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290, *Appleton, C. J.*, said: "If the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If, for the purposes of justice, the tort may be waived in the case of the adult, and *assumpsit* maintained, it can, to accomplish the same great purpose, be equally well waived

4. **Tenants in Common Must Join.**—Tenants in common must join where they waive the tort and sue in *assumpsit* for any entire injury done to the common property,¹ and joint trespassers may also be sued jointly in *assumpsit* where the tort is waived.²

5. **Effect of Election.**—Where the plaintiff, with knowledge of the facts, has elected to waive the tort and sue in *assumpsit*, he cannot afterward discontinue his action and sue in tort, and *vice versa*; an election once made, is final.³ But a mere demand of

as to the minor." And see *Walker v. Davis*, 1 Gray (Mass.) 506.

1. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; 22 Am. Rep. 410; *Putnam v. Wise*, 1 Hill (N. Y.) 234; 37 Am. Dec. 309.

2. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; 22 Am. Rep. 410; or jointly or severally, *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105.

But where the conversion is a joint act of husband and wife, *assumpsit* against them jointly will not lie, for as to the wife, the promise is void. *Carleton v. Haywood*, 49 N. H. 314.

3. *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228; *Moller v. Tuska*, 87 N. Y. 166; *Boots v. Ferguson*, 46 Hun (N. Y.) 129; *Kinney v. Kiernan*, 49 N. Y. 164; *Rodermund v. Clark*, 46 N. Y. 354; *Lloyd v. Brewster*, 4 Paige (N. Y.) 537; *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416; *Bulkley v. Morgan*, 46 Conn. 393; *Dibble v. Sheldon*, 10 Blatchf. (U. S.) 178. And see *Thompson v. Howard*, 31 Mich. 309; *Farwell v. Myers*, 59 Mich. 179; *Acer v. Hotchkiss*, 97 N. Y. 395; *O'Donald v. Constant*, 82 Ind. 212. See also *ELECTION*, vol. 6, p. 250.

If an action is commenced for the money, or a proceeding taken in bankruptcy, an election is made and the tort waived, and trover cannot be afterwards brought. *Smith v. Baker*, L. R., 8 C. P. 350. In this case, *Bovill, C. J.*, said: "If an action for money had and received is brought, that is, in point of law, conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way." So, where the action is in tort for the wrongful taking and conversion of property, the plaintiff cannot, upon a failure of proof that the taking was wrongful or tortious and at the close of the case, waive the tort and recover as upon a contract. *Ransom v. Wetmore*, 39 Barb. (N. Y.) 104. And in *Buckland v. Johnson*, 15 C. B. 145; 80 E. C. L. 145; 23 L. J. C.

P. 204, it was held that the plaintiff, having sued one of two joint tort-feasors in tort, could not afterwards sue the other for money had and received. And see, to the same effect, *Brinsmead v. Harrison*, L. R., 6 C. P. 589.

Where an assignee of an insolvent debtor, knowing that the latter made the sale of goods for the purpose of delaying or defrauding his creditor, brings an action against the vendee on a note given by him for the purchase price, and secures the demand by an attachment of his property, he thereby so far affirms the sale and waives his right to disaffirm it, that he cannot, by discontinuing the action and demanding the goods, entitle himself to maintain an action of trover against the vendee on his refusal to return them. *Butler v. Hildreth*, 5 Met. (Mass.) 49. *Shaw, C. J.*, said: "We are then brought to the question, what act on the part of the assignee is to be taken as proof of his election. It would, we think, be going too far to say that the mere demand of the price should be admitted as a waiver of his right to avoid the sale and claim the goods, because, in many cases, if the price can be obtained it would be equally beneficial to the creditors, and he would have no further occasion to pursue the harsher remedy of impeaching the sale. But we think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts which ought to influence him in its election, it is conclusive."

A judgment in trover or trespass, whether for or against the defendant, is a bar to a subsequent action of *assumpsit*. *Agnew v. McElroy*, 10 Smed. & M. (Miss.) 552; 48 Am. Dec. 772;

payment, unassented to, is not an election,¹ though it is other-

Floyd v. Browne, 1 Rawle (Pa.) 121; 18 Am. Dec. 602; Rice v. King, 7 Johns. (N. Y.) 20; Kitchen v. Campbell, 3 Wils. 304.

And a judgment in *assumpsit* is a bar to an action for conversion. Fields v. Bland, 81 N. Y. 239; Walsh v. Chesapeake, etc., Canal Co., 59 Md. 423.

Where the owner of the goods waives the tort and recovers in an action *ex contractu* against some of the joint tortfeasors, he is estopped by his election from maintaining trover against the others. Terry v. Munger, 2 N. Y. Supp. 348; 49 Hun (N. Y.) 560; *aff'd* in 21 N. Y. 161, where it was said that the election, when made, is final and cannot be reconsidered, even where no injury has been done by the choice or would result from setting it aside.

If the action of *assumpsit* fails for want of jurisdiction, the plaintiff cannot afterward bring trover against the assignee of the wrongdoer, for after electing to treat the property as belonging to the wrongdoer and suing him for its price, he is estopped from asserting title against the latter's vendees. Hield v. Burton, 49 Mich. 53.

Even though the judgment in trover produces no fruits, it is a bar to another action against the defendant for money had and received. *Per* Jarvis, C. J., in Buckland v. Johnson, 15 C. B. 145; 80 E. C. L. 145.

But in order to be bound to his election to sue in contract, it must appear that the plaintiff knew of the tort at the time the action was brought. Equitable, etc., Foundry Co. v. Hersee, 103 N. Y. 25; Hays v. Midas, 104 N. Y. 602; Bach v. Tuch, 47 Hun (N. Y.) 536.

Shaw, C. J., in Butler v. Hildreth, 5 Met. (Mass.) 49, said: "But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee, which, if he had known them before, would have led him to a different election—whether these facts relate to the character of the sale, and bear upon the question whether it was fraudulent or not, or whether they relate to the remedy. As if the assignee, on commencing his action for the price, believes that he has secured the amount due, by a valid attachment of the defendant's property, and afterward discovers that it is not the property of the defendant, and that his supposed remedy has failed. Or if he

should discover that the defendant had an offset, which would be good against an action of *assumpsit* for the price, but not good against the action of trover. If, on any of these grounds, it should appear that he had received his election under a mistake of facts, and more especially if he had been led into such mistake by the adverse party, it might present the question in a different view." But this was merely *dicta*, and it is very much to be doubted if a plaintiff, after commencing an action of *assumpsit* with knowledge of the tort, would be allowed, upon subsequently discovering that the defendant had a valid set-off, to discontinue his action and bring trover.

Evidence of Election.—The judgment roll in the former action is receivable in evidence, not by way of estoppel, but as showing an election to treat the taking as a sale; and it seems that proof of the commencement of the former action, with full knowledge of the facts, would be just as conclusive upon the question of election as the judgment. Terry v. Munger, 121 N. Y. 161.

1. Valpy v. Sanders, 5 C. B. 886; 57 E. C. L. 886. In Morris v. Robinson, 3 B. & C. 196; 5 D. & R. 34; 10 E. C. L. 49, where a quantity of indigo had been shipped from Calcutta by freight, and had been improperly sold under an order of the court of vice-admiralty, the owner of the indigo was held entitled to maintain trover against the defendant, who had purchased and received thirty-two chests of it, notwithstanding his agent, under a power of attorney, had made an unsuccessful application to the vice-admiralty court to obtain the proceeds of certain other of the chests of indigo sold under the same circumstances.

In Burn v. Morris, 4 Tyr. 485, where trover was brought for a twenty-pound bank note, which the plaintiff had lost, and which the defendant had received from a woman who had found it, and exchanged it at the bank, notwithstanding the plaintiff had received from the woman seven pounds, being part of the proceeds obtained by the defendant by the exchange of the note, it was held that the action might be maintained, the seven pounds being allowed only in the reduction of damages, the court saying that Brewer v. Sparrow, 7 B. & C. 310; 14 E. C. L. 50, was distinguish-

wise where it is assented to, even though payment is never made;¹ or where the defendant accounts to the plaintiff and pays over the proceeds.²

VII. PROCEDURE — 1. Declaration or Complaint.—The material averments in an action of trover are ownership or possession of the property in the plaintiff,³ and its wrongful taking and conver-

able by the fact that the assignees had there received a sum as the whole balance due to them upon the footing of the account.

In *Hurst v. Gwennap*, 2 Stark. 306, where goods had been delivered by a bankrupt to the defendant, upon sale or return, after an act of bankruptcy, but without notice, the assignees, after their appointment, required the defendant to say whether he would keep the goods or not, and he elected to keep them; whereupon the assignees delivered a bill of parcels as upon sale by the bankrupt, and demanded payment of the amount; the defendant refused to pay, claiming a set-off, whereupon the assignees, without further demand, brought trover and were held entitled to recover.

1. *Lythgoe v. Vernon*, 5 H. & N. 180.

2. *Brewer v. Sparrow*, 7 B. & C. 310; 14 E. C. L. 50.

If the owner, with knowledge of the facts, accepts a receipt from the wrongdoer and afterward claims credit for the amount, it amounts to a waiver. *Singer Mfg. Co. v. Greenleaf* (Ala. 1893), 14 So. Rep. 109.

3. *Nance v. Georgia*, etc., R. Co., 35 S. Car. 307; *Wharton v. Georgia*, etc., R. Co., 35 S. Car. 608; *Wright v. Field*, 64 How. Pr. (N. Y.) 117; *Womble v. Leach*, 83 N. Car. 84; *Humpfner v. Osborne* (S. Dak. 1891), 50 N. W. Rep. 88. And see *Redpath v. Lawrence*, 42 Mo. App. 191; *Lyen v. Bond*, 3 Wash. Ter. 407; *First Nat. Bank v. Gibbins* (Ind. App. 1893), 35 N. E. Rep. 31.

The material averments in an action of trover are that the plaintiff is the owner of the property, describing it with reasonable certainty, and that the defendant wrongfully took and converted it to his own use; or that the defendant, being in the lawful possession, wrongfully converted it to his own use, and that the plaintiff was entitled to the possession at the time of such conversion. *Robinson v. Peru Plow*, etc., Co., 1 Okla. 140.

An allegation that the property belonged to the plaintiff is not an aver-

ment that he is the absolute owner, but only such as makes admissible any evidence showing that he stands in such relation to the property as to enable him to maintain trover. *Duggan v. Wright*, 157 Mass. 228.

A complaint averring possession in the plaintiff is sufficient to support a judgment in favor of the possessor against a trespasser without a direct averment of ownership or title. *Rosenthal v. McMann*, 93 Cal. 505.

In an action by a mortgagee for a conversion by a subsequent mortgagee of the same property, who has sold and bought it in under his mortgage, a complaint which fails to allege possession, right of possession, or demand of possession, is insufficient, since in *Washington* a chattel mortgage vests no title or right of possession in the mortgagee. *Binnian v. Baker*, 6 Wash. 50.

The complaint must show that the plaintiff was the owner of the property or entitled to the possession at the time of the taking and conversion. *Smith v. Force*, 31 Minn. 119; *Mount v. Cumberly*, 19 N. J. L. 124; and where it was alleged that on May 8th the plaintiff "was and is now" the owner of the property, and that "on or about the twelfth of May" the defendant took and converted it, the complaint was held insufficient, for he may not have been the owner on the twelfth of May. *Sawyer v. Robertson*, 11 Mont. 416.

An allegation that the defendant wrongfully took into his possession property, of which the plaintiff was the owner, sufficiently alleges a right of possession. *Kerner v. Boardman* (C. Pl.), 14 N. Y. Supp. 787. But in an action by a receiver, an averment that he was directed by the court to take the property into his possession, is insufficient, in not alleging that he ever actually had possession of the property. *Kehr v. Hall*, 117 Ind. 405.

An allegation that A died, leaving the plaintiffs under the law of the domicile, owners of the property, is a sufficient allegation of ownership. *Berney v. Drexel*, 33 Hun (N. Y.) 34. But an

sion by the defendant.¹ But the declaration need not show the

averment that the defendants "wrongfully took from the plaintiff, and carried away and converted to their own use," certain goods, is bad in not alleging property in the goods. *Day v. Watts*, 92 Ind. 442.

The use of the term "assignee," etc., after the name of the plaintiff in the declaration, is to be treated as mere *descriptio personæ*, and does not of itself authorize the conclusion that the declaration purports to be for a cause of action that had accrued to the assignors by a conversion prior to the assignment, and claimed to have passed by the assignment to the plaintiff. *Bloom v. Sexton*, 33 Mich. 181.

An allegation that the defendant "without leave, forcibly and wrongfully drove away certain stock belonging to the plaintiff, and has not returned the same," is sufficient both as to the title, right of possession, and conversion. *Warnick v. Baker*, 42 Mo. App. 439.

Under *Iowa Code*, § 3225, providing that "the facts constituting the plaintiff's right to the present possession and the extent of his interest in the property, whether it be full or qualified ownership," must be set out, it was held that evidence of a chattel mortgage to the plaintiffs was not admissible to prove their ownership under a petition alleging that they were the "absolute and unqualified owners," and "that they acquired said ownership by purchase." *Kern v. Wilson*, 73 Iowa 490.

Where the complaint alleges the ownership of the property converted in the plaintiff, but fails to allege that he was at the time in possession or entitled to the possession, it will be held sufficient where there is no demurrer and its sufficiency is questioned for the first time at the trial by an objection to the evidence. *Brickley v. Walker*, 68 Wis. 563.

A statement in a complaint that the plaintiff "has been at great trouble and expense in tracing and searching for his said property," is an insufficient allegation of the plaintiff's ownership, or right of possession. *Johnson v. Oregon*, etc., Nav. Co., 8 Oregon 35.

In *Baals v. Stewart*, 109 Ind. 371, it was held that where possession of the property is not sought in an action to recover damages for its wrongful conver-

sion, the complaint need not aver that the plaintiff is entitled to possession.

A count in trover which is defective in failing to allege that the plaintiff is possessed of the goods in controversy, as of his own property, is not cured by verdict. *Sevier v. Holliday, Hempst.* (U. S.) 160. But see *Good v. Harnish*, 13 S. & R. (Pa.) 99.

Action by Guardian.—A declaration in an action of trover by a guardian which fails to show that he is entitled to the possession, but only alleges possession in his ward, is bad on demurrer. *Dearman v. Dearman*, 5 Ala. 202.

Replication.—Where the answer alleged that the only interest the plaintiff ever had in the goods was as administrator, and that after his removal as such, the defendant lawfully bought them from his successor, a replication alleging that, while the plaintiff was administrator, the goods were in the possession of third persons who claimed them as their own, that the plaintiff, under the belief that they belonged to the estate, brought an action of replevin therefor, on the trial of which, the property was awarded to such third persons, and that by reason of the defendant's conversion he was unable to return them to the adjudged owners, who, thereupon, brought suit on his replevin bond and recovered judgment against him and his sureties for the value of the goods with the cost, by the payment of which judgment he had become the owner of the goods, was held sufficient. *McFadden v. Schroeder* (Ind. 1892), 29 N. E. Rep. 491.

1. See cases cited above. See also *Davis v. Davis*, 6 Blackf. (Ind.) 394.

A complaint alleging that the defendant railroad unlawfully took, converted, and appropriated the property in controversy to its own use, by hauling it away and using it in its road, sufficiently charges a conversion. *Louisville, etc., R. Co. v. Balch*, 105 Ind. 93.

An allegation of conversion which cannot be rejected as surplusage, may convert a count which, without such allegation, would not be a count in trover, into such a count. *Wells v. Connable*, 138 Mass. 513.

The petition is not insufficient for failing to allege that the defendant took possession of or sold the property, where it is alleged that he fraudulently advised and instigated the sale. *Cone*

v. Ivinson (Wyoming, 1893), 33 Pac. Rep. 31.

Where the complaint shows facts to the effect that a deposit in a bank by the defendant in his own name, of money delivered to him by the plaintiff, was a wrongful appropriation thereof, and alleges a conversion by the wrongful withdrawal and use of the money, the action is one for conversion, although the complaint does not characterize the deposit as a conversion. *Thompson v. Vroman*, 66 Hun (N. Y.) 245. See *Hoowe v. Kreling*, 93 Cal. 136, where the complaint was treated as one for a conversion and not for the enforcement of a trust.

An allegation "that the defendants converted to their own use, or wrongfully deprived the plaintiff of his goods; to wit, four barrels of whisky," was held to be good, the alternate form in which the tort was alleged being equivalent, and together importing a single injury. *Meizel v. Carr*, 25 Md. 46.

A tax was raised in a town composed of two congressional townships, but none of it had been expended when the plaintiff township was detached from the town. In an action by it against the town for the conversion of the money so received, the complaint alleged that, "The defendant has unlawfully and wrongfully kept the money in its treasury and converted the same to its own use," and it was held that, as it did not appear from the complaint when the money was converted, nor that it was in the treasury at the time of the separation of the two townships, it stated no cause of action, since if the conversion occurred prior to the severance of the townships there was no remedy by the one town against the other. *Clayton v. Bennington*, 24 Minn. 14.

Possession in Defendant.—It is sufficient to aver that the defendant, being in the lawful possession of the property, wrongfully detained or converted it to his own use. *Robinson v. Peru Plow, etc., Co.*, 1 Okla. 140; *Humpfner v. Osborne* (S. Dak. 1891), 50 N. W. Rep. 88; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11.

A complaint alleging property in the plaintiff, possession by the defendant as bailee, the value of the property and defendant's refusal to deliver it on demand, states sufficient cause to support an action for conversion. *Gregory v. Fichtner* (C. Pl.), 14 N. Y. Supp. 891; 27 Abb. N. Cas. (N. Y.) 86.

Allegation of a Legal Conclusion.—Where the property was rightfully lev-

ied upon by the direction of the creditors, and in an action against them for its conversion, the petition alleged that "by and through the officer," they had converted it to their own use, it was held that this was but the allegation of a legal conclusion, and that in the absence of any statement as to what the defendants did after directing the levy, the petition was properly held bad on demurrer. *Burt v. Decker*, 64 Iowa 106.

But an allegation that the defendant "unlawfully took possession of the said cross-ties, and converted them to his own use," is not made an allegation of a conclusion of law by the use of the word "unlawfully." *Nance v. Georgia, etc., R. Co.*, 35 S. Car. 307.

Execution Against the Person.—A complaint alleging the receipt by the plaintiff of the defendant's money in a fiduciary capacity and the conversion of it to his own use, charges conversion within the provision of *New York Code Civ. Proc.*, § 549, for the purpose of sustaining an execution against the person. *Bullen v. Murphy*, 16 Abb. N. Cas. (N. Y.) 474.

Where the action is for damages, and not to recover specific property, an order of arrest of the defendant obtained under § 179, sub. 3, of the *New York Code*, cannot be upheld. *Seymour v. Van Curen*, 18 How. Pr. (N. Y.) 94.

Conversion by Partners.—An averment that the defendants were partners is immaterial, and need not be proven. *Head v. Goodwin*, 37 Me. 181.

Joint Conversion.—A complaint charging separately a conversion of personal property by one defendant by his sale thereof to the other, and the conversion by the latter by his purchase from the former, states in effect a joint conversion and but one cause of action. *Smith v. Briggs*, 64 Wis. 497.

Amendment.—Where, in an action of trover, a second petition was filed charging that the defendant maliciously sued out a writ of attachment and caused the property to be seized and sold at a sacrifice, it was held to state a new and distinct cause of action, and not allowable as an amendment. *Scovill v. Glasner*, 79 Mo. 449.

Trover or Replevin.—A complaint alleging a wrongful taking, a wrongful possession, and an unlawful conversion, is a complaint in replevin and not in trover. *Enos v. Bemis*, 61 Wis. 656; and where the averment was that the defendant "wrongfully took and converted to his own use" the property, it

nature or evidence of the plaintiff's title,¹ nor is it necessary to set forth how, or in what way, or by what means, the conversion was accomplished,² though the fact of conversion should be directly alleged.³ The property should be described with reasonable certainty, though a very general description is sufficient.⁴

was held to be an action of replevin, and that the allegation of conversion was surplusage. *Vogel v. Badcock*, 1 Abb. Pr. (N. Y.) 176.

1. *Warren v. Dwyer*, 91 Mich. 414; *Williams v. Raper*, 67 Mich. 427; *Harvey v. McAdams*, 32 Mich. 472; *Heine v. Anderson*, 2 Duer (N. Y.) 318.

It is unnecessary to state in what manner the plaintiff became the owner, because it is a matter of evidence. *Malcolm v. O'Reilly*, 46 N. Y. Super. Ct. 222. But if the plaintiff attempts to set out the facts by which he claims to have acquired title and they are insufficient to sustain his claim, the pleading is bad. *First Nat. Bank v. St. Croix Boom Co.*, 41 Minn. 141.

Where the complaint, after alleging a mortgage of the goods to the plaintiff and default thereon, also alleges delivery of them to the plaintiff by the mortgagor in satisfaction of the mortgage debt, there is no error in permitting the plaintiff to make proof of his title simply as the mortgagee. *Smith v. Konst*, 50 Wis. 360.

Though the plaintiff, instead of pleading title in himself, pleads the evidence of his title, it will be held sufficient. *Swift v. James*, 50 Wis. 540.

2. *Decker v. Mathews*, 12 N. Y. 313; *Richardson v. Hall*, 21 Md. 399; *Smith v. Thompson*, 94 Mich. 381. In this last case it was held that in an action of trover for the conversion of stock, the declaration need not allege that the shares had been indorsed so as to enable the defendant to transfer them; and in *Beebe v. Knapp*, 28 Mich. 53, it was held that the declaration need not set forth the false representations by which the plaintiff was induced to part with his property.

The usual declaration in trover is sufficient to enable the plaintiff to show the facts essential to a recovery. *Hutchinson v. Whitmore*, 90 Mich. 255; *Duggan v. Wright*, 157 Mass. 228; *Paalzow v. North Carolina Estate Co.*, 104 N. Car. 437; *First Nat. Bank v. St. Croix Boom Co.*, 41 Minn. 141; *Hawkins v. Pearce*, 11 Humph. (Tenn.) 44.

A statement of the attendant circumstances is redundant and irrelevant,

and should be stricken out. *Green v. Palmer*, 15 Cal. 411; 76 Am. Rep. 492.

In an action for the conversion of bank checks, under an allegation that they were obtained without the plaintiff's authority, evidence is admissible to show that the possession of them was obtained through the forgery of the plaintiff's indorsement by a third person. *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298.

Where the plaintiff avers a demand for the property and a refusal to deliver, he need not set forth the specific facts, showing the detention to have been wrongful. *Chapin v. Merchants' Nat. Bank*, 31 Hun (N. Y.) 529.

Where the plaintiff states facts which, if true, entitle him to the relief asked, the technical rules of pleading formerly applicable to the action of trover, cannot be applied, under the *Missouri* Statute, to defeat the action. *Knipper v. Blumenthal*, 107 Mo. 665.

In an action against a carrier, it is unnecessary to allege his duty as such, if his business is set forth together with his negligence and the loss resulting therefrom. *Wright v. McKee*, 37 Vt. 161.

3. It is not sufficient to allege the fact of conversion inferentially, or to merely state facts which constitute the evidence of conversion. *Perry v. Musser*, 68 Mo. 477.

Thus, if the plaintiff alleges a demand and refusal, but omits to aver a conversion, the declaration is ill, the demand and refusal being only evidence of a conversion. *Watress v. Pierce*, 36 N. H. 240.

An averment that the defendant unlawfully, fraudulently, willfully, and maliciously took the property, is not an averment of a conversion. *Triscony v. Orr*, 49 Cal. 612.

4. A general description of the property in actions of trover is sufficient. *Stinchfield v. Twaddle*, 81 Me. 273; *Colebrook v. Merrill*, 46 N. H. 160; *Taylor v. Wells*, 2 Saund. 74.

If the goods are described according to common acceptance, it is sufficient; thus, a declaration in trover for 400

"ends" was held sufficient as being a particular term, well understood, and the proper denomination of all short pieces of boards. *Knight v. Barker*, 2 *Ld. Raym.* 1219; 11 *Mod.* 66. So, it has been held that trover for "old iron" is good after verdict. *Talbot v. Spear*, *Willes Rep.* 70; and also for two "packs" of flax and two "packs" of hemp, without setting out the weight or quantity of a pack, is good after verdict, and it seems even upon special demurrer. *Thornton v. Bernard*, 2 *Ld. Raym.* 991. So, also, where the description of so many ounces of cloves, mace, and nutmegs, without stating the quantity of each. *Hartford v. Jones*, 1 *Ld. Raym.* 588; so as to "a parcel of diamonds." *White v. Graham*, 2 *Str.* 827; and "a parcel of pack cloths, wrappers and cords." *Bottomley v. Harrison*, 2 *Stra.* 809; also for three "ricks or stacks" of hay, without alleging the quantity each rick contained. *Wood v. Davis*, 1 *Mod.* 189; 1 *Lev.* 301; so for six parcels of lead. *Green v. Green*, cited in *Jenny v. Norris*, 1 *Vent.* 106; or for a "library of books," without expressing what they are. *Emery's Cas.*, cited in *Elpicke v. Acton*, 1 *Vent.* 114; or two pieces of cloth, *Isles v. Windsor*, *Sty.* 419. Trover for a "suit" of knots was held sufficiently certain. *Parkhurst v. Shefton*, 2 *Show.* 315; or for a parcel of thread, without mentioning the quantity or quality. *Jenny v. Norris*, 1 *Lev.* 303; for it is certain enough in trover, where damages only are to be recovered, and not the thing itself. *Copleston v. Piper*, 1 *Ld. Raym.* 191, *per* Powell, J. Trover for ten weights was held good, if the jury can understand the case, and damages only are to be recovered. *Hook v. Gallaway*, 12 *Mod.* 3. See also *Chamberlain v. Cooke*, 2 *Vent.* 78. So, also, in trover for a "piece" of tepee, without saying how many yards it contained. *Radley v. Rudge*, 2 *Str.* 738; and for fifty pieces of square timber wood. *Halsegrave v. Thompson*, cited 2 *Str.* 810; and in trover for divers quantities of chinaware, earthenware, and linen, without setting forth particulars, the description was held good after judgment by default. *Hobbs v. Green*, *Barnes* 276.

In the infancy of this action, however, it was held necessary in the declaration in trover to ascertain the goods which were the subject of dispute with as much certainty and accuracy as was required in an action of detinue or replevin. *Taylor v. Wells*,

2 *Saund.* 74, note; thus, where the declaration was for a "parcel" of lings, without specifying the quantity contained, the verdict and judgment for the plaintiff was reversed. *Gramvel v. Rhobotham*, *Cro. Eliz.* 865; and trover for 200 weights of lead and 200 of brass, without showing the quantity, was held too uncertain after verdict. *Powell v. Hopkins*, *Sty.* 247.

Where the declaration was to recover the value of numerous articles of various kinds of household furniture, agricultural implements, robes, harnesses, etc., the description of the property referred to as "the goods and chattels in the schedule hereunto annexed, and of the value therein mentioned," was held by long usage to be sufficient. *Stinchfield v. Twaddle*, 81 *Me.* 273. Such was the form used in *New Hampshire*, though it was said to be "somewhat untechnical to do it." *Hilton v. Burley*, 2 *N. H.* 193; and the court in that state refused to sustain the objection after the verdict. *Edgerly v. Emerson*, 23 *N. H.* 572; 55 *Am. Dec.* 207.

In *Kinder v. Shaw*, 2 *Mass.* 398, note, the chief justice observed that in trover, a schedule annexed to the writ is no part of the declaration, and that it was a very improper practice. And see opinion of *Parker, C. J.*, to the same effect in *Rider v. Robbins*, 13 *Mass.* 284.

In an action of trover, a description of the goods as "certain goods; to wit, a lot of goods in a certain store in A," was held insufficient. *Edgerly v. Emerson*, 23 *N. H.* 555; 55 *Am. Dec.* 207; and a declaration for a "tool chest containing divers, tools and working utensils" and "a trunk containing clothes" is sufficiently certain. *Ball v. Patterson*, 1 *Cranch (U. S. Cir. Ct.)* 607. So, also, where the property was described as "a certain black mare, of the value of one hundred dollars," *Heddy v. Fullen*, 1 *Blackf. (Ind.)* 51; or a "pair of oxen of the value of one hundred dollars." *Vananken v. Wickham*, 5 *N. J. L.* 509.

The plaintiff, under a declaration for the conversion of "one grindstone," may recover the value of the frame in which it was placed, if the jury find the frame was essential to its use and taken away with it. *Patterson v. Dudley*, 12 *Gray (Mass.)* 375.

The same strictness in the description of the property is not required upon a motion of arrest as upon a demurrer to the declaration. *Henry v. Sowles*, 28 *Fed. Rep.* 521.

Neither the time when the conversion took place,¹ nor the value of the property, is a material allegation,² but there should be a claim for damages;³ and where special damages are sought to be

Where, in an action of trover, the timber was described in the declaration as "being that hewn timber and those round logs which were cut on the land of petitioner and from the land of C. by one R., and were by such R. left and deposited in the waters of the O. river at a point not far from the bridge of the M. & A. railroad, and being that timber and logs referred to in the contract between petitioner and said R., dated 15th of April, 1891, and recorded in Book L, folio 169, in the office of the clerk of the supreme court of B. county, said state, July 7th, 1891, to which logs and timber petitioner claims title," it was held sufficiently certain. *Leitner v. Strickland*, 89 Ga. 363.

Description of Bank Bills.—In trover for bank bills, a description of them as "certain current bank bills representing in all one hundred and fifty dollars in money, and of the value of one hundred and fifty dollars," is good after the verdict. *Colebrook v. Merrill*, 46 N. H. 160.

In *Iasigi v. Shea*, 148 Mass. 538, a declaration that the defendant converted "large sums of money, the property of the plaintiff," was held good on general demurrer. *Little v. Gibbs*, 4 N. J. L. 240.

Where they were described as "bank notes, commonly so called, issued by certain incorporated banks," the name of the banks and number or denomination of the notes being given, it was held to sufficiently state the parties to, and the legal effect and substance of the notes, as to be sufficient. *Dows v. Bignall*, Hill & D. Supp. (N. Y.) 407.

Description of the Bond or Note.—Where the action is for a bond in the possession of the defendant, the latter will not be compelled by the court to deliver a copy to the plaintiff in order that he may declare with accuracy. *Denslow v. Fowler*, 2 Cow. (N. Y.) 592.

The plaintiff will have to prove the value as alleged, and if he cannot state the precise amount, he may state that it was of great value, to wit: of the value of a certain sum. *Bissel v. Drake*, 19 Johns. (N. Y.) 66. He need not state the dates or times for payment, it being presumed that they are not in his possession. *Bank of New Brunswick v. Neilson*, 15 N. J. L. 337; 29 Am. Dec. 691. He need not recite any part of it or give its date.

Pierson v. Townsend, 2 Hill (N. Y.) 550. Certainty in the description to a common intent is all that is required. *Taylor v. Morgan*, 3 Watts (Pa.) 333. But see *Fry v. Baxter*, 10 Mo. 302, where it is said that an omission to allege the value of a note can only be reached by special demurrer.

Amendment.—Where trover is brought for a mare in foal, a recovery may be had for the colt after birth, and declaration may be amended as to the description of the colt. *King v. Wright*, 77 Ga. 581.

1. *Hixon v. Pixley*, 15 Nev. 475; *Richardson v. Hall*, 21 Md. 399.

2. An allegation of value is not material, and the omission of the defendant to deny it does not operate as an admission of the value averred in the complaint. The action of trover can be maintained, although no value is averred or proved; the conversion being shown, the plaintiff is entitled to nominal damages. *Connoss v. Meir*, 2 E. D. Smith (N. Y.) 314; *Starr v. Cragin*, 24 Hun (N. Y.) 177; *Richardson v. Hall*, 21 Md. 399; *Pearpoint v. Henry*, 2 Wash. (Va.) 192. And see *Kuhland v. Sedgwick*, 17 Cal. 123. But see *contra*, *Hixon v. Pixley*, 15 Nev. 475; *Carlyon v. Lannan*, 4 Nev. 156. The complaint should aver either that the property converted is of some value, or that the plaintiff sustained damages by reason of the conversion. *Ryan v. Hurley*, 119 Ind. 115.

In an action for the conversion of mining stock, where the complaint alleged that on a specified time, the defendant bought for the account of the plaintiff "six hundred dollars' worth" of stock, and at two subsequent times bought "fifteen hundred dollars' worth" of other stock, the allegations of the value of the stock were held sufficient to support a judgment in favor of the plaintiff. *Herrlich v. McDonald*, 80 Cal. 460.

3. *Stirling v. Garritee*, 18 Md. 468; *Ryan v. Hurley*, 119 Ind. 115.

It is not necessary that the damages be specifically alleged, but only that they be claimed as part of the relief demanded. *Levi v. Legg*, 23 S. Car. 282.

Nor is it necessary to state the amount of the damage. *Mattingly v. Darwin*, 23 Ill. 567.

recovered, they should be specially laid.¹ The omission of a material averment in the complaint may be cured by its express admission in the answer.²

Where there is an allegation of a refusal to account, or of an actual conversion, it is unnecessary to allege a demand and refusal,³ and it is improper to charge the defendant with making a malicious use of the property.⁴ The declaration may contain a count in trover and one in trespass *vi et armis*,⁵ and a recovery may be had on a single count for several articles taken and converted at different times and places.⁶

Trover is a transitory action and the venue may be laid in any county, though the conversion took place out of the jurisdiction of the state courts;⁷ but the place where the cause of action arose is *prima facie* the place where the venue ought to be laid.⁸

1. See *infra*, this title, *Measure of Damages*.

2. Where the complaint failed to allege the delivery of the property to the defendant, together with the object of the delivery, and the refusal of the defendant to return it, the omission was held to be cured by the express admission of those facts in the answer. *Ferrera v. Parke*, 19 Oregon 141.

In Louisville, etc., *R. Co. v. Lawson*, 88 Ky. 496, it was held that if the petition was defective in not positively averring a conversion, the defect was cured by the answer which denied that the defendant had "converted said goods." And see *Ramsey v. Hurley* (Tex. 1888), 12 S. W. Rep. 56.

3. *Sloan v. Lick Creek, etc., Gravel Road Co.*, 6 Ind. App. 584; *Knowlton v. Logansport*, 75 Ind. 103; *Snyder v. Barber*, 74 Ind. 47; *Bunger v. Roddy*, 70 Ind. 26; *Proctor v. Cole*, 66 Ind. 576; *Nelson v. Corwin*, 59 Ind. 489; *Jeffersonville, etc., R. Co. v. Gent*, 35 Ind. 39; *Ferguson v. Dunn*, 28 Ind. 58; *Robinson v. Skipworth*, 23 Ind. 311; *Reish v. Reynolds*, 68 Ind. 561; *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298; *Saratoga Gas, etc., Co. v. Hazard*, 55 Hun (N. Y.) 251; *Pease v. Smith*, 61 N. Y. 481; *LaFayette County Bank v. Metcalf*, 40 Mo. App. 502; *Holdridge v. Lee* (S. Dak. 1892), 52 N. W. Rep. 265.

An allegation that the defendant collected a certain sum of money belonging to the plaintiff which he failed and refused to account for, necessarily implies a demand, for there can be no refusal without a demand. *Sloan v. Lick Creek, etc., Gravel Road Co.*, 6 Ind. App. 584; *Snyder v. Barber*, 74 Ind. 47.

An allegation of a wrongful taking of the property is sufficient without averring a demand. *Norman v. Horn*, 36 Mo. App. 419.

But where the goods came properly into the hands of the defendant, a demand and refusal should be alleged. *Baker v. Fuller*, 21 Pick. (Mass.) 318.

4. He is only liable for its value. *Moffatt v. Pratt*, 12 How. Pr. (N. Y.) 48.

5. And the declaration is not demurrable because the two appeared to be for the same cause of action. *Lippman v. Myers*, 53 N. J. L. 21.

6. *Barron v. Davis*, 4 N. H. 338.

7. *Robinson v. Armstrong*, 34 Me. 145; 1 Chitt. Pl. 282. Trover will lie in England for a conversion in Ireland. *Brown v. Hedges*, 1 Salk. 290. And see *Barker v. Warren*, 2 Mod. 270.

It is a transitory action and the trial might be transferred to a distant county, or even to a distant state, if the defendant should happen to be found there. *Mather v. Ministers of Trinity Church*, 3 S. & R. (Pa.) 511; 8 Am. Dec. 663.

Jurisdiction.—The action may be brought before a justice of the peace. *Smith v. Grove*, 12 Mo. 51; *Anonymous*, 3 N. J. L. 487.

Postmaster Detaining Mail.—A postmaster is liable to an action of trover in the state courts, for improperly detaining mail matter, though the detention is under color of a regulation of the post office department. *Teall v. Felton*, 1 N. Y. 537; 49 Am. Dec. 352.

8. If the defendant shows by affidavit where the cause of action arose, exclusively, and that he has witness material to his defense residing in that county, he has a right to have the venue there. The plaintiff can only divest him of

2. Bond.—Under the *South Carolina* Act of 1827, the action of trover was made a proceeding *in rem*; ¹ the plaintiff could be required to give a bond to be answerable for all damages sustained by the defendant through his illegal conduct in commencing the action, ² and the defendant to give a bond for the forthcoming of the property, the subject-matter of the action. ³

this right by stipulating to give evidence arising in the county where he has laid the venue, and in addition to that, stating, by affidavit, that he has witness material to his cause residing in that county. *Duryee v. Orcott*, 9 Johns. (N. Y.) 248.

Where the venue is not laid within the county where the act complained of was done, the plaintiff cannot, after the evidence is given on the trial, submit to a non-suit, and the defendant is entitled to the verdict. *Hull v. Southworth*, 5 Wend. (N. Y.) 265.

1. The act of 1827 makes the action of trover commenced under its provisions, a proceeding *in rem*, and when a writ is issued and served, the chattel is in the custody of the law and cannot be distrained for rent. *Seigling v. Main*, 1 McMull. (S. Car.) 252.

A writ in trover cannot be served under the provisions of this act in any other district than that to which it is returnable. *Nesbit v. McDaniel*, *Cheves* (S. Car.) 12.

2. In an action on a bond given by the plaintiff in trover, in pursuance of the act of 1827, "to be answerable for all damages which the defendants might sustain by any illegal conduct in commencing and conducting the said action of trover," the mere fact that the defendant had a verdict does not constitute a breach of the condition of the bond. "Illegal conduct" means something which the law prohibits, and the plaintiff's conduct is not illegal because he failed to establish his right of action. *Brown v. Spann*, 3 Hill (S. Car.) 324.

3. *Ricks v. Richardson*, *Dudley* (S. Car.) 57; *Haile v. Miller*, 12 Rich. (S. Car.) 163; *Bowen v. Coker*, 3 Rich. (S. Car.) 142.

Whenever the law requires the defendant to give security, and makes it the duty of the sheriff to obtain that security from him, it implies a power of arrest. Under an order conformable to the Trover Act of 1827, requiring the defendant to give security for the forthcoming of the property, the sheriff has a right to take the body of the defendant and keep him in custody

until he gives the security. *Poole v. Vernon*, 2 Hill (S. Car.) 667. But where the sheriff has taken security for the production of the property, under the act of 1827, he cannot afterwards retake the defendant on account of the alleged insufficiency of such security. *Ricks v. Richardson*, *Dudley* (S. Car.) 57.

The defendant might even be required to give a bond under the Trover Act of 1827 for the production of the property, and to give bail also. *Vose v. Hannahan*, 6 Rich. (S. Car.) 225.

It is a necessary legal consequence that if the chattel sued for, is not delivered to satisfy the plaintiff's judgment, the trover bond is forfeited, unless the defendant, or his security when sued, can show something which will in law save his bond; and where the sheriff levied on, and offered for sale, a chattel which was the subject of a pending action of trover, and either from there having been no sale effected or from the defendant himself having been the bidder, the right of property remains unchanged, the sheriff will not be considered as having put it out of the power of the defendant to produce the chattel, according to the condition of his trover bond. *Floyd v. Ervin*, 1 Strobb. (S. Car.) 437.

The bond taken by the sheriff for the production of the chattel may be discharged by the plaintiff, or the chattels for which the action is brought may be delivered up to the sheriff by the defendant, and the bond canceled, in order to discharge the sureties, and make them competent witnesses. *Brown v. Spann*, 3 Hill (S. Car.) 324; *Bowen v. Coker*, 3 Rich. (S. Car.) 142.

A trover bond conditioned for the production of the chattel is not void because it contains a further bad condition for the appearance of the defendant. *Haile v. Miller*, 12 Rich. (S. Car.) 163.

The defendant has a right to use a chattel pending the action, and is not liable for any natural deterioration arising from the ordinary use of it. *Floyd v. Ervin*, 1 Strobb. (S. Car.) 437.

3. Plea or Answer.—The general issue, in trover, is not guilty. There is some conflict of authority as to the right of the defendant to show, under such plea, that the plaintiff had no such interest in the property as would authorize him to sue in trover. It is generally held in the *United States* that he can,¹ and this was

Continuance.—It has been held in *South Carolina* that the defendant in trover may be ordered to give bail to the action as the condition of a continuance of the cause granted at his instance. *Stanley v. Miers*, 1 Brev. (S. Car.) 24.

1. *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Swope v. Paul*, 4 Ind. App. 463; *Eureka Iron Works v. Bresnahan*, 66 Mich. 493; *Ribble v. Lawrence*, 51 Mich. 569; *Jones v. Rahilly*, 16 Minn. 320; *Kenny v. Georgen*, 36 Minn. 190; *Johnson v. Oswald*, 38 Minn. 550. And see *Gerard v. Jones*, 78 Ind. 378; *Ford v. Griffin*, 100 Ind. 85; *Brevoort v. Brevoort*, 40 N. Y. Super Ct. 211; *Kennedy v. Strong*, 10 Johns. (N. Y.) 289; *Fenlason v. Rackliff*, 50 Me. 362; *O'Connell v. Kilpatrick*, 64 Md. 122; *Rotan v. Fletcher*, 15 Johns. (N. Y.) 207. Defendant may show a paramount title in a stranger. *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Kennedy v. Strong*, 14 Johns. (N. Y.) 130; *Cook v. Howard*, 13 Johns. (N. Y.) 284; *Aikin v. Buck*, 1 Wend. (N. Y.) 466; *Davis v. Hoppock*, 6 Duer (N. Y.) 254. But where it appears that the plaintiff was in the actual possession of the goods at the time of the taking, the defendant should connect himself in some way with such stranger owner. *Wheeler v. Lawson*, 103 N. Y. 40; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Eureka Iron Works v. Bresnahan*, 66 Mich. 494; *Harker v. Dement*, 9 Gill (Md.) 7; 52 Am. Dec. 670.

Where the action is based solely on a wrongful detention, the defendant may, under the general denial, show title in a stranger, although he does not connect himself with such title. *Griffin v. Long Island R. Co.*, 101 N. Y. 348.

The defendant may prove property in himself at the date of the alleged conversion. See *McClelland v. Nichols*, 24 Minn. 176; or that he had a mortgage on the property, *Schoenrock v. Farley*, 49 N. Y. Super. Ct. 302; and where the action is for the conversion of hoops, may show title to the land from which they were cut. *Hart v. Hart*, 48 Mich. 175. And see *Swift*

v. James, 50 Wis. 540; *Tyson v. McGuineas*, 25 Wis. 656; *Vanness v. Nafie*, 5 N. J. L. 683. But the plaintiff may dispute such title. *Parks v. Loomis*, 6 Gray (Mass.) 467.

The plaintiff's admission that the property is in a third person may be proved at the trial. See *Glenn v. Garrison*, 17 N. J. L. 1; or the defendant may give any evidence showing a right of property or right of possession in another, *Robinson v. Peru Plow, etc., Co.*, 1 Okla. 140; for the general denial denies not only the conversion, but also the plaintiff's title. *Robinson v. Frost*, 14 Barb. (N. Y.) 536.

The defendant can offer anything in evidence tending to show that the plaintiff had no title in the matter in controversy at the institution of the action, or that the ownership was in a third person, or that the alleged cause of action never existed, or that he had no right to the alleged cause of action, as fraud in the acquisition of the plaintiff's title, *Thomas v. Ramsey*, 47 Mo. App. 84; for the plaintiff upon the general issue must recover upon the strength of his own title and right of possession, and not on the want of title in his adversary. *Bricker v. Hughes*, 4 Ind. 146. But the defendant cannot, under the general denial, show that the promise supporting the bill of sale under which plaintiff claims, was unfilled, or that the bill was an unlawful preference under the laws of the state relating to general assignments for the benefit of creditors, *Boyle v. Williams*, 1 Misc. (N. Y.) 112; nor is evidence that the plaintiff has had dealings with the defendant in which he became indebted to the latter, and for which judgment is pending in the defendant's favor, admissible under the general denial. *National S. S. Co. v. Tugman*, 143 U. S. 28.

Under the *Michigan* practice, a plea containing in substance the general issue, and notice that special matters of defense will be introduced, is sufficient, *Adams v. Kellogg*, 63 Mich. 105; and where the goods were taken in attachment against a third person, the officer must give notice of his attachment in order to admit evidence of justification

formerly the rule in *England*;¹ but since the adoption of the pleading rules of Hilary Term, the general issue of not guilty is there held to operate only as a denial of the conversion, and not of the plaintiff's title to the goods,² and this is the rule adopted

thereunder. *Eureka Iron Works v. Bresnahan*, 66 Mich. 489; *Frankel v. Coots*, 41 Mich. 75; *Fry v. Soper*, 39 Mich. 727. And see *McLaughlin v. Smith*, 45 Mich. 277.

In *Daggett v. Adams*, 1 Me. 201, Mellen, J., in delivering the opinion of the court, said: "When a debtor, from whom property has been taken by an officer on *mesne* process or execution, sues such officer for such taking, a mere general issue would not be sufficient, because proof of property in the plaintiff, and of a taking by the defendant would maintain the action. If, therefore, in such case the defendant claims a right to take away and dispose of the property, he must either set forth that right, in the form of a special plea of justification, or accompany the general issue with a brief statement which must contain, though in a less formal manner, the nature of his authority, and the manner in which he has exercised it."

In *Pemberton v. Smith*, 3 Head (Tenn.) 18, it was held that all matters of defense might be given in evidence under the general issue, save a release and the Statute of Limitations, and that a plea of justification was unnecessary on the part of an officer selling the property under an execution.

In *Blakey v. Douglas* (Pa. 1886), 6 Atl. Rep. 398, it was held that under the general issue, the plaintiff must prove his title, general or special, coupled with the right of immediate possession and the wrongful conversion by the defendant, and that the latter might rebut either of the allegations of fact on which the plaintiff's right of action depends; for example, he might show an outstanding paramount title to the property in controversy, or that he had not wrongfully converted it to his own use.

In *Sylvester v. Girard*, 4 Rawle (Pa.) 185, it was held that under the plea of not guilty, the defendant can defeat the plaintiff by showing title in himself or a third person, and that either will equally defeat the plaintiff's recovery.

In *Miller v. Knapp* (Pa. 1890), 19 Atl. Rep. 555; 26 W. N. C. (Pa.) 29, it was held that under the plea of not guilty, the defendant could give in evidence the record of proceedings before

a justice of the peace, showing that the swine for which the action of trover was brought were taken and condemned according to law, for being suffered to be at large without rings in their noses.

1. *Leake v. Loveday*, 4 M. & G. 972; 43 E. C. L. 500; 1 Chitt. Pl. 489; *Gilb. C. P.* 64, 65. A special plea in trover, though admitted, was censured by Lord Kenyon, in *Webb v. Fox*, 7 T. R. 391. And see *Lynner v. Wood*, Cro. Car. 157.

2. *White v. Teal*, 12 Ad. & El. 106; 40 E. C. L. 33; *Reg. Gen. Hil. T.*, 4 W. 4; *Reg. Gen. Hil. T.*, 16 Vict., 1 El. & Bl.; 1 Chitt. Pl. 530; 3 Steph. N. P. 2668; 1 Add. Torts, § 529. The plaintiff is entitled to a verdict on the plea of not guilty if a conversion in form is shown, although it appears that he had parted with his property in the goods at the time of the conversion. *Vernon v. Shipton*, 2 M. & W. 9, 2 Gale 195. Nor can the defendant, under such plea, set up an absolute property in the goods in himself by sale from the plaintiff, although the only evidence of a conversion is a demand and refusal. *Barton v. Brown*, 5 M. & W. 298. But the plea of not guilty only admits the plaintiff's property or right of possession to the extent necessary to maintain the action of trover, and the defendant may therefore show that he was a tenant in common with the plaintiff, *Stancliffe v. Hardwick*, 2 C. M. & R. 1; *Higgins v. Thomas*, 8 Q. B. 908; 55 E. C. L. 908; or that he has some qualified right in the property and has only dealt with it in the manner in which he was entitled to in the exercise of such right. *Young v. Cooper*, 6 Exch. 259; *Wilkinson v. Whalley*, 5 M. & G. 590; 44 E. C. L. 311; *Verrall v. Robinson*, 2 C. M. & R. 495; *Kynaston v. Crouch*, 14 M. & W. 266; *per Parke, B.* Evidence of a lien is not admissible under the general issue, for the plea denies only the conversion and admits a title in the plaintiff, which includes the right of possession, and a lien is inconsistent with such right. *White v. Teal*, 4 P. & D. 43; 12 Ad. & El. 106; 40 E. C. L. 33. Nor can it be shown that the goods were given to the plaintiff by the defendant

in some states.¹ Under those rules, if the defendant wishes to put in issue the plaintiff's right to the possession of the goods, he should traverse that he was possessed of them as of his own property, in the manner and form as alleged in the declaration.² All matters in confession and avoidance should be specially pleaded,³ and no special plea in bar can be good unless it

upon a condition and retaken by the latter upon its non-performance. *Jones v. Davies*, 2 L. M. & P. 483; 6 Exch. 663; 20 L. J. Exch. 483.

Under the general denial, however, the defendant may show that there was not a wrongful conversion. See *Mayhew v. Herrick*, 7 C. B. 229; 18 L. J. C. P. 179; 62 E. C. L. 229; such plea putting in issue the legality of the conversion and not the mere fact of conversion. *Young v. Cooper*, 6 Exch. 259. And see *Kynaston v. Crouch*, 14 M. & W. 266.

1. In *Florida*, under the rules governing the practice of the circuit court, which were copied from the rules of court of Hilary Term, 4 Wm. IV., the plea of not guilty operates as a denial only of the conversion, and not of the facts stated in the inducement, and the defendant cannot, under such plea, introduce evidence in denial of all property or right of possession in the plaintiff. *Robinson v. Hartridge*, 13 Fla. 501. And see *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1.

Under *Massachusetts* Pub. St., ch. 167, § 20, the defendant is required to set forth in his answer, in clear and precise terms, each fact intended to be relied upon in the avoidance of the action. *Savage v. Darling*, 151 Mass. 5.

In an action of trover by the purchaser of goods, the defendant cannot avail himself of his equitable right under *New York* Code of Civ. Proc., § 507, to have the contract rescinded, where the answer does not ask for rescission, or offer to repay the money paid therein. *McLeod v. Maloney*, 3 N. Y. Supp. 617; 51 Hun (N. Y.) 636. Under *New York* Code, § 508, where the facts stated in the answer are intended only as a partial defense, or in mitigation of damages, the answer must so state and give notice, and if no such statement is made, it will be assumed that they were pleaded as a complete defense, and if demurred to, must be tested as such. *Thompson v. Halbert*, 109 N. Y. 329.

2. *White v. Teal*, 12 Ad. & El. 106; 40 E. C. L. 33; *Owen v. Knight*, 4

Bing. N. Cas. 54; 33 E. C. L. 277; *Brandao v. Barnett*, 1 M. & G. 908; 39 E. C. L. 703; *Isaac v. Belcher*, 5 M. & W. 139; *Vernon v. Shipton*, 2 M. & W. 9. And see *Chase v. Goble*, 2 M. & G. 930; 40 E. C. L. 698; *Ashley v. Minnett*, 3 N. & P. 231; *Samuel v. Duke*, 3 M. & W. 631; *Unwin v. St. Quintin*, 2 Dowl. N. S. 790. Where the goods were sold under execution, it was held that the defendant might show, under such plea, that the plaintiff authorized the sale. *Pickard v. Sears*, 6 Ad. & El. 469; 33 E. C. L. 115.

It is held that this plea, denying the plaintiff's right of possession, is equivalent to the general issue under the former practice, and under it the defendant may show that the goods belonged to a third person. *Leake v. Loveday*, 4 M. & G. 972; 2 Dowl. N. S. 624.

Such plea means that the plaintiff has no property in the goods as against the defendant. *Nicolls v. Bastard*, 2 C. M. & R. 659.

In trover by the assignee of a bankrupt, a plea that the plaintiff is not the assignee puts in issue the petitioning creditor's debt and the act of bankruptcy. *Butler v. Hobson*, 4 Bing. N. Cas. 290; 33 E. C. L. 358.

3. 1 Chitt. Pl. 532; *Stancliffe v. Hardwick*, 2 C. M. & R. 1; 3 Dowl. P. C. 762; *Kelcey v. Minter*, 1 Bing. N. Cas. 721; 27 E. C. L. 559; *Pearson v. Graham*, 6 Ad. & El. 899; 33 E. C. L. 239; *Fancourt v. Bull*, 1 Bing. N. Cas. 681; 27 E. C. L. 542.

In *Samuel v. Duke*, 6 Dowl. P. C. 544, it is said that in trover against a sheriff who has levied under *feri facias*, if the act of conversion be seizure of goods, a justification under the writ must be specially pleaded; but if the conversion be the sale of goods, the justification may be given in evidence under a plea denying the plaintiff's right of possession.

Where a sheriff justifies under an attachment and order of sale therein issued, an averment that of the "proceedings under said order of sale, said defendant made due return to said

confesses and avoids the facts set forth in the declaration as constituting the conversion.¹

4. Pleading and Proof Must Correspond.—The proof must correspond with the allegations in the pleadings.²

5. Evidence—*a.* IN GENERAL—BURDEN OF PROOF.—The general rules as to the competency and admissibility of testimony in civil cases are applicable in an action of trover, and a general reference thereto is deemed sufficient.³

court, according to the mandate thereof," is not a sufficient allegation of the return of the attachment or order of sale. *Young v. Davis*, 30 Ala. 213.

A plea of former recovery in an action based on a wrongful sale of the property, is demurrable, unless it shows that the conversion and sale were identical. *Hopkinson v. Shelton*, 37 Ala. 306.

A plea justifying the conversion under a judgment of a justice of the peace, which fails to allege that the proceedings were had within the territorial jurisdiction of the justice, is defective. *Vaden v. Ellis*, 18 Ark. 355. A plea of former recovery in *assumpsit* for the non-performance of the same promises mentioned in the declaration, is bad. *Smith v. Scantling*, 4 Blackf. (Ind.) 443.

The defendant may plead in bar a valid release to his co-trespassers. *Montgomery v. Erwin*, 24 Ark. 540.

An answer alleging a purchase of the property from the plaintiff, with a detailed statement of the facts leading to the purchase, states a good defense. *Mynatt v. Hudson*, 66 Tex. 66.

In an action for conversion for failure to return a horse left with defendant to be pastured, an answer to the effect that by the terms of the contract, the defendant was not to be responsible on account of any injury caused by a railroad passing over his farm, or loss or casualties resulting from insufficient fences to confine the horse, but failing to show that the failure to return was caused by the railroad, or insufficient fences, is bad on demurrer. *Glenn v. Dailey*, 96 Ind. 472.

In an action for the conversion of money, an allegation in the answer that the money had been paid to the plaintiff, is not inconsistent with a general denial of the allegations in the complaint, showing the plaintiff's right to receive the money. *First Nat. Bank v. Lincoln*, 36 Minn. 132.

1. *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Hurst v. Cook*, 19 Wend. (N. Y.) 463. A special plea which amounts only

to the general issue, is bad. *Kennedy v. Strong*, 10 Johns. (N. Y.) 289; *Briggs v. Brown*, 3 Hill (N. Y.) 87; *Turner v. Waldo*, 40 Vt. 51. And see *Fenlason v. Rackcliff*, 50 Me. 362.

2. In trover for "one gray horse, Charlie," a recovery for the conversion of "one mouse-colored mare-mule named Julia," will be set aside. *Wilkenson v. King*, 81 Ala. 156.

Proof of a mortgaged title in the plaintiff supports an allegation that the property converted was hers, and is not a variance. *Duggan v. Wright*, 157 Mass. 228.

In an action by the assignee of a corporation, the defendant may, under the averment that he bought the goods from the company, show a purchase from its general manager. *Hamm v. Drew*, 83 Tex. 77.

Where an action is brought for the conversion of a slave called John, the plaintiff cannot recover upon proof of the conversion of a slave where there was no proof that his name was John. *Ward v. Smith*, 8 Ired. (N. Car.) 296.

Joint Conversion.—Where the complaint charges a joint conversion, the plaintiff is not bound to prove a joint conversion or fail; he may recover against one while the others are acquitted. *Ray v. Light*, 34 Ark. 421. But this does not allow a joint action against defendants for several trespasses. *Dahms v. Sears*, 13 Oregon 47.

Where the conversion was alleged to have been made by the defendant and another, on whom the writ had not been served, it was held that the action was sustained by proof of the conversion by defendant alone. *Barron v. Davis*, 4 N. H. 338.

An allegation as to place is immaterial, and it is not a material variance, therefore, where the evidence shows a different place from that alleged. *First Nat. Bank v. Brown* (Tex. 1892), 23 S. W. Rep. 862.

3. See EVIDENCE, vol. 7, p. 42.

The burden of proof is upon the plaintiff to show conversion.¹ An original tortious taking is presumptive evidence of conversion against anyone in whose possession the property may be found, and the burden of proof is upon the defendant to show that he came honestly by the property.² It is not necessary that the guilt of the defendant be shown beyond a reasonable doubt, but the verdict should be given according to the weight of evidence, as in other civil cases.³ If the defendant admits the act of conversion, but claims title to the goods, he must prove it.⁴

b. PROOF OF TITLE OR POSSESSION.—The plaintiff must show property and prove the title he has chosen to allege in the declaration.⁵ If he relies upon written evidence to establish the

1. *Panama R. Co. v. Johnson*, 17 N. Y. Supp. 777; 63 Hun (N. Y.) 629; *Johnson v. Couillard*, 4 Allen (Mass.) 446; *Boyle v. Roche*, 2 E. D. Smith (N. Y.) 335. See also *Kellogg v. Hamilton* (Miss. 1891), 10 So. Rep. 479.

Evidence that a man fetched goods away, saying that he was ordered by the defendant so to do, and that his name was painted on a cart in which they were taken, is not sufficient to connect the defendant with the taking. *Everest v. Wood*, 1 C. & P. 75; 11 E. C. L. 320.

Conditional Sale.—Delivery upon a sale is presumed absolute, and the plaintiff, the vendor, reclaiming the goods, must show the condition on which he relies. *Furniss v. Hone*, 8 Wend. (N. Y.) 256.

Quantity and Quality of Goods.—In an action to recover a stock of goods, it appeared that only a part of the stock was converted. Upon failure to show the quantity and character of the converted articles, or the value of any of them, it was held that the direction of a verdict for the defendant was proper. *First Nat. Bank v. Montgomery*, 70 Miss. 550.

It is competent for the plaintiff, in an action by a consignee against the carrier for the conversion of a part of a carload of grain in bulk, to prove that he has paid for the entire load. *Peebles v. Boston R. Co.*, 112 Mass. 498.

In an action for the conversion of ice, the testimony of a railway agent as to the number of carloads shipped by the defendant at the time of the alleged conversion, and the amount in each car, although it does not purport to give the exact quantity shipped, is admissible. *Gregory v. Rosenkrans*, 78 Wis. 451.

The plaintiff's testimony as to the

quantity of logs converted was not objectionable as a mere guess, when based upon a careful estimate made on the premises. *Clink v. Gunn*, 90 Mich. 135.

Confusion of Goods.—Where property has been mingled with the goods of the defendant, without his fault, the burden of proof is on the plaintiff to show what portion of the goods he is entitled to. *Wilson v. Wilson*, 37 Md. 1; 11 Am. Rep. 518.

2. *Cormier v. Batty*, 41 N. Y. Super. Ct. 70.

3. *Sinclair v. Jackson*, 47 Me. 102; 74 Am. Dec. 446; *Kruse v. Seeger*, etc., Co. (C. Pl.), 16 N. Y. Supp. 529.

4. *Thompson v. Stever*, 11 N. Y. St. Rep. 784.

5. See *supra*, this title, *Declaration or Complaint*. See also *Yoner v. Neidig*, 1 Yeates (Pa.) 19; *Gregory*, etc., R. Co. v. *Selleck*, 43 Conn. 320; *Debow v. Colfax*, 10 N. J. L. 128; *Besherer v. Swisher*, 3 N. J. L. 748; *Shannon v. Owen*, 1 M. & R. 392.

A plaintiff who claims title under a sheriff's sale, must show the judgment as well as the execution. *Yates v. St. John*, 12 Wend. (N. Y.) 74; *Dane v. Mallory*, 16 Barb. (N. Y.) 46.

When the jury has been charged, in an action for conversion, that plaintiff must prove his ownership, it is not error to refuse to charge that he must prove that the sale under which he claims has actually occurred. *Jacobs v. Totty*, 76 Tex. 343.

The plaintiff sued the defendant for the conversion of oil placed in his possession for storage by W, and to establish his title, introduced in evidence a judgment roll in an action brought by W against him, in which the title to the oil was in issue, and in which it was decided that he was the owner, and it was held that the judgment conclusively

property, which he fails in doing, he cannot recur to, and rely on, a mere possessory title.¹ Where title is acquired by bill of sale, or other like written instrument, it should be produced, or its absence accounted for;² but where it has been acquired by oral sale, the writings pertaining thereto, subsequently accepted, need not be produced.³ If the plaintiff relies upon a mortgage for his title, it must be produced.⁴ An oral agreement cannot be produced to control the effect or construction of such mortgage.⁵

To show title to severed portions of the realty, evidence of the ownership of the lands may be introduced.⁶

The plaintiff may testify directly as to his possession,⁷ and declarations of a party in possession are admissible to explain the nature of the possession, as that he holds subordinate to another.⁸

established his right to the oil, and excluded evidence offered by the defendant to dispute that right. *Hughes v. United Pipe Lines*, 119 N. Y. 423.

The plaintiff claiming title to property by virtue of a sale on execution, may show that the sale was made in a different manner from that stated in the officer's return upon the execution. *Drake v. Mooney*, 31 Vt. 617; 76 Am. Dec. 145.

Vendee.—In trover by a vendee, he must show a complete performance of his contract of purchase. *Farmers' Bank v. McKee*, 2 Pa. St. 318.

1. *Sheriff v. Cadell*, 3 Esp. 617.

2. *Slatterie v. Pooley*, 6 M. & W. 664; *Dunn v. Hewitt*, 2 Den. (N. Y.) 637.

In *Richard v. Wellington*, 66 N. Y. 308, the introduction of parol evidence to explain items of an account rendered, was held to be error.

Bill of Lading—Evidence of Title in Consignee.—In *Halliday v. Hamilton*, 11 Wall. (U. S.) 560, it was held that where goods are put in charge of a carrier by a purchaser, to be transported to consignees in pursuance of a special agreement that they shall sell the goods to pay a draft made against the goods, the bill of lading being attached to and sent with the draft, the legal title of the goods passes to the consignees on delivery to the carrier.

3. Written acknowledgments and receipts need not be produced, nor their absence accounted for, to admit parol evidence of the transaction for which they are designed to evidence. *Dunn v. Hewitt*, 2 Den. (N. Y.) 637. See also *Blood v. Harrington*, 8 Pick. (Mass.) 552.

Where a verbal sale is perfected by delivery, and a bill of sale is subse-

quently accepted by the vendor, the verbal sale may be proven by parol evidence without the production of the writing. *Sanders v. Stokes*, 30 Ala. 432. See also *Adams v. Davis*, 16 Ala. 748.

An invoice is no evidence of sale, and, standing alone, furnishes no proof of title. *Dows v. National Exch. Bank*, 91 U. S. 618.

4. *Bissell v. Pearce*, 28 N. Y. 252.

5. See *Underwood v. Simmonds*, 12 Met. (Mass.) 275. So, evidence of a parol agreement of the mortgagor and mortgagee of personal property, is inadmissible to control the construction or effect of the mortgage. *Clark v. Houghton*, 12 Gray (Mass.) 38.

Parol evidence is not admissible to prove that a contract produced in writing for the sale of goods was intended to embrace property not mentioned in the writing, nor that other property was to pass on the same consideration which the writing has limited to the property specified in it. *Ripley v. Paige*, 12 Vt. 353.

6. *Grant v. Smith*, 26 Mich. 201.

In trover for logs, parol evidence of the plaintiff's ownership in possession of the land from which they were taken, is competent as a basis of his ownership of the logs. *Hodson v. Goodale*, 22 Oregon 68.

7. *Rand v. Freeman*, 1 Allen (Mass.) 517.

8. *Carne v. Nicoll*, 1 Bing. N. Cas. 430; 27 E. C. L. 446; *Peaceable v. Watson*, 4 Taunt. 16; *Davis v. Pearce*, 2 T. R. 35; *Hadden v. Powell*, 17 Ala. 314; *Mobley v. Bilberry*, 17 Ala. 428; *Thomas v. DeGraffenreid*, 17 Ala. 602; *Spence v. Smith*, 18 N. H. 593.

The declarations of a person in possession are admissible as a part of the

Such declarations or admissions are not only competent to rebut a title set up by the party who made it, but are affirmative evidence of title in the party for whom the person in possession declares that he holds.¹ Acts and declarations of the defendant with respect to the property converted, are admissible in an action of trover.²

6. Effect of Judgment for Plaintiff.—A recovery by the plaintiff in trover operates to divest him of his property in the chattels converted, and to transfer his title to the defendant.³ There has been not a little conflict of authority, both in the *United States* and in *England*, as to whether this transfer of title is effectuated by the mere rendition of the judgment in favor of the plaintiff,⁴ or

res gestæ to prove the character of his possession, as, that he claims the property as his own or holds it in subordination to the claim of another, but not to show that he had given it to a third person, or that he had loaned it. *Nelson v. Iverson*, 17 Ala. 216.

1. *Doe v. Williams*, Camp. 621; *Holloway v. Rakes*, 2 T. R. 55; *Doe v. Jones*, 1 Camp. 367; *Doe v. Austin*, 9 Bing. 41; 23 E. C. L. 256; *Willies v. Farley*, 3 C. & P. 395; 14 E. C. L. 366; *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Arkwright*, 5 C. & P. 575; 24 E. C. L. 462; *White v. Dinkins*, 19 Ga. 285; *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205.

The declarations of one in the occupancy of land, that he is in as the servant of the plaintiff, are sufficient evidence to prove the possession and title of such plaintiff. *Woods v. Blodgett*, 18 N. H. 249; *Rand v. Dodge*, 17 N. H. 343.

Declarations of one in possession of personal property, that it is owned by another, are competent evidence in favor of a person declared to be the owner, as against an officer who has attached it as the property of the party in possession. *Putnam v. Osgood*, 52 N. H. 148.

The declaration of a person in the possession of goods, *ad ante litem motam*, that he made over the property to a third person, is competent evidence in favor of such third person against a creditor of the declarant, who has subsequently attached the property. *Wolcott v. Keith*, 22 N. H. 196.

The testimony as to statements made by an attaching debtor, in his action in regard to the property, may be introduced in favor of the plaintiff, claiming as his vendee in an action against the sheriff, to recover the attached

property. *Adams v. Kellogg*, 63 Mich. 105; *Caldwell v. Wilson*, 2 Spears (S. Car.) 63.

But such declarations of a party in possession are not evidence against the owner. *Carter v. Feland*, 17 Mo. 383.

2. *Adams v. Kellogg*, 63 Mich. 105.

Where the defendant has received goods from the plaintiff, as his factor, the defendant is precluded by his admissions of property in the plaintiff, made subsequent to the conversion, from showing that the plaintiff's property in the goods had been divested previously to his receiving them. *Kennedy v. Strong*, 14 Johns. (N. Y.) 128.

3. See authorities to this section in the subsequent notes.

4. *Adams v. Broughton*, 2 Str. 1078; *Carlisle v. Burley*, 3 Me. 250; *White v. Philbrick*, 5 Me. 146; 17 Am. Dec. 214; *Floyd v. Browne*, 1 Rawle (Pa.) 121; 18 Am. Dec. 602; *Marsh v. Pier*, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103; *Merrick's Est.*, 5 W. & S. (Pa.) 9; *Emery v. Nelson*, 9 S. & R. (Pa.) 12; *Woolley v. Carter*, 7 N. J. L. 85; *Ewing v. Ford*, 1 A. K. Marsh. (Ky.) 457; *Murrell v. Johnson*, 1 Hen. & M. (Va.) 449; *Foreman v. Neilson*, 2 Rich. Eq. (S. Car.) 287; *Rogers v. Moore*, 1 Rice (S. Car.) 60; *Bogan v. Wilburn*, 1 Spears (S. Car.) 179; *Norris v. Beckley*, 2 Mill (S. Car.) 228; *Campbell v. Phelps*, 1 Pick. (Mass.) 61; 11 Am. Dec. 139. And see *Kenyon v. Woodruff*, 33 Mich. 310.

In *Adams v. Broughton*, 2 Str. 1078, it is maintained that the judgment, and not the payment of the money recovered, changes the property, and that the true rule is as laid down by Parke, B., in *King v. Hoare*, 13 M. & W. 495, "that that which is uncertain is made certain by the judgment, and then the

whether the judgment must be actually satisfied, to accomplish this result. The weight of modern authority in both countries seems to sustain this latter proposition.¹ Satisfaction of a judgment for the full value of the property converted is a bar to any

judgment affords a higher remedy and the right of action for trover is merged in it."

"A judgment in trover," says the court in *Bogan v. Wilburn*, 1 Spears (S. Car.) 179, "is an acknowledgment by the plaintiff in the most solemn form that his property has become the property of the defendant by conversion. And as the plaintiff, by commencing and continuing the action, has shown his confidence in the personal credit of defendant, and the verdict gives him damages commensurate with the price of the chattel and its hire, from the conversion to the verdict, the recovery is a discharge of all right of action touching the use of the chattel, subsequent to the conversion complained of." And in *Norris v. Beckley*, 2 Mill (S. Car.) 228, it is resolved that "by bringing an action of trover, the plaintiff trusts to the personal credit of the defendant in the same manner as by taking a note or bond in payment of property sold. The property is changed, even though the money should never be recovered."

By obtaining the judgment, the plaintiff in trover acquires a right to demand and receive from the defendant a specific sum of money, in lieu and in satisfaction of his right to the property. *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

1. *Brinsmead v. Harrison*, L. R., 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T., N. S. 798; 19 W. R. 956. See 41 L. J. C. P. 190; 20 W. R. 784; 27 L. T. N. S. 99 (Exch. Ch.); *Marston v. Phillips*, 12 W. R. 8; 9 L. T. N. S., 289 (Q. B.); *Jenkins Cent.*, p. 189 (Cent., Ca. 88); *Keilw.* 58 B; *Holroid, J.*, in *Morris v. Robinson*, 3 B. & C. 196; 10 E. C. L. 49; *Cooper v. Shepherd*, 3 C. B. 266; 54 E. C. L. 265; *Holmes v. Wilson*, 10 Ad. & El. 503, note C; 37 E. C. L. 161; *Spivey v. Morris*, 18 Ala. 254; 52 Am. Dec. 224; *White v. Martin*, 1 Port. (Ala.) 215; 26 Am. Dec. 365; *Sheldon v. Kibbe*, 3 Conn. 214; 8 Am. Dec. 176; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Ex p. Drake*, 5 Ch. Div. 866; *Atwater v. Tupper*, 45 Conn. 144; 29 Am. Rep. 674; *Jones v. Cobb*, 84 Me. 153; *Hopkins v. Hersey*, 20 Me. 449; *Dearth v. Spencer*, 52 N. H. 213; *Hyde v. Noble*, 13 N. H. 501; 38 Am. Dec.

508; *Smith v. Smith*, 51 N. H. 571; *Howard v. Smith*, 12 Pick. (Mass.) 202; *Murray v. Lovejoy*, 2 Cliff. (U. S.) 191; *Stirling v. Garritee*, 18 Md. 468; *Schindel v. Schindel*, 12 Md. 109; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 307; *Clarke v. Marriott*, 9 Gill (Md.) 331; *Hoag v. Breman*, 3 Mich. 160; *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43; *American Medicine Co. v. Keisler*, 44 N. Y. Super. Ct. 557; *Goff v. Craven*, 34 Hun (N. Y.) 150; *Marsden v. Cornell*, 62 N. Y. 215; *Thayer v. Manley*, 73 N. Y. 305; *Curtis v. Groat*, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204; *Acheson v. Miller*, 2 Ohio St. 205; *Sanderson v. Caldwell*, 2 Aik. (Vt.) 203; *Elliott v. Hayden*, 104 Mass. 180; *Knott v. Cunningham*, 2 Sneed. (Tenn.) 204; *Barb v. Fish*, 8 Blackf. (Ind.) 481; *Jones v. McNeil*, 2 Bailey (S. Car.) 466; *Sharp v. Gray*, 5 B. Mon. (Ky.) 4; *United Soc. v. Underwood*, 11 Bush (Ky.) 265; 21 Am. Rep. 214; *Elliott v. Porter*, 5 Dana (Ky.) 299. See *Bell v. Perry*, 43 Iowa 368; *Morgan v. Chester*, 4 Conn. 387; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211; 9 Am. Dec. 512.

Brinsmead v. Harrison, L. R., 6 C. P. 584, is an oft-quoted authority to the effect that the mere rendition of a judgment in trover without satisfaction thereof does not vest the title to the property in the defendant. "The only way," says *Willes, J.*, in this case, "that the judgment in trover can have the effect of vesting the property in the defendant, is by treating the judgment as being (that which in truth it ordinarily is), an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price, as upon a sale of the goods."

Lovejoy v. Murray, 3 Wall. (U. S.) 1, was an action of trespass in which the defendant pleaded in bar a judgment in favor of the plaintiff in a former action against a joint trespasser, and the court resolved that, "Nothing short of satisfaction, or its equivalent, can make good the plea of former judgment in trespass offered as a bar in an action against another joint trespasser, who was not a party to the first judgment." Judge *Miller*, in delivering the opinion of the court, reaches this

subsequent action by the plaintiff for the same property, against the same defendant, or one standing in privity with him.¹ A partial recovery does not have this effect.² The general rule is that the title thus transferred to the defendant has relation back to the time of the conversion.³ However, this relation back will not operate to render a third person a trespasser for any act done

conclusion very satisfactorily. He says: "In reference to the doctrine that the judgment alone vests the title of the property converted in the defendant, we have seen that it is not sustained by the weight of authority in this country. It is equally incapable of being maintained on principle. The property which was mine has been taken from me by fraud or violence. In order to procure redress I must sue the wrongdoer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining the judgment—a decision that I am entitled to the relief I ask—the property which before was mine has become that of the man who did me wrong; in other words, the law, without giving me satisfaction for my wrong, takes from me that which was mine and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice. It is said that the judgment represents the price of the property, and as the plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant should have the property before he has paid that price? The payment of the price, and the transfer of the property are, in the ordinary contract of sale, current acts."

1. *Marston v. Philips*, 12 W. R. 8; 9 L. T. N. S. 289 (Q. B.); *Holmes v. Wilson*, 10 Ad. & El. 503, n.; 37 E. C. L. 161; *Holroid J.*, in *Morris v. Robinson*, 3 B. & C. 196; 10 E. C. L. 49; *Lacon v. Barnard*, Cro. Car. 35; *Field v. Jellicus*, 3 Lev. 124; *Willes, J.*, in *Brinsmead v. Harrison*, L. R., 6 C. P. 584; *Jones v. McNeil*, 2 Bailey (S. Car.) 466.

"It is clear from these authorities," says O'Neil, J., in *Jones v. McNeil*, 2 Bailey (S. Car.) 466, "that even in trover, to constitute a bar to a second action for the value of the chattel, the verdict must have found a sum intended to cover the value of the chattel; and in trespass the force of this rule is enhanced, and its application is the more immediate inasmuch as in this form of action the injury done to

the possession, and not right of property, is the gravamen of the action."

A judgment in trover for permanent conversion changes the property; but it seems to be competent for the plaintiff in that action to show that the damages were given for temporary conversion, and not as the value of the chattel. 3 Starkie on Ev., pt. 4, 1508.

In the same book and page, note Z., a reference is made to Gilbert's Law Ev. 265 (2d ed.), and Trials *per Pais*, 224, where it is said to be laid down, "that if a jury give but three pounds damages for a horse whose real value is fifteen pounds, a new action lies for damages for the horse, where evidence may be given that the first action was only for the conversion, and not for the damages for the horse itself."

In trover by A against B for a bedstead, B pleaded a former recovery by A in trover for the same identical bedstead against C, averring that the conversion by C for which that action was brought was a conversion not later in point of time than the conversion mentioned in the declaration against B, and that before the conversion in that declaration mentioned, C, being possessed of the bedstead, sold it to B, who paid him for the same and received it under such sale, and that the taking under such sale was the conversion complained of in the declaration against B. In *Cooper v. Shepherd*, 3 C. B. 266; 54 E. C. L. 265, it was held that this plea was a good answer to the action.

2. See authorities cited in note 1, *supra*.

In *Holmes v. Wilson*, 10 Ad. & El. 503; 37 E. C. L. 161, it appears: "By a recovery in trespass for taking, or trover for converting, personal chattels, followed by satisfaction, the property is altered and vests in the defendant; but it is otherwise, where the damages were not estimated on the footing of the full value."

3. *Brinsmead v. Harrison*, L. R., 6 C. P. 484; *Barnett v. Brandao*, 6 M. & G. 640, note; 46 E. C. L. 638; *Cooper v. Shepherd*, 3 C. B. 266; 54 E. C. L.

by him between the time of the conversion, and the rendition of the judgment.¹

VIII. MEASURE OF DAMAGES—1. General Rule.—In trover, the plaintiff does not seek to recover the property in specie, nor property of a like kind or value, but he seeks the equivalent in money of that of which he has been deprived, and, consequently, as a general rule, the measure of the damages is the value of the property at the time of the conversion, with legal interest thereon, from the date of the conversion to the entry of judgment,²

265; *Buckland v. Johnson*, 15 C. B. 145; 80 E. C. L. 145; *Adams v. Broughton*, 2 Str. 1078; *Bishop v. Viscountess Montague*, Cro. Eliz. 824; *Unwin v. St. Quintin*, 11 M. & W. 277; *Bacon v. Kimmel*, 14 Mich. 201; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211; 9 Am. Dec. 512; *Stirling v. Garrittee*, 18 Md. 468; *Smith v. Smith*, 51 N. H. 571; *White v. Martin*, 1 Port. (Ala.) 215; 26 Am. Dec. 365; *Addison on Torts*, par. 522, 1357; *Cooley on Torts*, p. 458.

Carpenter, J., in *Atwater v. Tupper*, 45 Conn. 144; 29 Am. Rep. 674, seems to combat the theory that the title changes by relation back to the time of the conversion. "There is no substantial reason," says he, "for holding that the change of the title, whenever it occurs, takes effect by relation at the time of the conversion. The only reason that occurs to us is that the plaintiff recovers interest from the time of conversion. But that argument fails, when we consider, as we may, that the interest is an equivalent for the use of the property in the meantime. . . . We are satisfied that the better rule is that the title changes when the judgment is satisfied." His position does not seem supported by authority.

1. *Bacon v. Kimmel*, 14 Mich. 201. And see *Liford's Case*, 11 Coke 51; *Menvill's Case*, 13 Coke 21; *Smith v. Milles*, 1 T. R. 480; *Balme v. Hutton*, 9 Bing. 471; 23 E. C. L. 338; *Jackson v. Bard*, 4 Johns. (N. Y.) 234; 4 Am. Dec. 267; *Case v. DeGoes*, 3 Cal. (N. Y.) 261.

2. See *CONVERSION*, vol. 4, p. 121; *DAMAGES*, vol. 5, p. 40; *Wood v. Morewood*, 3 Q. B. 440; 43 E. C. L. 810; *Finch v. Blount*, 7 C. & P. 478; 32 E. C. L. 590; *Alsager v. Close*, 10 M. & W. 584; *Ewbank v. Nutting*, 7 C. B. 809; 62 E. C. L. 808; *Edmondson v. Nuttall*, 17 C. B. N. S. 280; 112 E. C. L. 279; *Mercer v. Jones*, 3 Camp. 477; *Owen v. Routh*, 14 C. B. 327; 78 E. C. L. 326; *Shaw v. Holland*, 15 M. & W. 136; *Falk v. Fletcher*, 18 C. B.

N. S. 403; 114 E. C. L. 403; *Watson v. McLean*, El. Bl. & El. 75; *Mulliner v. Florence*, 3 Q. B. Div. 484; *Reid v. Fairbanks*, 13 C. B. 692; 76 E. C. L. 692; *Johnson v. Lancashire, etc.*, R. Co., 3 C. P. D. 499; *France v. Gaudet*, L. R., 6 Q. B. 199; *Watt v. Potter*, 2 Mason (U. S.) 77; *Scull v. Briddle*, 2 Wash. (U. S.) 150; *Bourne v. Ashley*, 1 Low. (U. S.) 27; *Bradley v. Harden*, 73 Ala. 70; *Williams v. Crum*, 27 Ala. 468; *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498; *Ryburn v. Pryor*, 14 Ark. 505; *Jefferson v. Hale*, 31 Ark. 286; *Monat v. Wood* (Colo. 1893), 35 Pac. Rep. 58; *Douglass v. Kraft*, 9 Cal. 562; *Cassin v. Marshall*, 18 Cal. 689; *Hamer v. Hathway*, 33 Cal. 117; *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462; *Hall v. Trout*, 35 Cal. 229; *Parrante v. Garratt*, 50 Cal. 112; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Swift v. Barnum*, 23 Conn. 553; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483; *Sutton v. Dana*, 15 Colo. 98; *Robinson v. Hartridge*, 13 Fla. 501; *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1; *Riley v. Martin*, 35 Ga. 136; *Vaughan v. Webster*, 5 Harr. (Del.) 256; *Cutter v. Fanning*, 2 Iowa 580; *Robinson v. Hurley*, 11 Iowa 410; 79 Am. Dec. 497; *Russell v. Huiskamp*, 77 Iowa 727; *Yater v. Mullen*, 24 Ind. 277; *Keaggy v. Hite*, 12 Ill. 99; *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28; *Tripp v. Grounder*, 60 Ill. 474; *Lillard v. Whittaker*, 3 Bibb (Ky.) 92; *Johnson v. Sumner*, 1 Met. (Mass.) 172; *Marshall v. Piles*, 3 Bush (Ky.) 249; *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209; 18 Am. Dec. 167; *Freeman v. Lockett*, 2 J. J. Marsh. (Ky.) 390; *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 18; *Justice v. Mendell*, 14 B. Mon. (Ky.) 12; *Cole v. Ross*, 9 B. Mon. (Ky.) 393; 50 Am. Dec. 517; *Chamberlain v. Worrell*, 38 La. Ann. 347; *Selkirk v. Cobb*, 13 Gray (Mass.) 313; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396; *Beecher v. Denniston*, 13 Gray

subject to exceptions in those cases where exemplary or consequential damages are proved.¹

Where a vendor elects to disaffirm a contract and sue in trover, the measure of damages is the actual value of the goods, not being affected by the price agreed.²

2. Where Plaintiff Has Limited Interest.—The owner of a limited interest, who is liable over to the general owner, may, in an action of trover against a stranger, recover, not merely the extent of his interest, but the entire value of the goods at the time of the conversion;³ but, in the absence of this responsibility over, the owner

(Mass.) 354; *King v. Ham*, 6 Allen (Mass.) 298; *Clement, etc., Mfg. Co. v. Meserole*, 107 Mass. 363; *Barry v. Bennett*, 7 Metc. (Mass.) 354; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Stirling v. Garritee*, 18 Md. 468; *Hopper v. Haines*, 71 Md. 64; *Funk v. Dillon*, 21 Mo. 294; *Dustan v. Andrew*, 44 N. Y. 72; *Parmenter v. Fitzpatrick*, 135 N. Y. 190; *Mechanics', etc., Bank v. Farmers', etc., Bank*, 60 N. Y. 40; *Wehle v. Haviland*, 69 N. Y. 448; *Stevens v. Rodger*, 25 Hun (N. Y.) 54; *Prince v. Conner*, 69 N. Y. 608; *King v. Orser*, 4 Duer (N. Y.) 431; *Cutler v. James Gould Co.*, 43 Hun (N. Y.) 516; *Devlin v. Pike*, 5 Daly (N. Y.) 85; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Bissell v. Hopkins*, 4 Cow. (N. Y.) 53; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 298; *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *Allen v. Dykers*, 3 Hill (N. Y.) 593; *New York Guaranty, etc., Co. v. Flynn*, 65 Barb. (N. Y.) 365; *Andrews v. Durant*, 18 N. Y. 496; *Phillips v. Speyers*, 49 N. Y. 653; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Rand v. White Mts. R. Co.*, 40 N. H. 79; *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424; *Dixon v. Caldwell*, 15 Ohio St. 412; *Chauncey v. Yeaton*, 1 N. H. 151; *Rankin v. Mitchell*, 1 Han. (N. B.) 495; *Hayden v. Bartlett*, 35 Me. 203; *Robinson v. Barrows*, 48 Me. 186; *Symes v. Oliver*, 13 Mich. 9; *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 262; *Allen v. Kinyon*, 41 Mich. 281; *Chase v. Blaisdell*, 4 Minn. 90; *Murphy v. Sherman*, 25 Min. 106; *Briscoe v. McElween*, 43 Miss. 556; *Carter v. Feland*, 17 Mo. 383; *Polk v. Allen*, 19 Mo. 467; *Davis v. Fairclough*, 63 Mo. 61; *Spencer v. Vance*, 57 Mo. 427; *Charles v. St. Louis, etc., R. Co.*, 58 Mo. 458; *O'Meara v. North American Min. Co.*, 2 Nev. 112; *Carlyon v. Lannan*, 4 Nev. 156; *Newman v. Kane*, 9 Nev. 234; *Jacoby v.*

Laussatt, 6 S. & R. (Pa.) 300; *Dennis v. Barber*, 6 S. & R. (Pa.) 420; *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303; *Lyon v. Gormley*, 53 Pa. St. 261; *McDowell v. Murdock*, 1 Nott & M. (S. Car.) 237; 9 Am. Dec. 684; *Burney v. Pledger*, 3 Rich. (S. Car.) 191; *Norris v. Beckley*, 2 Mill. (S. Car.) 228; *Jones v. Allen*, 1 Head (Tenn.) 626; *Commercial, etc., Bank v. Jones*, 18 Tex. 811; *Moore v. Aldrich*, 25 Tex. Supp. 276; *Hatcher v. Pelham*, 31 Tex. 201; *Hillebrant v. Brewer*, 6 Tex. 45; *Schooler v. Hutchins*, 66 Tex. 324; *Barber v. Hutchins*, 66 Tex. 319; *Hull v. Davidson* (Tex. 1894), 25 S. W. Rep. 1047; *Grant v. King*, 14 Vt. 367; *Thrall v. Lathrop*, 30 Vt. 307; 73 Am. Dec. 306; *Crumb v. Oaks*, 38 Vt. 566; *Ganson v. Madigan*, 13 Wis. 167; *Tenney v. State Bank*, 20 Wis. 152; *Ingram v. Rankin*, 47 Wis. 406; 32 Am. Rep. 762; *Anderson v. Sloan*, 72 Wis. 566.

1. See *infra*, this title, *Special Damages*.

2. *Stevens v. Low*, 2 Hill (N. Y.) 132; *Andrews v. Durant*, 18 N. Y. 496.

Where one bought cotton from a warehouseman, and subsequently sold it, but left the cotton in the warehouse, and when he went to make delivery to his vendee discovered that the warehouseman had, before the first sale, sold a portion of it to a third party and could not deliver it, and was thereby compelled to account to the second vendee for the deficit and the advance of price, it was held that the damages to be allowed should be measured by what he was compelled to pay his vendee, and not for what he originally paid for the cotton. *Beall v. Rust*, 68 Ga. 774.

3. *Green v. Farmer*, 4 Burr. 2214; *Swire v. Leach*, 18 C. B. N. S. 479; 114 E. C. L. 477; *Angier v. Taunton, etc., Co.*, 1 Gray (Mass.) 621; 61 Am. Dec. 436; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Harker v. Dement*, 9 Gill (Md.) 7; 52 Am. Dec. 670; *Schley v.*

of a special or qualified interest cannot recover damages beyond the extent of his special claim.¹ A party to a mortgage, the mortgagor or mortgagee who, at the time of the conversion, is

Lyon, 6 Ga. 530; Burk v. Webb, 32 Mich. 173; Davidson v. Gunsolly, 1 Mich. 388; Ingersoll v. Van Bokkellin, 7 Cow. (N. Y.) 670; Smith v. James, 7 Cow. (N. Y.) 329; Warren v. Kelley, 80 Me. 512. So in replevin, Atkins v. Moore, 82 Ill. 240; Brizsee v. Maybee, 21 Wend. (N. Y.) 144.

In Hayden v. Smith's Case, 13 Cook 489, the rule is thus stated: "He who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath a general property, and upon evidence, damages shall be mitigated; but clearly the bailee or he who hath the special property, shall have a general action of trespass against a stranger, and shall recover all damages with which he is chargeable over." See St. Louis, etc., Ry. Co. v. Biggs, 50 Ark. 173.

One who has received goods belonging to another from a sheriff, and has given a receipt promising to redeliver when required, may recover full damages in trover for their conversion. Poole v. Symonds, 1 N. H. 289; 8 Am. Dec. 71.

In Turner v. Hardcastle, 11 C. B. N. S. 683; 10 E. C. L. 683, in trover for the goods, by assignees of a bankrupt, the goods having been purchased by him under an agreement by which the money was to be paid by installments, and an assignment of the property was to be executed by the vendor, and the whole purchase-money had been paid with power to the vendor to re-enter, in case of default of payment of the installment, it was held that the assignees were entitled to recover the full value of such goods against the stranger, notwithstanding default had been made in payment of some of the installments, and the vendor had, to that extent, an interest in the goods.

Bailee.—A bailee who is answerable over to the bailor for the safe keeping of property, is entitled to recover against a stranger the full value of the property bailed. Caswell v. Howard, 16 Pick. (Mass.) 562; Pomeroy v. Smith, 17 Pick. (Mass.) 85.

Sheriff.—An officer who holds goods under attachment may recover the full value of the goods in an action of trover against one who wrongfully converts them. An officer who attaches

and sells on execution, goods held by another officer on a prior attachment, and afterwards again attached by that officer, and pays off the debt to pay which the first attachment was made, is liable in an action to the first officer for the full value of the goods. Robinson v. Ensign, 6 Gray (Mass.) 300; Thompson v. Marsh, 14 Mass. 269; Vinton v. Bradford, 13 Mass. 114; 7 Am. Dec. 119. See also Gordon v. Jenney, 16 Mass. 469; Buck v. Remsen, 34 N. Y. 382.

1. Jarvis v. Rogers, 15 Mass. 389; King v. Bangs, 120 Mass. 514.

So in an action for the conversion of a ship, evidence that the plaintiff was the owner of but one-sixteenth part thereof, will go in the reduction of damages. Dockwray v. Dickenson, Skin. 640.

The plaintiff's debtor transferred a note to the defendant for collection and handed the receipt for it to the plaintiff as collateral security. The defendant, not being able to collect it, allowed it to go into the possession of the plaintiff's debtor, who collected it and paid the plaintiff a portion of his debt. In trover, it was held that the measure of damages was the unpaid portion of the plaintiff's debt, and not the entire value of the note, since the plaintiff would not be liable over to his debtor for the difference between the amount of his debt and the full value. Sheldon v. Southern Express Co., 48 Ga. 625.

In Haverly v. Elliott (Neb. 1894), 57 N. W. Rep. 1010, where the plaintiff owned and conducted a confectionery store, the defendant, having a lien against the property, brought suit in equity to foreclose it, and obtained the appointment of a receiver, who took possession of the property and place of business, and sold the property to pay the lien; in an action of trover for the conversion, it having been decided that the order appointing the receiver was wrongful, it was held that the measure of the plaintiff's damages was the value of her interest in the property sold by the receiver, at the time he took possession of the same, and the actual loss sustained by the suspension of her business during the time she was prevented from carrying it on.

In Jellett v. St. Paul, etc., R. Co., 30 Minn. 265, the plaintiff had delivered

entitled to the possession, may, as against a stranger, recover the full value of the property converted;¹ so may, also, a lessee,² or pledgee.³

But as against the general owner, or one claiming under him, the owner of a limited interest can recover only the value of such interest.⁴ As against his debtor, a creditor who has wrongfully

corn to the defendant for transportation, subject to plaintiff's directions. The plaintiff had previously sold to a third person, who had paid part of the consideration. Without authority from the plaintiff, the defendant delivered it to the purchaser. It was held that the measure of damages was the full value with interest, but that the plaintiff was entitled to prove in mitigation of damages that the purchaser had paid for the corn.

Recovery by Partner.—In an action of trover for the conversion of the interest of one partner in partnership property, the measure of damages is the value of his undivided share in the property converted, irrespective of the question whether or not the partnership was solvent, and without regard to the state of the partnership accounts. *Carrie v. Cloverdale Banking, etc., Co.*, 90 Cal. 84.

1. *White v. Webb*, 15 Conn. 302; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Howe v. Bartlett*, 8 Allen (Mass.) 20; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *Allen v. Butman*, 138 Mass. 586; *Byrom v. Chapin*, 113 Mass. 308; *Cram v. Bailey*, 10 Gray (Mass.) 87; *Marsden v. Cornell*, 62 N. Y. 215; *Densmore v. Mathews*, 58 Mich. 616; *Manning v. Monaghan*, 28 N. Y. 585; *Brown v. Carroll*, 16 R. I. 604. See also *Turnpike Co. v. Fry*, 88 Tenn. 296; *Freeman v. Underwood*, 66 Me. 229; *Chaffin v. Carpenter*, 4 Met. (Mass.) 580; 38 Am. Dec. 381; *Caswell v. Howard*, 16 Pick. (Mass.) 562.

2. In *Harker v. Dement*, 9 Gill (Md.) 7; 52 Am. Dec. 670, it was held that in an action of trespass by a termor against his reversor for an unauthorized interruption of his possession during the term, the measure of damages is the actual loss sustained by the lessee. But in such an action against a stranger and wrongdoer, the termor is treated as the absolute owner of the property and is entitled to recover its full value. The termor, being bound to restore the property to him from whom he has obtained it, or to stand responsible in

damages for its full value, has the right to recover its full value from a stranger who has wrongfully deprived him of it.

In *Baker v. Hart*, 52 Hun (N. Y.) 363, the plaintiffs were lessees of certain lands, with the right to quarry for a term of ten years only. The defendant dug and carried away a quantity of stone. In an action of trover, it was held that the plaintiffs could recover, although the lease gave them no title to the stone which they did not dig out; but only gave the right to the stone which they quarried themselves.

3. *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Mechanics', etc., Bank v. Farmers', etc., Bank*, 60 N. Y. 40; *Thompson v. Toland*, 48 Cal. 117; *Treadwell v. Davis*, 34 Cal. 606; *Lyle v. Barker*, 5 Binn. (Pa.) 457. See also *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Clark v. Pinney*, 7 Cow. (N. Y.) 681; *Kissman v. Roberts*, 6 Bosw. (N. Y.) 154; *Alt v. Weldenberg*, 6 Bosw. (N. Y.) 176; *St. Louis v. Bissell*, 46 Mo. 157.

Where goods were deposited with a pawnbroker, in the way of his trade, being privileged from distress, in an action of trover by the pawnbroker, the measure of damages was held to be the full value of the goods, and not merely the plaintiff's interest therein. *Swire v. Leech*, 18 C. B. N. S. 479; 114 E. C. L. 477.

In *Johnson v. Stear*, 15 C. B. N. S. 330; 109 E. C. L. 330, where the pledgee had, by illegal dealing with the pledge, determined the bailment, and the pledgor had brought an action for the conversion of the goods, it was held that the proper measure of damages was the actual damage the pledgor had sustained by the conversion, and in this case, as there was no intention on his part to redeem, the pledge was merely nominal.

4. *Spoor v. Holland*, 8 Wend. (N. Y.) 445; 24 Am. Dec. 37; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *White v. Allen*, 133 Mass. 423; *King v. Bangs*, 120 Mass. 514; *Strong v. Strong*, 6 Ala.

345; *Hill v. Larro*, 53 Vt. 629; *Burdick v. Murray*, 3 Vt. 302; *Mississippi Mills v. Meyer*, 85 Tex. 433; *Cocke v. Cross*, 57 Ark. 87; *Cohen v. Salit*, 21 N. Y. Supp. 585; *Johnson v. Lancashire, etc., R. Co.*, L. R., 3 C. P. D. 502; *Donald v. Suckling*, L. R., 1 Q. B. 585; *Davidson v. Gunsolly*, 1 Mich. 388.

In *Chamberlin v. Shaw*, 18 Pick. (Mass.) 278, Shaw, C. J., said: "In an action of trover, though the plaintiff's possession of the property has been violated, he waives all claims to damages on account of that violation, and seeks an indemnity only for the loss of his property. Hence it is, that the value of the property at the time of the conversion is *prima facie* the measure of damages. Now, if the case is so situated, that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject, of course, to all legal liens. The assignees denying and intending to contest the factor's lien, get possession of the goods and convert them. The factor brings trover, establishes his lien and recovers. How shall damages be assessed? If he recover the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid circuity of action, why should not damages be assessed to the amount of his lien? He is fully indemnified, the balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if, for any cause, the defendant is not entitled to the balance of the value, a very different rule should prevail, and justice would require that the whole value of the property should be assessed to the plaintiff."

In an action for the conversion of a watch, where it appeared that it was obtained by a third person from the plaintiff, falsely representing that it was for another person, but before the fraud was discovered the alleged purchaser paid several installments, it was held that as against the innocent pledgee, the plaintiff could recover only the market value of the watch, less the amount of the installments paid. *Meeks*

v. Simon (C. Pl.), 21 N. Y. Supp. 1004.

In *White v. Allen*, 133 Mass. 423, A delivered a quantity of hides to B, to be by him tanned and sold, and out of the proceeds of the sale, B was to pay A a certain sum at which the hides were charged to B, and was to retain the balance of the proceeds of the sale for his labor and services, but, until tanned and paid for, the title of the hides was to remain in the possession of A; where, before the process of tanning was complete, B died, and A took possession of the hides, completed the process, and sold them for a sum which was their value at the time A took possession, it was held that B's administrator might maintain an action of trover against A and might recover the difference between the amount at which the hides were charged to B and the amount realized from the sale by A.

Bailee of Co-Tenant.—In *Benjamin v. Strempel*, 13 Ill. 466, it was held that a bailee of goods of several tenants in common, might maintain an action of trover against a stranger and recover the full value to the owners, but that, as against a part owner, he could recover only the interest of the others; the value of the interest of the parties sued should be excluded in the assessment of damages. See also *Dockway v. Dickinson*, Skin. 640.

Sheriffs.—Where the conversion is by an officer acting under a legal writ against the general owner, the owner of the special interest may be entitled to the same measure of damages against him as against the general owner. See *Baldwin v. Bradley*, 69 Ill. 32; and *Penland v. Leatherwood*, 101 N. Car. 509. On the other hand, an officer holding under an attachment or execution in favor of the owner of the special interest, may recover the value of the interest only, that is, the amount of the execution, and not the full value of the goods taken. *Linville v. Black*, 5 Dana (Ky.) 176. See also *Clark v. Dearborn*, 103 Mass. 335; *Booth v. Ableman*, 20 Mich. 21; 88 Am. Dec. 730.

Where a sheriff levied an attachment on and sold property pledged to a third person to secure a debt which equalled the value of the property, the pledgee was entitled to recover of the sheriff the value of such property less prior liens thereon, and was not limited to the amount it sold for less such liens. *Grabfilder v. Lockett* (Tex. 1894), 26 S. W. Rep. 168.

converted the security and is sued therefor, may recoup the amount of his debt.¹ So may the innocent pledgee of such creditor or pawnee.² The mortgagee, as against the mortgagor, can recover only the extent of his mortgage debt.³ On the other hand, in the absence of proof of special damages, the mortgagor, as against the mortgagee, or those claiming under him, is entitled to recover only the value of the property converted, less the mortgage debt.⁴ As against a common carrier, who has a lien upon

Common Carrier.—In an action against a common carrier for the conversion of goods delivered to a person not authorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods less the freight, with interest from the date of the conversion. *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

1. *Stearns v. Marsh*, 4 Den. (N. Y.) 227; 47 Am. Dec. 248; *Chinery v. Viall*, 5 H. & N. 255; *Brierly v. Kendall*, 17 Ad. & El. 337; 79 E. C. L. 937; *Belden v. Perkins*, 78 Ill. 449; *Nabring v. Bank of Mobile*, 58 Ala. 204; *McCalla v. Clark*, 55 Ga. 53; *Bradley v. Burkett*, 82 Ga. 255; *Neller v. Kelly*, 69 Pa. St. 403; *Work v. Bennett*, 70 Pa. St. 487; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 271; *Johnson v. Stear*, 15 C. B. N. S. 330; 109 E. C. L. 330.

In an action against a pledgee of a note given as collateral security, the measure of the plaintiff's damages is the difference between the collateral note and his indebtedness to the defendant at the time of the conversion. *Hallack Lumber, etc., Co. v. Gray* (Colo. 1893), 34 Pac. Rep. 1000.

2. In *Ludden v. Buffalo, etc., Co.*, 22 Ill. App. 415, in an action of trover against the pledgee of certain goods pledged to him by the factor, it was held that, inasmuch as the form of action was equitable, the plaintiff could recover damages only to the extent of the injury actually sustained; and the pledgee might recoup from the value of the goods pledged, the amount of the factor's advances thereon. See also *Belden v. Perkins*, 78 Ill. 449.

In *First Nat. Bank v. Boyce*, 78 Ky. 42; 39 Am. Rep. 198, a lot of bagging was shipped by a manufacturer to a firm of commission merchants to be sold on his account. The factors advanced upon the goods, and, having placed some of them in a warehouse, took receipts, which they pledged as their own, to secure a loan. An action

was brought by the principals to recover the value of the bagging, and the answer of the defendant, setting up the insolvency of the factors and claiming, as a set-off, the amount that the factors had advanced on them to the owner, was demurred to and the demurrer sustained in the lower court; but on appeal, the supreme court reversed the case on the ground that "Equitable defense, by way of recoupment or equitable set-off, has been entertained and made effectual in actions of trover. While saying that the factor had no right to pledge the goods of his principal, the courts have, with great unanimity, allowed the amount sought to be recovered of the innocent pledgee of the factor to be reduced by the sums justly due from the principal to his factor."

3. *Allen v. Judson*, 71 N. Y. 77; *Fowler v. Haynes*, 91 N. Y. 346; *Parish v. Wheeler*, 22 N. Y. 494; *La Crosse, etc., Co. v. Robertson*, 13 Minn. 291; *Ward v. Henry*, 15 Wis. 239.

In *Becker v. Dunham*, 27 Minn. 32, where goods in the hands of the mortgagee are seized, upon writs of attachment against the mortgagor, in an action against the levying officer, the mortgagee can recover only the value of his interest in the goods. So in *Straw v. Jenks*, 6 Dak. 414.

4. *Brierly v. Kendall*, 17 Ad. & El. 937; 79 E. C. L. 937; *McClure v. Hill*, 36 Ark. 268; *Jones v. Horn*, 51 Ark. 19; *Street v. Sinclair*, 71 Ala. 110; *Cushing v. Seymour*, 30 Minn. 301; *Brink v. Freoff*, 40 Mich. 610; *Brown v. Phillips*, 3 Bush (Ky.) 656; *Womble v. Leach*, 83 N. Car. 84; *Ball v. Linney*, 48 N. Y. 6; 8 Am. Rep. 511; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Washburn v. Corlis* (B'klyn City Ct.), 21 N. Y. Supp. 422; *Craig v. McHenry*, 35 Pa. St. 120.

Where plaintiff admits that the defendant has a lien on the property to a certain amount, that amount may be deducted by the jury in assessing

the goods which he has wrongfully converted, the measure of damages is the market value, less the amount of his lien.¹

It would seem that the vendor in a conditional sale would be allowed to recover, as against the vendee in an action of trover, only the balance of the unpaid purchase-money as a just compensation for his interest, and it has been so held;² but it also has been held in some jurisdictions that the vendor, upon default, may recover in an action of trover for the conversion, the full value of the property, without any deduction for payments made by the vendee or those claiming under him,³ on the ground that they have acquired no rights in the property.

3. Value—*a*. WHEN ESTIMATED.—As a general rule, the value at the time and place of conversion is the basis of the measure of damages, except where the property converted is of fluctuating value;⁴ and this rule is not altered where there has been a subse-

damages. *Fowler v. Gilman*, 13 Met. (Mass.) 267.

In an action of trover against a mortgagee of chattels who, on default of an installment due, seized and sold the mortgaged property for the extinguishment of the entire debt, it was held that the measure of damages for the wrongful conversion, was the value of the property less the amount of the debt secured by it, and any special damages. *Brink v. Freoff*, 40 Mich. 610.

1. *Briggs v. Boston, etc.*, R. Co., 6 Allen (Mass.) 246; 83 Am. Dec. 626; *Peebles v. Boston, etc.*, R. Co., 112 Mass. 498; *Ingledeu v. Northern R. Co.*, 7 Gray (Mass.) 86.

Inn-Keepers.—But in *Mulliner v. Florence*, 3 Q. B. Div. 485, the case of a pledge is distinguished from that of a lien with the right of detainer. In this case, where an inn-keeper having a lien upon goods tortiously sold them, it was held that his lien was thereby destroyed, and that in an action for the conversion, the plaintiff was entitled to the full value of the goods, and the defendant was not entitled to deduct the amount which was due in respect to the lien.

2. *Johnston v. Whittemore*, 27 Mich. 463; *Guilford v. McKinley*, 61 Ga. 230; *Ross v. McDuffie* (Ga. 1893), 16 S. E. Rep. 648.

So in *Pennsylvania*, it was held that where the time of the seizure and sale of a chattel as the property of a vendee, where the sale to him was conditional, and where the vendor retained either the exclusive or joint possession of it, and had been paid a part of the price and the vendor had the legal title

to the chattel, and the vendee had but an equity in it equal to the amount of money paid by him on the contract, the measure of damages to which the vendor would be entitled, as against the sheriff's vendee, would not be the value of the chattel itself, but the amount of the purchase-money unpaid. *Rose v. Story*, 1 Pa. St. 190; 44 Am. Dec. 171.

3. *Angier v. Taunton, etc.*, Mfg. Co., 1 Gray (Mass.) 621; 61 Am. Dec. 436; *Carter v. Kingman*, 103 Mass. 517; *Brown v. Haynes*, 52 Me. 581. And as against a purchaser, see *Colcord v. McDonald*, 128 Mass. 470; or an attaching creditor of the vendee. See also *Buckmaster v. Smith*, 22 Vt. 201. The measure of damages is the value of the property at the time of the conversion without deduction for payments by the vendee. *Smith v. Foster*, 18 Vt. 182.

4. *Simpson v. Alexander*, 35 Kan. 225; *Lentry v. Kelley*, 49 Kan. 82; *Sherman v. Finch*, 71 Cal. 68; *Greeley v. Stilson*, 27 Mich. 152; *Dalton v. Laudahn*, 27 Mich. 529; *Burk v. Webb*, 32 Mich. 173; *Allen v. Kinyon*, 41 Mich. 281; *Keineskamp v. Beaty*, 74 Md. 388; *Hendricks v. Evans*, 46 Mo. App. 313; *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209; 18 Am. Dec. 167; *Robinson v. Peru Plow, etc., Co.*, 1 Okla. 140; *Arrowsmith v. Gordon*, 3 La. Ann. 110; *Robinson v. Hartridge*, 13 Fla. 501; *Shepard v. Pratt*, 16 Kan. 209; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Linan v. Reeves*, 68 Ala. 89; *Street v. Nelson*, 80 Ala. 230; *Burks v. Hubbard*, 69 Ala. 379; *Tucker v. Hamlin*, 60 Tex. 171.

In *Tuttle v. White*, 46 Mich. 485; 41

quent decline in the value of the goods;¹ nor, on the other hand, where the defendant has sold the property at a greater price.²

Where a demand and refusal either constitute the conversion or afford presumptive evidence of it, it is no infringement of the rule to regard that event as the time as of which the value is to be estimated.³

Am. Rep. 175, in an action of trover against an innocent purchaser of logs from a willful trespasser, it was held that the measure of damages was their value when first taken under the control of the defendant.

In *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211; 9 Am. Dec. 512, it was said that, "It must be borne in mind that the plaintiff in an action of trover compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser or as answerable to him for the value of the thing converted? He selects the date of the conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict."

In *Cassin v. Marshall*, 18 Cal. 689, it was held in a charge to the jury that, "In estimating the value of property, you will take as the basis of your verdict the cash value of the articles in the market at the time they were taken out of the possession of the plaintiff by the defendant," was not error.

A purchaser bought champagne, lying at a wharf, at fourteen shillings per dozen, and re-sold it at twenty-four shillings to the captain of a ship about to leave *England*. The wharfinger refused to deliver the wine and the plaintiff was unable to fulfil his contract. In an action for the conversion, it was held that the purchaser was entitled, as damages, to the price at which he had sold the champagne, that being the real value of the goods at the time of the conversion. *France v. Gaudet*, L. R., 6 Q. B. 199; 40 L. J. Q. B. 121.

Where a shipmaster sailed away with a cargo of salt against the consent of the owner, the value was estimated at the time of the sailing. *Falk v. Fletcher*, 18 C. B. N. S. 405; 114 E. C. L. 404.

Conversion by Wrongful Execution or Attachment.—In an action for the wrongful attachment of personal property which was subsequently sold, it was held that the measure of damages

was the value of the property at the time of the seizure. *Henshaw v. Bank*, 10 Gray (Mass.) 568. See also *Newman v. Kane*, 9 Nev. 234. But in *Sprague v. Brown*, 40 Wis. 612, where the property of a third person was seized and sold under an execution, and was afterward bought by the third person at the execution sale, it was held that the measure of damages against the officer who seized and sold the property was the amount paid by the third person to the purchaser at the execution sale, not including its actual value, together with any special damages caused by the wrongful taking.

1. *Kingsbury v. Smith*, 13 N. H. 109; *Devlin v. Pike*, 5 Daly (N. Y.) 85; *Mott v. Pettit*, 1 N. J. L., 298.

2. *Badillo v. Tio*, 7 La. Ann. 487; *Baker v. Wheeler*, 8 Wend. (N. Y.) 508; 24 Am. Dec. 66; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211; 9 Am. Dec. 512.

Retail Price.—The measure of damages in an action for the conversion of a stock of liquors, is their value when seized, and not the price obtained by retailing them in small quantities. *Tucker v. Hamlin*, 60 Tex. 171. See also *Miller v. Jannett*, 63 Tex. 82.

In *Block v. Coombs*, 63 Tex. 419, an instruction to the jury that they should find as actual damages a sum not less than that for which the goods actually sold, was held erroneous.

3. *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28; *First Nat. Bank v. Strong*, 28 Ill. App. 525; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Garrard v. Dawson*, 49 Ga. 434.

So where a common carrier refuses to deliver goods until a certain sum is paid for freight, it is not error to regard this time of refusal as the date from which to estimate the value. *Northern Transp. Co. v. Sellick*, 52 Ill. 249. And in *Hendricks v. Evans*, 46 Mo. App. 313, where the defendant purchased a team of horses from the plaintiff's bailee, and when the plaintiff demanded the same, put the horses out of his possession, it was held that

b. WHERE ESTIMATED.—The value should be estimated according to the market value at the place of conversion.¹ But the plaintiff, in estimating the value of the property, is not limited absolutely to the value at the precise spot of the conversion,² for, where there is no market, there the measure of damages may be determined by the market value of the goods at some convenient market, less the cost of transportation to that place.³ And in the case of goods converted at an intermediate point, when in a state of transportation, it is held that the value at the place of delivery should afford the measure of damages.⁴

c. HOW ESTIMATED—EVIDENCE OF VALUE.—The price at

the measure of damages was the value at the time of the demand, although the condition of the horses had improved since the purchase.

1. *Hamer v. Hathaway*, 33 Cal. 117; *Hisler v. Carr*, 34 Cal. 645.

2. *Selkirk v. Cobb*, 14 Gray (Mass.) 317; *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144.

In *Selkirk v. Cobb*, 13 Gray (Mass.) 317, it was said: "The rule is perfectly well established that in actions of tort for the conversion of personal property, the measure of damages is its value at the time of the conversion. This was so stated by the court in its directions to the jury, which were therefore in that particular entirely correct. The additional qualification asked for by the defendant, that the market value of the property at the place where it was converted should be taken into consideration, was properly refused. 'Place,' as used in this connection, was indefinite and uncertain. If adopted it might have misled the jury by its being supposed to limit them in ascertaining the value of the property to inquirers as to sales made on the precise spot where the conversion took place or its immediate vicinity. Within such a circumscribed range it may have been impossible to find that the property had there acquired any marketable value."

3. *Hallett v. Novion*, 14 Johns. (N. Y.) 273.

In *Boylston Ins. Co. v. Davis*, 70 N. Car. 485, where certain iron was wrongfully seized, converted, and left on Core Beach, it was held that the measure of damages might be the price of the iron in any other Atlantic port where there was a market for it at the time of the conversion, less the cost of getting it there.

So in *Burne v. Ashley*, 1 Low. (U.

S.) 27, in an action of trover for the conversion of a whale in the Okhotsk Sea, it was held that the measure of damages was the value of the whale at the time of the conversion, which was to be found by taking the value of the oil and bone at New Bedford, which was the ruling market of the country at that time, and the home port of both vessels, less the expense of preparing it, freight, and insurance, with interest to be added. See also *Bartlett v. Budd*, 1 Low. (U. S.) 223.

In *Hodson v. Goodale*, 22 Oregon 68, it was held that in trover for logs, converted in a river some distance from a market, the measure of damages was the value at the nearest convenient market, less the cost of moving them.

4. See *Gillingham v. Dempsey*, 12 S. & R. (Pa.) 183; *Bailey v. Shaw*, 24 N. H. 297; 55 Am. Dec. 241; *The Joshua Barker*, 1 Abbott Adm. R. 218.

So in *Farwell v. Price*, 30 Mo. 587, where goods shipped from St. Louis, consigned to a party in Boston, were converted at New Orleans by the forwarding agent, it was held that the measure of damages was the value of the flour at the place of destination. In this case it was said that, "In actions against carriers for the wrongful conversion of property intrusted to them, damages have been usually given according to the value of the goods at the place of destination. We do not see how the forwarding merchant occupies any better position in respect to this than the carrier; he is an agent of the consignor, and if he fails to discharge his duty to his principals and converts the goods to his own use, the principal or the party standing in his place, ought to be recompensed to the extent of his injury, having reference to proximate and natural results." See *CARRIERS OF GOODS*, vol. 2, p. 905.

which the goods have been disposed of at public sale is evidence of the market value.¹ And evidence as to the price at which the goods sold at auction is properly admissible to show the value.² In general, all evidence tending to show the actual value of the property at the time and place of the conversion, may be considered in estimating the measure of damages.³ Evidence of the value of the goods at a time prior or subsequent to the time of conversion, where there are no more direct means of reaching the

1. See MARKET VALUE, vol. 15, p. 467; *Parmenter v. Fitzpatrick*, 135 N. Y. 190; *Beach v. Raritan, etc.*, R. Co., 37 N. Y. 470.

In *Parmenter v. Fitzpatrick*, 135 N. Y. 190, it was held that the price obtained at an actual *bona fide* sale of the property, fairly conducted and not forced, whether at an auction or private sale, was competent upon the question of the market value.

In *Steiner v. Trnum* (Ala. 1893), 13 So. Rep. 365, it was held that the price at which a horse sold at a forced public sale at a market, in accordance with the terms described by the other parties, with which a plaintiff had no connection, was no legal criterion of value as against the plaintiff.

2. Auction Sales.—*Hutchinson v. Poyer*, 78 Mich. 337; *Dyer v. Rosenthal*, 45 Mich. 590; *Davis v. Zimmerman*, 40 Mich. 28; *Smith v. Mitchell*, 12 Mich. 180; *Whitehouse v. Atkinson*, 3 C. & P. 344; 14 E. C. L. 339.

Evidence of what the goods sold for at auction should be received for the consideration of the jury, to be compared with the other evidence of value that may be offered, and be allowed such weight as the circumstances of the sale and the degree of competition actually exhibited should entitle it to. *Campbell v. Woodworth*, 20 N. Y. 500; *Gill v. McNamee*, 42 N. Y. 46; *Heinmuller v. Abbott*, 34 N. Y. Super. Ct. 228.

3. *Waters v. Langdon*, 16 Vt. 570; *Stillwell v. Farewell*, 64 Vt. 286; *Mortimer v. Marder*, 93 Cal. 172.

In an action by attaching creditors, it was proper to allow one who appraised the goods to testify as to their value. *Dalton v. Stiles*, 74 Mich. 726.

So, in an action for the value of a stock of goods seized by an officer, one who was engaged in the same line of business, and had assisted in making out the inventory, was allowed to testify as to its value, although he said that he could not give any opinion as to the

exact value. *Hutchinson v. Poyer*, 78 Mich. 337.

In an action for the conversion of certain railroad stock, the plaintiff was allowed to give evidence tending to show that the railroad company was about to, and did increase the stock, and that the owners of the stock were by the regulations of the company to have certain portions *pro rata* of the new stock at reduced rates, not to enable the plaintiff to recover the value of the new stock as special damages, but as being a circumstance which would legitimately bear upon the questions of the value of the property converted. *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28.

So in *Merchant v. Jordan* (Supreme Ct.), 3 N. Y. Supp. 468, in an action for the recovery of receiver's certificates, evidence relating to a contemplated reorganization of the road was admitted as affecting the value of the stock.

In *Simpson v. Cincinnati, etc.*, R. Co., 81 Ga. 495, it was held that the value of four bales of cotton at Rome, Georgia, could not be inferred from the value of six, including these four, at Cincinnati, nor from the value of the other two at Rome, as it did not appear that the two were of as light weight and quality as the four in question.

In an action for the conversion of a large number of watches, testimony as to their average value is competent. *Illingworth v. Greenleaf*, 11 Minn. 235.

Custom-House Valuation.—In *Caffe v. Bartrand*, 1 How. Cas. (N. Y.) 224, it was held that where foreign goods had been passed through the custom house, the valuation put upon them there could be introduced as evidence.

Comparison with Similar Property.—The market value may be ascertained from the value of the same quantity of like property. *Lawton v. Chase*, 108 Mass. 238.

Bill of Sale.—A bill of sale executed by the plaintiff to a third person may

value, may be considered.¹ Expert testimony of witnesses, acquainted with the value of similar property, is admissible, although they have never seen the property in question.²

If the defendant has, by his act, prevented the plaintiff from ascertaining the true value of the goods converted, it may be presumed that they were of the best quality and highest value.³

Where property has no market value, the actual value to the

be given in evidence by the defendant. *Scott v. Burch*, 6 Har. & J. (Md.) 67.

1. *Pitt v. Texas Storage Co.* (Tex. 1892), 18 S. W. Rep. 465. In this case it was held that evidence of the value of the goods when left for storage, was competent to prove their value at the time they were converted, three years afterward.

In an action for the conversion of a steam-engine boiler, evidence of the value of the property a year after the suit was brought was held to be inadmissible, in the absence of any assurance that there was no more direct method of ascertaining its value. *Yater v. Mullen*, 23 Ind. 562.

2. *Beecher v. Denniston*, 13 Gray (Mass.) 354; *Lawton v. Chase*, 108 Mass. 238. See also *Fitchburg R. Co. v. Freeman*, 12 Gray (Mass.) 401; 74 Am. Dec. 600; *Brady v. Brady*, 8 Allen (Mass.) 101; *Cornell v. Dean*, 105 Mass. 435; *Miller v. Smith*, 112 Mass. 470; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Brill v. Flagler*, 23 Wend. (N. Y.) 354; *Carr v. Moore*, 41 N. H. 131.

In *Vandime v. Burpee*, 13 Met. (Mass.) 288, Durey, J., said: "It seems to us that it would be impracticable to dispense with this species of testimony, in many actions of trover for personal property, where no detailed facts could adequately inform the jury of the value of the article. The opinion of the witness as to the value of a horse, is much more satisfactory evidence than a detailed statement of the size, color, age, etc., to give the jury requisite information to enable them to assess damages for the conversion of such a horse."

3. **Presumption of Value.**—The principle is settled, that a person who has acquired the possession of goods, and has put it out of the power of the owner to show the quality and value of the property by any artifice or concealment, may be held liable to the value of the best quality of such goods. *Bailey v. Shaw*, 24 N. H. 297; 55 Am. Dec. 241; *Clark v. Miller*, 4 Wend. (N. Y.) 628; *Amory v. McGregor*, 15 Johns. (N. Y.) 24. See also *Harris v. Rosen-*

berg, 43 Conn. 227; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

In *Armory v. Delamirie*, 1 Str. 504; 1 H. L. Cas. 151, where the plaintiff found a jewel, and upon presenting it to a goldsmith to know what it was worth, the smith's apprentice removed the stone from the socket and refused to surrender it, it was held that the plaintiff might prove what a jewel of the finest water which would fit the socket from which the stone was removed would be worth, and the jury was instructed that, unless the defendant produced the jewel and showed it not to be of the finest water, they should presume everything against him and make the value of the best jewel the measure of damages.

In *Tea v. Gates*, 10 Ind. 164, where the property converted, although not shown to be in the possession of the defendant, was traced to him, and was of a kind that would not, probably, remain very long in his possession, yet in taking it he could have ascertained the precise quantity; having failed to do so, it was held that the instructions to the jury that they should solve all doubts in relation to the amount and value against the defendant, were properly given.

So, in *Kavanaugh v. Taylor*, 2 Ind. App. 502, an action of trover for the conversion of a carload of potatoes, it was held that since the seller had no opportunity to inspect the potatoes when they were converted by the defendant, the jury was justified in finding from him the highest price and the largest quantity proved, and where the defendant plead that the potatoes were damaged when converted, the burden rested heavily upon him to prove it.

But in *Clumes v. Pezzy*, 1 Campb. 8, where the only evidence respecting the property was that of the plaintiff's servants, who declared that they delivered certain bottles at the defendant's house, but as to the contents thereof they were ignorant, Lord Ellenborough directed the jury to presume that the bottles were filled with the cheapest

owner,¹ or the cost of replacing it,² may afford the true measure of damages.

4. Value as Affected by Accession or Act of Wrongdoer.—In accordance with the general rule, as to the measure of damages, the plaintiff is not entitled to an increase after the time of conversion.³

The plaintiff is not entitled to the value of the goods at the time of conversion, where, prior to that time, the value of the goods had been increased by the defendant's labor;⁴ and, by the weight of authority, the plaintiff is not entitled to any increase in the value of the goods, arising by the act of the defendant subsequent to the conversion,⁵ unless the defendant has acted

liquor in which the plaintiff dealt. And in *Beecher v. Denniston*, 13 Gray (Mass.) 354, where the defendant concealed the chattel until a late stage of the trial, the instructions to the jury were that the plaintiff ought not to be prejudiced by an intentional withholding of the chattel, calculated and intended to prevent him from showing its actual value as the measure of damages, and that they ought to give the full value, no more or no less, with no ground of exception.

1. *Heald v. McGowan* (C. Pl.), 5 N. Y. Supp. 450; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Stickney v. Allen*, 10 Gray (Mass.) 352.

In *Heald v. McGowan* (C. Pl.), 5 N. Y. Supp. 450, where an action was to recover certain electrotype plates, it was held that in estimating their value at the time of the conversion, the cost of replacing them, and the fact that they had a use which was valuable for the plaintiff, and that they could be used in reprinting the work for which they were made if another edition should be demanded, were relevant and material facts, there being no market value for the conversion. See also *Lovell v. Shea* (Super. Ct.), 18 N. Y. Supp. 193.

In an action against a railroad for the loss of a case containing a portrait of the plaintiff's father, the measure of damages was the actual value of the portrait to the plaintiff, and not the market value; and evidence that the plaintiff had no other portrait of his father was admissible. *Green v. Boston, etc., R. Co.*, 128 Mass. 221; 35 Am. Rep. 370.

In *Doyle v. Eccles*, 17 U. C. C. P. 644, in an action for the conversion of a solicitor's docket and papers showing entries of evidence of certain bills and costs, it was held that the measure of damages was not the value of the book

as a mere book, but what it was worth to the plaintiff irrespective of its value.

2. *Stickney v. Allen*, 10 Gray (Mass.) 352.

3. In *Arkansas Valley, etc., Co. v. Mann*, 130 U. S. 69, in an action of trover for the recovery of cattle, it was held that the plaintiff was entitled to the value of the animals up to the time of the demand, but not to the commencement of the suit. See also *Scott v. McAlpin*, 6 U. C. C. P. 302, where it was held that the plaintiff was not entitled to the animals bred from the mares subsequent to the conversion.

In *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498, it was held that an agent purchasing female slaves, who was ignorant at the time that the title was not in the vendor, was not liable for the value of children of the female, born after delivering to his principal.

4. *Wooden Ware Co. v. U. S.*, 106 U. S. 432; *Winchester v. Craig*, 33 Mich. 205; *Hinman v. Heyderstadt*, 32 Minn. 250. See *Hyde v. Cookson*, 21 Barb. (N. Y.) 106.

5. *Green v. Farmer*, 4 Burr. 2223; *Reid v. Fairbanks*, 13 C. B. 692; 76 E. C. L. 692; *Beede v. Lamprey*, 64 N. H. 513; 10 Am. St. Rep. 426; *Saunders v. Clark*, 106 Mass. 331; *Tuttle v. White*, 46 Mich. 487; 41 Am. Rep. 175; *Aborn v. Mason*, 14 Blatchf. (U. S.) 405; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92.

So, in an action of trover for the conversion of an unfinished vessel which the defendant, subsequent to the conversion, completed, the measure of damages was the value at the time of the conversion, and not the enhanced value at the time of its completion. *Reid v. Fairbanks*, 13 C. B. 692; 76 E. C. L. 692.

In *Aborn v. Mason*, 14 Blatchf. (U. S.) 405, where a quantity of wool and yarn were delivered to the manufacturer to be made into cloth, and while in the process of manufacture were

maliciously or in bad faith.¹ Where goods are taken at one place and transported by the defendant to another, thereby increasing their value, it is held that the expense of transportation should be allowed the defendant.²

Although there is considerable conflict upon the question, it may be said that according to the weight of authority, both in *England*³

attached, and while under attachment the unfinished goods were completed, the measure of damages in trover for the wrongful attachment was held to be the value of the unfinished goods at the time of the conversion, that is, the value of the goods in their manufactured state less the expense of manufacturing.

In *Dresser Mfg. Co. v. Waterston*, 3 Met. (Mass.) 9, where cloths were sent to a printing company and were subsequently converted by them, it was held that the plaintiff could recover in damages only the value of the goods at the time they were delivered, and not their value after they were printed.

Co-Owners—Goods Manufactured Upon Shares.—Where one party furnishes raw material to another to be manufactured upon shares, they become co-tenants, and if the manufacturer converts the finished article to his use, the co-tenant may recover full damages for his share. *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51.

But, where goods are delivered to a manufacturer to be put in a marketable state upon contract that they shall be delivered after deducting all expenses of manufacturing, with commissions, it was held that, in an action of trover against one claiming the property under an assignment from the manufacturer, the measure of damages is the plaintiff's interest in the raw material, and not the enhanced value when manufactured. *Hyde v. Cookson*, 21 Barb. (N. Y.) 92.

But in *Pierce v. Schenck*, 3 Hill (N. Y.) 28, where logs were delivered to a miller to be sawed, who, after sawing a part of them into boards within the time, failed to perform as to the rest and converted both the boards and logs to his own use, it was held that the bailor might maintain trover and recover for the whole without any declaration on account of what had been actually sawed. In this case, however, two judges held that the point as to the right of the plaintiff to recover for the full value of the logs sawed, was not made at the trial. Cowen, J., said

that, "When a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire, and without a stipulation to the contrary, he has no right to demand payment until the work is complete, and *fortiori*, he has no right to carve out payment for himself without consulting his bailor. A miller is entitled to take toll from your grist on grinding, but if he chooses to grind only a part and then sell the whole, he is not entitled to toll for what he actually grinds."

1. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; 25 Am. Dec. 66; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Aborn v. Mason*, 14 Blatchf. (U. S.) 405. But see *Carroll v. More*, 30 Wis. 576.

In *Silsbury v. McCoon*, 3 N. Y. 381; 53 Am. Dec. 307, which was trover for the conversion of an amount of corn into whisky, it was held that the *animus* with which the corn was converted was an important element in the measure of damages; although in the same case in the lower court, as reported in 6 Hill (N. Y.) 425, and 4 Denio (N. Y.) 332, the idea that the rights of the party depended on the motive or intention, was repudiated.

2. *Omaha, etc., R. Co. v. Tabor*, 13 Colo. 41; *Hill v. Canfield*, 56 Pa. St. 454; *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 550; 84 Am. Dec. 763. See also *Herdic v. Young*, 55 Pa. St. 176; *Saunders v. Clark*, 106 Mass. 331; *Ward v. Carson River Wood Co.*, 13 Nev. 62.

In *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769, in an action of trover for a quantity of logs, the measure of damages was the value of the logs when taken, and not at the mill where they were taken to be sawed.

3. *Wood v. Morewood*, 3 Q. B. 440; 43 E. C. L. 810; *Jegon v. Vivian*, L. R., 6 Ch. 742; *Hilton v. Woods*, L. R., 4 Eq. 432; *In re United Colliery Co.*, L. R., 15 Eq. 46; *Livingston v. Rawyards Coal Co.*, 42 L. T. N. S. 334.

Formerly, the technical rule prevailed in the English court, which was, that when a part of the realty is severed from the whole and converted

and the *United States*,¹ is, that the measure of damages for the

into a chattel, then, instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land; and that in estimating the damages against the wrongdoer, the owners of the fee should be paid the value of the chattel at the time when it was converted. See *Martin v. Porter*, 5 M. & W. 352, and *Morgan v. Powell*, 3 Q. B. 278; 43 E. C. L. 734. This rule, however, has been qualified, as stated in the text. *Wood v. Morewood*, 32 B. 440; 43 E. C. L. 810; *Livingston v. Rawyards Coal Co.*, L. R., 5 App. Cas. 25; *Templemore v. Moore*, 15 Ir. C. L. Rep. 14.

Chancery, after some hesitation, adopted the common-law rule. In *Llynoi Coal, etc., Co. v. Brogren*, L. R., 11 Eq. 188, and *Hilton v. Woods*, L. R., 4 Eq. 432, the principle was recognized that where the plaintiff and defendant were adjoining mine owners, and the defendant crossed his boundary and took coal from his neighbor's mines, the value was to be measured by the selling price of the coal at the pit's mouth, with just allowance for the cost of raising, but not for getting or severing.

These cases were overruled in *Jegon v. Vivian*, L. R., 6 Ch. 742, where Lord Hatherly remarked: "It strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for getting and hewing. Suppose the issue worked out, then what he has lost is the coal, but this rule would give him besides all the cost of getting and hewing. It seems a rough and ready mode of doing justice, though the remark that a willful trespasser ought to be punished is worthy of observation; and further, as was said by one of the judges, when you deprive a man of his property in this way, you deprive him of the management and control of his own property and he might have made a better bargain. All that, however, is of course speculative, and it seems to me the judges have founded their decision upon the ground of willful trespass. . . ."

In *Livingston v. Rawyards Coal Co.*, L. R., 5 App. Cas. 25, the rule is well stated by Lord Hatherly. He said: "There is no doubt that if a man furtively and in bad faith robs his neighbor of his property, and, because it is underground is probably not for some

time detected, the court of equity in this country will struggle, or I would rather say will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and, making him no allowance with respect of what he has so done as would have been justly made to him if the parties had been working by agreement. . . . But when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simplest course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

In this case the plaintiff was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When the plaintiff purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under the plaintiff's acre and a half, and in doing so damaged the surface. The plaintiff could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but to R. and C.; and the element of willful trespass and of special and exceptional need of support to the surface were absent. In a claim by the plaintiff for the value of the coal taken underneath the feu, it was held by the House of Lords that the measure of damages was the value of the coal to the plaintiff at the time it was taken, and that the best evidence under the peculiar circumstances of the case of that value, was the royalty paid by R. and C. for the surrounding coal field.

1. *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332; *Ross v. Scott*, 15 Lea (Tenn.) 479; *Ensley v. Nashville*, 2

conversion of severed portions of realty, where the wrongful act has been through ignorance, and not willful, as where there has been an honest dispute as to title, is the value at the time of the wrongful act, that is, at the same rate as if the property taken had been purchased *in situ* by the defendant at a fair market value of the district. But where the wrongdoer has acted willfully or in bad faith, he will not be allowed the benefit of his labor or expense.¹

Baxt. (Tenn.) 144; Silsbury v. McCoon, 3 N. Y. 379; 53 Am. Dec. 307; Forsyth v. Wells, 41 Pa. St. 291; 80 Am. Dec. 617; Beede v. Lamprey, 64 N. H. 513; 10 Am. St. Rep. 426; Swift v. Barnum, 23 Conn. 523.

In Waters v. Stevenson, 13 Nev. 157; 29 Am. Dec. 293, the court, after a careful review of the principal cases, said: "A careful examination of the authorities has convinced us that there is a growing inclination among all courts, where it can be done, to apply a just and safe rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is, to give the injured party as near compensation as the imperfections of human tribunals will permit. That is the whole idea of the law, and it is the duty of the courts to come as near it as possible in practice; and, although the courts differ as to the method of ascertaining the actual loss, still there is a refreshing unanimity of opinion that such loss, only when ascertained, ought to be compensated, in the absence of fraud, malice, or culpable negligence."

In Ross v. Scott, 15 Lea (Tenn.) 479, where the defendant, in good faith and an honest belief of title, mined coal on land only valuable for coal, and cut timber for the purpose of erecting houses on the land, and making props for the mine, he was held liable for the value of the coal *in situ*, and for the timber as trees.

1. Riddle v. Driver, 12 Ala. 590; Baldwin v. Porter, 12 Conn. 484; Cheeney v. Nebraska, etc., Stone Co., 41 Fed. Rep. 740; Winchester v. Craig, 33 Mich. 205; Symes v. Oliver, 13 Mich. 9; Ripley v. Davis, 15 Mich. 75; 90 Am. Dec. 262; Heard v. James, 49 Miss. 236; Gray v. Parker, 38 Mo. 160; Parker v. Waycross, etc., R. Co., 81 Ga. 396; Ellis v. Wire, 33 Ind. 127; 5 Am. Rep. 189; Eastman v. Harris, 4 La. Ann. 193; Lake Shore, etc., R. Co. v. Hutchins, 32 Ohio St. 584; Bennett v. Thompson, 13 Ired. (N. Car.) 146;

Silsbury v. McCoon, 3 N. Y. 379; 53 Am. Dec. 307, *overruling* 6 Hill (N. Y.) 425; 41 Am. Dec. 753; 4 Den. (N. Y.) 332; Alta Min., etc., Co. v. Benson, Min., etc., Co. (Arizona, 1888), 16 Pac. Rep. 565; Baker v. Wheeler, 8 Wend. (N. Y.) 505; 24 Am. Dec. 66; Tilden v. Johnson, 52 Vt. 628; 36 Am. Rep. 769; Wooden-Ware Co. v. U. S., 106 U. S. 432.

In Bly v. U. S., 4 Dill. (U. S.) 464, following decisions of the supreme court of Minnesota, it was held that where timber was cut upon public lands, willfully, fraudulently, or negligently, and without authority made into sawlogs, the government might sue in trover for the value and recover without a deduction arising from labor of the wrongdoer. Dillon, J., said: "Where timber has been cut into logs on public lands by a person who knows the lands belong to the government, or who on no reasonable grounds believes that it belongs to him, or by someone under whom he claims, and such logs are by him hauled to the watercourse and rafted, and taken to a distant boom, by means of which labor of the wrongdoer their value is much enhanced beyond their value when first severed from the freehold, the government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value; and, in either case, may recover without deduction for the enhanced value which may have been given the logs after severance from the freehold by the labor of the wrongdoer. In such case, the government is not confined to what is called 'stumpage' value, but may recover the value of the logs in the boom." See also Schulenburg v. Harriman, 2 Dill. (U. S.) 398.

Conversion by Co-Tenant. — It being by statute unlawful for the owner of an undivided interest in timber to cut down or remove trees from the land without having first obtained the consent of his co-tenants, in an action of trover against the vendee of such a co-tenant

So, the measure of damages for logs cut has been held to be the value of the timber standing;¹ and for coal or ore mined, the value *in place*.² But in some cases the technical rule prevails

by a non-consenting part-owner, it was held that the plaintiff was entitled to recover the value of his interest in the lumber at the date of the conversion, with no allowance for the expense or labor of the trespassing vendor. *Duff v. Bindley*, 16 Fed. Rep. 178.

1. *Morrison v. Robinson*, 31 Pa. St. 458; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *Whitney v. Huntington*, 37 Minn. 197; *Hinman v. Heyderstadt*, 32 Minn. 250; *Heard v. James*, 49 Miss. 236; *Winchester v. Craig*, 33 Mich. 205; *Ayers v. Hubbard*, 57 Mich. 322; 58 Am. Rep. 361; *Ayers v. Hubbard*, 71 Mich. 594.

In *Herdic v. Young*, 55 Pa. St. 176, which was an action of replevin of logs cut by the defendant by mistake on the plaintiff's land, the court said: "Our natural sense of justice furnishes the ground and measure of compensation for injuries done by one man to the property of another, from the man's adequate remedy to obtain it. Upon the principle of analogy, it is unjust to give to the plaintiff the advantage of the labor and expense of the defendant's cutting and hauling the logs and driving them to the boom. In a case of inadvertent trespass, one done in *bona fide* but mistaken belief of right, the true standard of damages would generally be the value of the logs at the boom (the place of replevin), less the cost of cutting, hauling and driving to the boom."

2. *Waters v. Stevenson*, 13 Nev. 157; 29 Am. Dec. 293; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *Lykens Valley, etc., Co. v. Dock*, 62 Pa. St. 232; *Ege v. Kille*, 84 Pa. St. 333; *Kier v. Peterson*, 41 Pa. St. 257; *Wood v. Morewood*, 3 Q. B. 440; 43 E. C. L. 810. See also *Austin v. Huntsville, etc., Min. Co.*, 72 Mo. 535; 37 Am. Rep. 446; *Chamberlain v. Collins*, 45 Iowa 429; *Coal Creek, etc., Mfg. Co. v. Moses*, 15 Lea (Tenn.) 300; 54 Am. Rep. 415.

In *U. S. v. Magoon*, 3 McLean (U. S.) 171, the jury was instructed, "that the value of the ore after its separation from the mine was not the measure of damages, and the digging and carrying away by the same person was presumed to be a continuous act, and the ore removed must be considered an aggravation of the trespass upon the soil."

So in *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 86, it was held that the plaintiff was entitled to recover the value of the ore, to be estimated as it lay in the bed, and not as it was after defendant had increased its value by removing it.

In *Forsyth v. Wells*, 41 Pa. St. 291, where parties were owners of adjoining tracts of coal lands, and the defendant opened a mine upon his own land, and the plaintiff claimed that the defendant had dug coal over the dividing line, it was plain that the measure of damages was the value of the coal when dug on the bank, or what was called "knocked down." It was held that the measure of damages was the value of the coal when in place. *Lowrie, C. J.*, said: "Where there is no wrongful purpose or wrongful negligence by the defendant, compensation for the injury done is the purpose of all remedies, and so long as we bear this in mind we shall have but little difficulty in managing the forms of action so as to secure a fair result; but if the defendant was guilty of no intentional wrong, he ought not to have been charged for the value of the coal after he had been at the expense of mining it, but only its value in place, with such other damage to the land as its mining may have caused."

In *Re United Merthyr, etc., Co.*, L. R., 15 Eq. 46, where coal had been wrongfully taken by working into the mine of an adjoining owner, the trespasser was treated as a purchaser at the pit's mouth, and required to pay the market value of the coal there, less the actual disbursement of severing and driving to bank, so as to place the owner in the same position as if he, himself, severed and raised the coal.

In *Missouri*, it was held that the proper measure of damages for wrongfully entering the land and taking away soil, was the value of the land removed. *Mueller v. St. Louis, etc., R. Co.*, 31 Mo. 262.

In *Wisconsin*, the rule was that the measure of damages in an action to recover damages for the cutting and carrying away of timber, was not the value of such timber at the place where the same was at the time of the commencement of the action, or its value as enhanced by the labor of the trespasser

and the value taken is that of the property immediately after severance, when it becomes chattel property.¹

or other, at the time of the wrongful conversion, but its value upon the lands at the time and place where the same was cut. See *Tuttle v. Wilson*, 52 Wis. 643; *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; but at present, by *Wisconsin Rev. Stat.*, § 462, it is provided that the measure of damages is to be the highest market value of such logs, timber, or lumber, in whatsoever place, shape, or condition the same shall be at any time before the trial while in the possession of the trespasser, or any purchaser from him with notice. This provision does not apply to innocent purchasers. *Wright v. Wooden-Ware Co.*, 50 Wis. 167.

In *Michigan*, there is an apparent conflict in the cases relating to the true measure of damages, in an action of trover for the conversion of timber. In *Grant v. Smith*, 26 Mich. 201, which was an action against one claiming under a tax title, who wrongfully cut timber on the lands of the plaintiff and removed the logs to the mill for manufacture, the measure of damages was said to be the value of the logs at the mill into which the defendant removed them, no allowance being made for his labor or expense. In this case, evidence that the defendant purchased the lands of one who claimed to have a tax title to show good faith, was held to be irrelevant.

In *Winchester v. Craig*, 33 Mich. 205, in an action of trover for the conversion of timber cut by the defendant on the plaintiff's land by mistake, Marston, J., with reference to the above case, said: "This deed having been rejected, there was nothing in the case tending to show that the defendant had acted other than as a willful trespasser, and such being the case, the plaintiff was clearly entitled to recover the value of the logs at the place to which he removed them." And the exclusion of the tax deed was justified on the ground that it would not have tended to show that the defendant acted honestly and in good faith. It is a fact that tax deeds are, almost universally, upon examination, found to be invalid, on account of defects appearing upon the face of the deed.

In *Tuttle v. White*, 46 Mich. 485; 41 Am. Rep. 175, the defendant was a will-

ful trespasser and was not allowed compensation for his labor.

In *Thompson v. Moiles*, 46 Mich. 42, which was an action of trespass *quare clausum fregit*, where a person cut timber in good faith, it was held that the measure of damages was the difference between the value of the land with the timber standing, and its value with the timber removed.

In the recent case of *Ayres v. Hubbard*, 71 Mich. 594, it was held that in trover to recover the value of timber cut on the plaintiff's land, if it appears that the trespass was neither willful nor negligent, the measure of damages is the value of the timber on the land. See also *Ayres v. Hubbard*, 57 Mich. 322; 58 Am. Rep. 361.

But in *Gates v. Rifle Boom Co.*, 70 Mich. 309, it was said that the trespasser, however innocent, cannot maintain an action of trover to recover his labor and expense from one whose timber he has wrongfully cut. It was so held where cord wood was cut on the lands of another, was hauled to a landing and piled up, and was then seized and sold by the owner of the land. See *Wetherbee v. Green*, 22 Mich. 311.

1. *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41; *Moody v. Whitney*, 38 Me. 174; *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426; *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1; See also *Foote v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; *Bennett v. Thompson*, 13 Ired. (N. Car.) 146. In *Smith v. Gonder*, 22 Ga. 353, in an action of trespass, it was said that the measure of damages was at least the value of the trees as they lay felled.

Maryland.—The value of the coal, when first taken from its native bed, and before it is put upon the mine cars, without deducting the expense of severing, is the measure of damages, and if the defendant, at the time of mining and recovering said coal, knew that the lands were not his own, such further damages may be awarded the plaintiffs as the facts and circumstances accompanying such mining and removing of the coal may warrant. *Franklin Coal Co. v. McMillan*, 49 Md. 549; 33 Am. Rep. 280; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403.

In *New Hampshire*, it seems that the measure of damages varies with the

In a case of the confusion of goods, where the defendant has acted wrongfully and the goods mingled are not of equal value, the plaintiff is entitled to recover the value of the whole in trover, as against the wrongdoer or his consignee.¹

Where the defendant is a purchaser, without notice of wrong, from a willful trespasser, the measure of damages is the value at the time of the purchase.²

form of action; that is, in an action of trespass, breaking into and entering the plaintiff's close and carrying away trees, the measure of damages should be the trees at the instant after they are severed. See *Adams v. Blodgett*, 47 N. H. 219; 90 Am. Dec. 569; *Foot v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151.

Illinois.—Where coal was taken from the land of the plaintiff and converted, the true measure of damages was held to be the value of the coal at the mouth of the pit or shaft, less the cost of conveying it there from the place where it was dug or mined, allowing nothing for the digging or the labor in separating the stone, sulphur, slate and earth from the coal first broken loose, or in breaking up the large masses. The tort-feasor is allowed nothing for the mining or any other act necessary for the production of the coal as an article of commerce. *McLean County Coal Co. v. Lennon*, 91 Ill. 561; *Illinois, etc., R. Co. v. Ogle*, 82 Ill. 627; *McLean County Coal Co. v. Long*, 81 Ill. 359.

In *Indiana*, the defendant is not allowed anything for the value of his labor or expense. In *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189, in an action for taking and converting the plaintiff's wheat as it stood in the field, and selling it, it was held that the measure of damages was the value of the wheat at the time of its sale; and in *Everson v. Seller*, 105 Ind. 266, in an action for an unlawful conversion of logs which the defendant cut on the premises of the plaintiff and hauled to a mill, the measure of damages was held to be the value of the lumber at the mill. See also *Yates v. Mullen*, 24 Ind. 277. See also *Peters, etc., Lumber Co. v. Lesh*, 119 Ind. 102, where a different rule was followed in an action of replevin.

So in *Iowa*. In *Stuart v. Phelps*, 39 Iowa 18, where the defendant wrongfully levied upon a crop of corn and caused it to be husked and cribbed, whereby its value was greatly increased, it was held that the defendant was not entitled to compensation for his labor

and expense. But see *Chamberlain v. Collinson*, 45 Iowa 429.

1. *Willard v. Rice*, 11 Met. (Mass.) 493; 45 Am. Dec. 226; *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627. See also *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

So where the mortgagor of goods, who was intrusted with the possession, either purposely or through want of proper care so mingled the goods with his own that they could not be distinguished, and consigned them for sale to a third person, the mortgagee was entitled to recover the value of the whole from the consignee. *Willard v. Rice*, 11 Met. (Mass.) 493; 45 Am. Dec. 226. A person who has property of another, and has fraudulently mingled it with his own, has the right to take possession of the whole mass for the purpose of separating and securing or disposing of the portion belonging to himself, and if it cannot be separated and he advertises and sells his interest in the whole, he does not thereby render himself liable to the other for the conversion of his property. *Stephenson v. Little*, 10 Mich. 433.

In *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 550; 84 Am. Dec. 763, where the plaintiff had cut a cord of wood and piled it up on the land of which he was in possession, and the defendant by mistake carried the wood to a distant market, and there mingled it with other wood so that it could not be identified, it was held that the plaintiff was entitled to recover the value of the wood at the place from which it was taken, and not the price at the market whither it was carried, which was a greatly improved price.

2. *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Hoxsie v. The Empire Lumber Co.*, 41 Minn. 548; *Alta Min., etc., Co. v. Benson Min., etc., Co.* (Arizona, 1888), 16 Pac. Rep. 565; *Silsbury v. McCoon*, 3 N. Y. 379; 53 Am. Dec. 307.

In *Tuttle v. White*, 46 Mich. 485; 41 Am. Rep. 175, which was an action of

5. **Property of Fluctuating Value**—*a*. **ENGLISH RULE.**—The measure of damages in the case of property of uncertain or fluctuating value, whether the action sounds in contract or tort, is held to be the value at the time of the trial, or at the time of the conversion, if the property has depreciated.¹ But in some cases, under peculiar circumstances, the plaintiff has been allowed the highest intermediate value from the time of the conversion to the time of the trial.² A distinction, however, is to be denoted in cases where

trover for the conversion of logs purchased in good faith from a willful trespasser, it was held that the measure of damages was their value when first taken under the defendants' control. Marston, C. J., said: "The defendants purchased from the trespassers, and if they acted in good faith in so doing, all they could ask would be protection in what they should expend in money or labor thereon thereafter. A person, however, in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser, or one who has no title and can give none, he must suffer the loss or look to his vendor. To hold otherwise would be to give the trespassers the benefit of their own wrong, contrary to all authorities. If these defendants had only made a partial payment for the logs under their contract of purchase, and the plaintiff herein was limited in his recovery to the value of the logs when first severed from the land, then the defendants would be the gainers; they would have the benefit of the trespasser's labor, and yet the latter could not maintain an action to recover the amount thereof, or the balance of the contract price. The conversion by these defendants took place when they first took charge or control over these logs in Black creek, and they should respond in damages according to the value at that time. There are very many cases where the value of the timber standing, or when first severed from the soil, would be but nominal, and to give willful trespassers, or those to whom they may sell, the benefit of any increased value put upon it by the original wrongdoer, and confine the owner to the nominal value, would but encourage the commission of acts of trespass, and tend to make purchasers at least careless as to the title they were acquiring. It is easy for any one to claim that he has purchased property in entire good faith, and very difficult in

many cases to establish the contrary, and if one claiming to be such, is protected to the extent of the increased value he may have in good faith added to the property, this is all he can fairly claim under the law."

Purchaser with Knowledge.—In *Smith v. Baechler*, 18 Ont. 293, in an action for the conversion of certain logs which had been cut without permission from the plaintiff's land, and purchased by the defendant and hauled to his mill, and there cut into lumber, it appearing that the defendant knew that he was buying logs taken from the plaintiff's land, or that at least he suspected that such was the fact, and willfully abstained from inquiry, it was held that the measure of damages was the value of the logs as they were in defendant's yard at the time they were demanded, without any deduction for cutting and hauling.

1. *Shepherd v. Johnson*, 2 East 211; *Owen v. Routh*, 14 C. B. 327; 78 E. C. L. 326; *Loder v. Kekule*, 3 C. B. N. S. 128; 91 E. C. L. 126; *Williams v. Archer*, 5 C. B. 318; 57 E. C. L. 318; *Harrison v. Harrison*, 1 C. & P. 412; 11 E. C. L. 436; *Greening v. Wilkinson*, 1 C. & P. 625; 11 E. C. L. 499; *Shaw v. Holland*, 15 M. & W. 136; *Gainsford v. Carroll*, 2 B. & C. 624; 9 E. C. L. 204; *Sanders v. Kentish*, 8 T. R. 162; *Forrest v. Elwes*, 4 Ves. 492. But see *In re Bahia*, etc., R. Co., L. R., 3 Q. B. 584, where in case of the failure of a corporation to recognize the transferee of stock, the measure of damages was said to be the value of the stock at the time of refusal.

2. *Archer v. Williams*, 2 C. & K. 26; 61 E. C. L. 25; *Greening v. Wilkinson*, 1 C. & P. 625; 11 E. C. L. 499. This last, a *nisi prius* case, is said to be imperfectly reported and of little authority. See *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614.

In *Mercer v. Jones*, Camp. 477, which was an action of trover for cotton, where it appeared that, at the time of the conversion, the cotton was

the plaintiff has not paid the consideration, when it is said that the measure of damages is the difference between the contract price and the market price at the time of the breach.¹

b. AMERICAN RULE.—In view of the very great conflict of authorities in the several states, no general rule can be laid down as to the measure of damages for the conversion of property of fluctuating value, such as bonds, stocks, etc. In a greater number of the states, the general rule as to the measure of damages, that it shall be at the time and place of the conversion, is adhered to,²

worth 6d. per pound and at the time of trial it was worth 10½ d., *Abbott, C. J.*, ruled that the jury were not limited to the full value. He said: "The jury may give the value at the time of the conversion or at any subsequent time at their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had been detained."

1. *Shaw v. Holland*, 15 M. & W. 136; *Gainsford v. Carroll*, 2 B. & C. 624; 9 E. C. L. 204; *Owen v. Routh*, 14 C. B. 327; 78 E. C. L. 326; *Forrest v. Elwes*, 4 Ves. 492; *Sanders v. Kentish*, 8 T. R. 162.

In *Shaw v. Holland*, 15 M. & W. 136, which was an action for the non-delivery of shares on a given day, *Parke, B.*, said: "With respect to the amount of damages, I was at first disposed to think that this was like the case of an action for not replacing stock, in which the measure of damages is, the difference of price on the day on which it ought to have been replaced, and on the day of the trial; but, upon consideration, I think it more resembles the case of an action for the non-delivery of goods. In the case of *Gainsford v. Carroll*, 2 B. & C. 624; 9 E. C. L. 204, which was an action for not delivering goods on a given day, the court held that it was not like the case of a loan of stock, where the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether; for, that the plaintiff having his money in his possession, might purchase the like goods the very day after the contract was broken; and therefore that the true measure of damages was, the difference between the price agreed upon and the market price of the goods at the time the contract was broken. Here, the plaintiff had his money in his own possession, and might have gone into the market and bought other shares as soon as the contract was broken."

2. *Bourne v. Ashley*, 1 Low. (U. S.) 27; *Watt v. Potter*, 2 Mason (U. S.) 77; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235; *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1; 28 Am. Rep. 268; *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 168; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Frothingham v. Morse*, 45 N. H. 545; *Bates v. Stausell*, 19 Mich. 91; *Habbell v. Blandy*, 87 Mich. 209; *St. Peter's Church v. Beach*, 26 Conn. 356; *Hurd v. Hubbell*, 26 Conn. 389; *Stewart v. Bright*, 6 Houst. (Del.) 344; *Boylan v. Hagnet*, 8 Nev. 345; *Bowker v. Goodwin*, 7 Nev. 135; *Lillard v. Whittaker*, 3 Bibb (Ky.) 92; *Arrington v. Wilmington, etc., R. Co.*, 6 Jones (N. Car.) 68; 72 Am. Dec. 559; *Vance v. Lounne*, 13 La. Ann. 223. *Assumpsit.*—*McKenney v. Haines*, 63 Me. 74; *Bush v. Holmes*, 53 Me. 417; *Smith v. Berry*, 18 Me. 123; *Berry v. Dwinel*, 44 Me. 268; *Pinkerton v. Manchester R. Co.*, 42 N. H. 429; *Stewart v. Ball*, 33 Mo. 154.

In *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424, *Bellows, J.*, said: "There being much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in *New York* and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and, perhaps, generally, it would not be

while in others, the strict rule of the highest intermediate value between the time of conversion and of trial is declared upon

so. . . . In the case of stocks, in regard to which the rule in *England* originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain."

In *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235, which was an action to recover damages for the conversion of stock held as collateral security, the measure of damages was held to be the value of the stock on the day of demand and refusal. See also *Sturges v. Heith*, 57 Ill. 451; 11 Am. Rep. 28; *Fosdick v. Greene*, 27 Ohio St. 484; 22 Am. Rep. 328. So in *Freeman v. Harwood*, 49 Me. 195, where an action of trover was maintained against a purchaser at a sale of the stock for taxes, the measure of damages was held to be the value of the stock at the day of sale. See also *McKenney v. Haines*, 63 Me. 74.

In *Arkansas*, the rule is stated to be that where the defendants have wrongfully held possession of property, and there has been an increase in value, after the taking, but before the demand, suit, or actual conversion, the plaintiff is entitled to the highest market value during such time. But when the property is actually converted and passes beyond the possible reach of the plaintiff, then its value and interest is the fixed measure of damages. *Peterson v. Gresham*, 25 Ark. 380.

So in *Maryland*. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 55. Where a pledgee of stock refused to surrender on the demand and tender of the debt, it was

held that the value of the stock on the day that the tender and demand were made, less the amount tendered, was the true measure of damages. *Franklin Bank v. Harris* (Md. 1893), 26 Atl. Rep. 523.

In *Illinois*, no distinction is recognized where the property converted is stocks, but the measure of damages is the market value of the property at the time of the conversion. *Sturges v. Keith*, 57 Ill. 452; 11 Am. Rep. 28; *First Nat. Bank v. Strang*, 28 Ill. App. 325.

The rule of damages is the same whether the action be for conversion or, in form, in *assumpsit*. *Brewster v. Van Liew*, 119 Ill. 554; 59 Am. Dec. 823. See also *Smith v. Dunlap*, 12 Ill. 184; *Galena, etc., R. Co. v. Ennor*, 123 Ill. 505.

In *Iowa*, the measure of damages is the market value at the time of the conversion. *Gravel v. Clough*, 81 Iowa 272; *Brown v. Allen*, 35 Iowa 306. But in case of an action on a contract, where the property contracted to be delivered has been paid for prior to delivery, the plaintiff may recover the highest market price between the day fixed for delivery and the day of bringing suit, if the action has not been unnecessarily delayed. *Stapleton v. King*, 40 Iowa 278; *Cannon v. Folsom*, 2 Iowa 102; 63 Am. Dec. 474; *Davenport v. Wells*, 3 Iowa 232.

In *Texas*, the highest immediate value with modifications prevails. *Calvit v. McFadden*, 13 Tex. 324.

In *Stephenson v. Price*, 30 Tex. 715, where cotton was delivered to a party as bailee to be redelivered on demand, and the bailee converted the property to his own use, the measure of damages was held to be the highest price between the time of the demand and the day of trial. So, also, in *Brasher v. Davidson*, 31 Tex. 190; 98 Am. Dec. 525, the strict rule was allowed. But in *Randon v. Barton*, 4 Tex. 289, it was said, we doubt the propriety of giving the vendee in all cases, as a measure of damages, the highest price of the article when it should have been delivered, on the day of trial. And in *Hatcher v. Pelham*, 31 Tex. 201, where cotton was delivered to a bailee to sell at a limited price in confederate money, and the bailee, failing to get the price, converted it to his own use, it was held that, under

principle,¹ or is provided for by statute.² In *Alabama*, *Mississippi*, and *Florida*, the allowance of the highest intermediate value

the peculiar circumstances, the measure of damages was the value of the cotton at the time of the conversion, with interest until trial.

In *Heilbronner v. Douglas*, 45 Tex. 402, which was an action upon a contract for failure to deliver, the rule was thus qualified: it was held that, where money, or other consideration for an article contracted for, has not been paid in advance of the time when the article was to have been delivered, or where extraordinary circumstances have occurred to produce extreme prices in the article during a long period of time, over which the suit has been protracted without any fault of the defendants, or where there are other circumstances attending the transaction, not in the ordinary course of trade, which would render it inequitable to allow as a measure of damages the highest price of the article after default in delivery, the measure of damages should be the value of the article at the time agreed on for delivery, with interest on that amount.

In *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52, which was an action of trover for the conversion of stock, the measure of damages was held to be the value of the stock at the time of the conversion, with interest to the time of trial. No reference was made in this case to the previous decisions of the state.

In *Virginia*, there is no distinction in the recovery of damages between contracts for the delivery of stock and other executory contracts. *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364. See also *Bull v. Douglas*, 4 Munf. (Va.) 303; 6 Am. Dec. 518; *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. (Va.) 366.

In *Wisconsin*, the market value at the time of conversion, is the measure of damages. In *Noonan v. Ilsley*, 17 Wis. 314, in an action to recover the value of stock agreed to be delivered on a certain day, the measure of damages was held to be the value of the stock on the day it was to be delivered with interest to the day of trial. See also *Ainesworth v. Bowen*, 9 Wis. 348, which was an action for the recovery of a school-land certificate. *Nudd v. Wells*, 11 Wis. 407; *Tenney v. State Bank*, 20 Wis. 152; *Flick v. Wetherbee*, 20 Wis. 392; *Pick-*

ering v. Bardwell, 21 Wis. 562; *Bigelow v. Doolittle*, 36 Wis. 115.

Evidence of Value.—The market value of stocks may be ascertained from reports of prices current at the time of the conversion. *Seligman v. Rogers*, 113 Mo. 642; *Whelan v. Lynch*, 60 N. Y. 469; 19 Am. Rep. 202.

In estimating the value of stock, evidence of the value of the corporate property is admissible. *Hitchcock v. McElrath*, 72 Cal. 565; *Freon v. Carriage Co.*, 42 Ohio St. 30; *Simpkins v. Law*, 54 N. Y. 179; *Smith v. Traders' Nat. Bank*, 82 Tex. 368.

In an action for the conversion of stock which had no market value, where there was evidence that about a year before the conversion, the defendant had admitted that he had sold three shares for \$200 a share and a third person had sold more shares to the defendant for \$55, a verdict for \$25 per share was sustained. *Brown v. Lawton*, 6 N. Y. Supp. 137; 53 Hun (N. Y.) 636.

1. *Indiana*.—In *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189, where it was held that if one forcibly took possession of certain wheat, as it stood in the field, drove the owner away, harvested it, and sold it, the measure of damages was the highest price of the property at any time between the taking and the sale. So in a suit instituted with reasonable diligence, on a breach of contract for the sale and delivery of new corn, which had been paid for in advance, the measure of damages was held to be the highest price of the corn at any time between the contract time of delivery and the rendition of the verdict. *Kent v. Sinter*, 23 Ind. 1.

In *Wyoming*, where certain railroad ties were converted and sold by the defendant, it was held that the plaintiff was entitled to recover the highest market price of the ties at any time between conversion and judgment. *Hilliard Flume, etc., Co. v. Woods*, 1 Wyoming 396.

2. *California*.—In *Douglas v. Kraft*, 9 Cal. 562, it was held that in case of property of fluctuating value, the plaintiff might recover the highest value at the time of its conversion or any time afterwards. Subsequently, this rule of the measure of damages was affirmed, and it was held that this was not an

seems to be left to the discretion of the jury.¹ This rule of the highest intermediate value, however, has in several of the states

open question in this state. *Hamer v. Hathaway*, 33 Cal. 117. But in *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462, the rule was modified, and it was held that the correct measure of damages was the highest market value within a reasonable time after the property was taken, with interest from that time. At present, however, the measure of damages is prescribed by *California* Civil Code, § 3366, which declares that in case of the conversion of personal property, the measure of damages is presumed to be, first, the value of the property at the time of the conversion, with interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, secondly, a fair compensation for the time and money properly expended in pursuit of the property. See *Barrante v. Garratt*, 50 Cal. 112; *Dent v. Holbrook*, 54 Cal. 145; *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 639. What is a reasonable time within the meaning of the statute, is a question of law for the court, when there is no dispute as to the facts. *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 639; *Himmelmänn v. Hotelling*, 40 Cal. 114; 6 Am. Rep. 600.

North Dakota Comp. Laws, § 4603, subd. 2, is identical with the *California* statute. A delay of eleven months in bringing an action was held fatal to the plaintiff's claim that he had prosecuted his action with reasonable diligence, within the meaning of the statute. *Pickert v. Rugg*, 1 N. Dak. 230.

Georgia.—The plaintiff may elect to take the value of the property at the time of the conversion with interest, or the highest value proven between the time of the conversion and the trial. *Georgia* Code, § 3077. If he elects to recover the highest value, he cannot recover interest thereon. *Ware v. Simmons*, 55 Ga. 94; *Tuller v. Carter*, 59 Ga. 395; *Jaques v. Stewart*, 81 Ga. 81; *Barnett v. Thompson*, 37 Ga. 335; *Central, etc., R. Co. v. Atlantic, etc., R. Co.*, 50 Ga. 444.

So in *Georgia*, it is provided that the plaintiff may take the value of the property at the time of the conversion and its hire until recovery, or he may

take the highest value of the property at any time between the conversion and the trial; but in no case is the plaintiff entitled to recover the highest intermediate value, with interest or hire. See *Jaques v. Stewart*, 81 Ga. 81.

1. *Alabama*.—If the value of the chattel is fluctuating, the jury may take the highest value at any time between the conversion and the time of trial, but they are not bound to take the highest value proved. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; *Tatum v. Manning*, 9 Ala. 144; *Ewing v. Blount*, 20 Ala. 694; *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498; *Jenkins v. McConico*, 26 Ala. 213.

In *Mississippi*, it is declared that where no fraud, malice, or oppression intervenes, the law limits the relief to compensation, as that term is legally understood, and the rule of the higher intermediate value is expressly rejected after a careful review of the English and *New York* cases. A compromise is, however, effected by making the damages discretionary with the jury when any of the following elements appear: "First, in all cases where the original act was willful and wrongful; second, where the original act was *bona fide*, but the subsequent detention, sale, or other disposition of the property, after a knowledge of the plaintiff's claim, was willful and injurious; third, where the original act, and the subsequent disposition of the property for a greater price than its market value, at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference, as a speculation resulting from his original, unintentional wrong; fourth, where the property in controversy has some peculiar value to the plaintiff, and is willfully withheld from the rightful owner, or he has been deprived thereof by the willful and wrongful act of the defendant." *Whitfield v. Whitfield*, 40 Miss. 353; *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262; *Bickell v. Colton*, 41 Miss. 368. The above rules are applicable to actions of trover, detinue, trespass, and replevin. *Bickell v. Colton*, 41 Miss. 368.

Florida.—In *Moody v. Caulk*, 14 Fla. 50, commenting upon the rule as to the measure of damages in trover, *Randall, C. J.*, said: "We think that in

been subject to modification ; so instead of the highest value between the conversion and the time of the trial, that between the conversion and a reasonable time after notice of the conversion within which the plaintiff may replace his property, is declared to be the most equitable indemnity.¹ This rule is adopted in *New Jersey*,² and, after many apparently conflicting decisions, is recognized in *New York*.³

actions for conversion where the subject of the action is ordinary merchandise, and like property which is the subject of traffic, or perishable property, the value at the time of the unauthorized act, with interest, is the proper measure of damages. In the case of public stocks held as an investment, such as pictures, jewels, and like articles, held otherwise than for purposes of immediate commerce, it would be equitable and proper that the highest value after conversion should prevail, if the jury should be satisfied from the evidence that the plaintiff would have held the property up to the time of the advance in value; for the defendant should make good the actual loss sustained by reason of his act." This seems to sanction the allowance of the highest intermediate value in the discretion of the jury. So, apparently, in *South Carolina*. See *Kid v. Mitchell*, 1 Nott & M. (S. Car.) 334.

1. *Federal Courts*.—In *Galigher v. Jones*, 129 U. S. 193, it was held that in stock transactions between a broker and his principal, in which the principal suffers from the neglect of the broker to execute orders, either for the sale of stock which he holds for the principal, or for the purchase of stock which the principal orders, or where the injury is through the conversion of stock, the measure of damages is not the highest intermediate value up to the time of trial, but the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it; in this respect disregarding the rule adopted in *England* and in several of the *United States*, and expressly following the rule of the *New York* court of appeals.

2. In *New Jersey*, in the case of commercial securities, the rule of the highest intermediate value between the time of the contract and the time of the conversion is held not to be the proper measure of damages; but the true measure of damages is the highest intermediate market value between the time of the conversion and a reasonable time

after notice of the conversion, within which to replace the securities. So, where commercial securities, pledged as collateral for the payment of a debt, were sold by the pledgee without authority, it was held that the pledgor might ratify the sale and claim the proceeds, or treat the unauthorized sale as a conversion, and recover the advance in the market price from the time of the sale up to a reasonable time within which to replace the securities; or, third, he might hold the pledgee for a breach of his duty to keep the property pledged until maturity, and claim as damages the market value of the securities at that time. *Dimock v. U. S. Nat. Bank* (N. J. 1893), 25 Atl. Rep. 926.

3. *New York Rule*.—After repeated efforts to formulate a rule which would fit all cases, the court of appeals has enunciated, as the most equitable rule, the following: "Whenever the property which forms the subject-matter of the dispute is subject to considerable and frequent fluctuations in price, the plaintiff is to be allowed the highest value attained by the chattel intermediate upon the wrongful act and such reasonable time, within which, by due diligence, he might restore the property of which he has been deprived." *Barnes v. Brown*, 130 N. Y. 372; *Wright v. Bank of Metropolis*, 110 N. Y. 237; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Colt v. Owens*, 90 N. Y. 368; *Markham v. Jaudon*, 41 N. Y. 235; *Matthews v. Coe*, 49 N. Y. 57; *Scott v. Rogers*, 31 N. Y. 676; *Gruman v. Smith*, 81 N. Y. 25; *Galigher v. Jones*, 129 U. S. 193. What is a reasonable time is declared to be a question for the jury in all circumstances of the case. See *Scott v. Rogers*, 31 N. Y. 676, and *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80. This is the recognized rule in this state and is applicable alike to actions on contracts as in tort. *Barnes v. Brown*, 130 N. Y. 372. Formerly, the rule of the highest intermediate value up to the time of trial prevailed in this state. *Romaine v. Van Allen*, 26 N. Y. 309; *Markham v. Jaudon*, 41

N. Y. 245. But the rigid application of this rule was early qualified and its soundness, as a general rule applicable to all cases, was seriously questioned.

In *Romaine v. Van Allen*, 26 N. Y. 309, an action was brought for the wrongful conversion of shares of bank stock owned by the plaintiff and deposited with the bank as security, with authority to sell only in case the plaintiff on demand should fail to repay the loan. It appeared that the shares were held for investment and not for speculative purposes. The bank sold the shares without any notice or demand of the payment, whereupon the plaintiff promptly refused to ratify and required the bank to replace the shares. The trial was had before a referee and lasted from October 25th, 1861, till July 25th, 1862. In estimating the damages, the value on the 30th of June, 1862, the highest value which the shares obtained, was adopted. The authorities upon which this case was decided were ably reviewed by Rapallo, J., in *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80. In *Burt v. Dutcher*, 34 N. Y. 493, this rule was also adopted, but the question as to the rule of damages was not discussed, but treated as definitely determined.

The earliest case in *New York*, where the rule of the highest intermediate value was to some extent adopted, and which appears to be the foundation upon which the subsequent law is built, was the case of *Cortelyou v. Lansing*, 2 Cal. Cas. (N. Y.) 200. The plaintiff had pledged a depreciation note having a face value of \$2629.40 for the payment of a loan of \$600, and the pledgee subsequently sold it for \$625, in 1788. In 1799, eleven years after the conversion of the certificate, a demand was made for the pledge, and subsequently suit was brought. It was held that the only rule of damages applicable to the case was that which gave the plaintiff the value of the certificate in 1799. Kent, J., said: "The plaintiff could be indemnified only by giving him the price of the certificate at the time he called upon the defendant to restore it, and one of the cases even carries the value down to the time of trial." The principle of *Cortelyou v. Lansing*, 2 Cal. Cas. (N. Y.) 200, was followed without qualification in *Wentworth v. West*, 3 Cow. (N. Y.) 82; *Clark v. Pinney*, 7 Cow. (N. Y.) 681; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223; 32 Am. Dec. 532.

The first case where the question appears to have been discussed on principle, was *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614. In this case, Duer, J., said: "It seems to us exceedingly clear, that the highest price for which the property could have been sold at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. When the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrongdoer, we have admitted, and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled, and in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrongdoer. Its allowance in these cases would in truth impose a penalty upon the wrongdoer and render the damages vindictive, instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or if claimed, ought not to be given. The calculation of damages according to the value of the property at the time the amount of the judgment is to be settled, is liable to similar objections. As a rule, it is susceptible only of a very partial application." And after a careful and elaborate review of English authorities and the authorities in his own and other states, said: "We must, therefore, adhere to the opinion that whether the action be trover or *assumpsit*, the highest intermediate value or price ought never to be taken as the measure of damages, unless the evidence justifies the belief, not that it might, but that it would, have been realized by the plaintiff, had he retained the possession of the property, or that it has been, or might still be, realized by the defendant."

In *Markham v. Jaudon*, 41 N. Y. 245, the rule, as laid down in *Romaine v. Van Allen*, 26 N. Y. 309, was followed. In this case it was held that the fact that the plaintiff had not paid for the

stocks made no difference in the rule of damages. In *Matthews v. Coe*, 49 N. Y. 57, Duer, C. J., took occasion to intimate his dissatisfaction as to the correctness of the rule, and said that he did not regard the rule as so firmly settled by authorities as to be beyond the reach of review whenever an action rendered it necessary.

In *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507; 66 N. Y. 518; 23 Am. Rep. 80, the following facts are recited in the opinion of Rapallo, J.: "From this account it appears that the plaintiff had, during the whole course of his transactions with the defendants, advanced in the aggregate but \$4,240 toward the purchase of shares, which, at the time of the alleged wrongful sale, November 14th, 1868, had cost the defendants upward of \$66,300 over and above all the sums so advanced by the plaintiff. By the stock lists in evidence it appears that these shares were then of the market value of less than \$67,000, and the surplus arising from the sale, after paying the amount due the defendants, amounted to only \$558, which sum represents the value at the time of the plaintiff's interest in the property sold. It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, November 24th, 1868, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action, and before the trial, the stock underwent alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale, of thirty shares at 170 per cent., was proved. It afterward declined, and on the day preceding the trial, October 20th, 1869, the price was 143, having, for a month previous to the trial, ranged between 137 and 145. The jury, in obedience to the rule laid down by the court, found a verdict for the plaintiff for \$18,000, being just the difference between 134, which was the average price at which the defendants sold, and 170, the highest price touched before the trial; thirty-six per cent. on 500 shares. More than two-thirds of this supposed damage arose after the bringing of the suit. This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not

only have supplied the necessary margin and caused the stock to be carried through its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience." It was accordingly held that the rule of the higher intermediate value was not an inflexible rule, applicable to all cases. Where the plaintiff has not paid the price, the proper measure of damages is the value at a reasonable time after notice of the defendant's breach, when the plaintiff could have replaced himself in the market. The case of *Markham v. Jaudon*, 41 N. Y. 235, was overruled so far as it related to the measure of damages.

Wright v. Bank of Metropolis, 110 N. Y. 237, was the next case where the question came before the court of appeals. The rule of *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80, was qualified to the extent that it was declared to be immaterial whether the plaintiff has, or has not, paid the consideration—the measure of damages is the value of the property when the plaintiff might, by due diligence, have replaced the property by going into the market and replacing. The following reasons were given by the court in an opinion by Peckham, J.: "In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same. . . . There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrongdoer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The

In *Pennsylvania*, in case of the conversion of stock, not involving an actually wrongful conversion or breach of trust,¹ the measure of damages is the value of the stock at the time of the technical conversion, with interest thereon.²

loss of a sale of the stock at the highest price down to trial, would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation, for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall be only such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay."

1. *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Musgrave v. Beckendorff*, 53 Pa. St. 310.

In *Bank of Montgomery v. Reese*, 26 Pa. St. 143, trover was maintained against a trustee. It was held that the trustee should not be allowed to take to himself the profits of the trust estate.

In *Wilson v. Whitaker*, 49 Pa. St. 117, Read, J., said: "The contention on the part of the plaintiff was that this case was ruled by the *Bank of Montgomery v. Reese*, 26 Pa. St. 143. That case was rightly decided and whenever a similar case occurs, we shall be governed by it. But this does not include *dicta* or expressions of opinion, which were not essential to the decision, and which were clearly extrajudicial. 'A corporation,' says Lewis, C. J., 'was trustee for the stockholders, but in disregard of the duties of the trust, in distributing this stock, it deprived Mr. Reese of a number of shares to which he was entitled.' The moment, therefore, that you establish the relation of trustee and *cestui que trust* between the bank and its stockholder, the latter is entitled either to have the specific article, as of the day on which it should have been delivered to him, or its highest price, with all dividends declared upon it. This is formed upon the ordi-

nary rule in equity that a trustee shall not put into his own pocket any of the profits arising from the trust estate."

In *Neiler v. Kelley*, 69 Pa. St. 403, which was an action of trover to recover damages for the conversion of railroad stocks, alleged to have been held by the defendants as collateral security for the payment of a debt, the measure of damages was held to be the market value of the stock at the time of the sale, with interest. In this case, Scarswood, J., recognizing the general rule as to the measure of damages and the modifications as established in early decisions, said: "The rule, however, is not changed, but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of trial. . . . but where a plaintiff seeks to fasten a responsibility for more than the usual measure of damages, he must also fasten upon the defendants the duty or obligation to deliver specifically the stock or securities at some particular time, and their refusal to fulfill that duty." In *Work v. Bennett*, 70 Pa. St. 484, the doctrine as stated in this last case was approved. The plaintiff brought an action for collateral which he had left with the defendant, who wrongfully repledged the security. It was held that the defendant might recoup the balance due as the damages for the conversion of the plaintiff's stock. See also *Van Voorhis v. Rea*, 153 Pa. St. 19.

2. *Huntingdon, etc., R. Co. v. English*, 86 Pa. St. 247; *North v. Phillips*, 80 Pa. St. 250; *Neiler v. Kelley*, 69 Pa. St. 403; *Work v. Bennett*, 70 Pa. St. 484; *Pennsylvania, etc., Ins. Co. v. Philadelphia, etc., R. Co.*, 153 Pa. St. 160.

Where a corporation, through an innocent mistake, allowed a transfer under a forged power of attorney, it was held that the owner of the stock might recover, not the highest price reached by the stock between the date of the conversion and the commencement of the suit, but the value of the stock at the

6. Choses in Action—Bills, Notes, etc.—In trover for the conversion of bills, notes, and other choses in action, the measure of damages is *prima facie* the face value thereof with interest;¹ but the defendant may show, in the reduction of damages, the insolvency or

time of the transfer, with interest. *Pennsylvania, etc., Ins. Co. v. Philadelphia, etc., R. Co.*, 153 Pa. St. 160.

1. *Paine v. Pritchard*, 2 C. & P. 558; 12 E. C. L. 261; *Mercer v. Jones*, 3 Camp. 477; *Delegal v. Naylor*, 7 Bing. 460; 20 E. C. L. 199; *Booth v. Powers*, 56 N. Y. 22; *Potter v. Merchants' Bank*, 28 N. Y. 645; 83 Am. Dec. 273; *Decker v. Matthews*, 12 N. Y. 313; *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130; *Loomis v. Mowrey*, 8 Hun (N. Y.) 311; *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Bank of Mobile v. Marston*, 7 Ala. 108; *Walker v. Forbes*, 25 Ala. 139; 60 Am. Dec. 408; *Ray v. Light*, 34 Ark. 421; *Griffith v. Burden*, 35 Iowa 138; *Sadler v. Bean*, 37 Iowa 439; *Garvin v. Wiswell*, 83 Ill. 215; *Murray v. Pate*, 6 Dana (Ky.) 335; *Robbins v. Packard*, 31 Vt. 570; 76 Am. Dec. 134; *Hersey v. Walsh*, 38 Minn. 521; *Exeter Bank v. Gordon*, 8 N. H. 66; *Woodborne v. Scarborough*, 20 Ohio St. 57.

A person who fraudulently places in circulation a negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof. *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 124.

In *Hynes v. Patterson*, 95 N. Y. 1, where the plaintiff's notes were fraudulently converted, and he satisfied the judgment therein in favor of third persons by the surrender of real estate which he had previously transferred to his wife without consideration, the measure of damages for the conversion of the notes was held to be the value of the property.

Where the maker of a note, barred by the Statute of Limitations, deceitfully obtained possession of the note and destroyed it, it was held that the whole amount with interest might be recovered in an action of trover, no presumption being made in favor of the wrongdoer. *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130.

In *Delaware Bank v. Smith*, 1 Edm.

Sel. Cas. (N. Y.) 351, in an action of trover by a bank against a carrier for the non-delivery of its own notes, the measure of damages was held to be merely nominal if the bills were destroyed, otherwise, if they had been converted to the defendant's own use.

In an action of trover to recover damages for the conversion of a check which had been lost and paid by a banker under a forged indorsement, it was held that the measure of damages was the full value of the amount for which it was drawn. *Survey v. Wells*, 5 Cal. 125.

In an action for the conversion of certificates of deposit, evidence that at the time of the alleged conversion payment had been demanded and refused, tends to show the maker's insolvency, and a depreciation in the value of the certificates, and should be admitted. *First Nat. Bank v. Dickson*, 5 Dakota 286.

In *Exeter Bank v. Gordon*, 8 N. H. 66, where the bank had received a note as collateral security, and had subsequently, without the consent of the pledgor, compromised it by receiving one-half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received, upon proof that the compromise was advantageous, and that the maker was insolvent and unable to pay the balance. See *Griggs v. Day*, 136 N. Y. 162.

Interest.—It has been held that the measure of damages is the amount of the note and interest at the time of the conversion, with interest upon the aggregate from that time to the verdict. See *St. Johns v. O'Connel*, 7 Port. (Ala.) 466. And in *Merchants', etc., Nat. Bank v. Masonic Hall*, 62 Ga. 271, where bonds with coupons for the interest were converted, a verdict for the value of the bonds and of the mature coupons at the time of the demand, with interest on the aggregate value from the demand, was not excessive. But in *Benjamin Wagon, etc., Co. v. Merchants' Exch. Bank*, 63 Wis. 470, this was denied, upon the ground that the plaintiff's recovery could not possibly exceed the amount due from the notes at the time the verdict was rendered,

inability of the obligee, or any other fact impugning their value.¹ Where, however, the maker has converted it, he cannot set up his own insolvency or inability in mitigation of damages.² Where policies of insurance which have matured, or on which the liability has attached, are converted, the measure of damages is *prima*

and hence only simple interest should have been computed therein till that time.

Nominal Damages Upon Surrender of Note.—In *Churchill v. Welsh*, 47 Wis. 39, where it appeared clearly in the evidence that the notes of a third person came into the hands of the defendant as an agent for the plaintiff solely, or as custodian for the plaintiff and the maker, and the defendant never claimed to own them, and offered before the suit to surrender them if both parties would agree, and after the suit was brought offered to bring them into court and to be relieved from the responsibility in relation to them, and it did not appear that the plaintiff had suffered any special damages, it was held that the verdict might be reduced to nominal damages and costs upon the surrender of the notes to the plaintiff.

So in *Thayer v. Manley*, 73 N. Y. 305, in an action for the conversion of several notes made by the plaintiff, where it appeared that after action was commenced, but before trial, one of the notes became due, and that all were still in the possession of the defendant, it was held that the plaintiff was entitled to recover full value, but that the judgment should give the defendant the right to cancel and return the notes as a satisfaction of damages.

In *Stone v. Clough*, 41 N. H. 290, which was an action of trover against one who wrongfully withheld a note which had been fully paid, upon surrender of the note only nominal damages were allowed.

Audited Account.—In *O'Donough v. Corby*, 22 Mo. 393, in an action of trover for an audited account, the measure of damages was held to be *prima facie* the amount the paper called for.

1. *Griggs v. Day*, 136 N. Y. 152; *Thayer v. Manley*, 73 N. Y. 305; *Western R. Co. v. Bayne*, 75 N. Y. 1; *Potter v. Merchants', etc., Bank*, 40 N. Y. Super. Ct. 405; *Ingalls v. Lord*, 1 Cow. (N. Y.) 240; *McPeters v. Phillips*, 46 Ala. 496; *First Nat. Bank v. Dickson*, 5 Dakota 286; *Alger v. Merritt*, 16 Iowa 121; *Callanan v. Brown*, 31 Iowa 333.

Evidence of the invalidity of the bill or note may be admitted. *Zeigler v. Wells*, 23 Cal. 179; 83 Am. Dec. 87.

The insolvency of the maker may be shown by parol evidence. *McPeters v. Phillips*, 46 Ala. 496.

In the absence of evidence of want of ability, the presumption is, that the maker is solvent and able to pay the note. *Potter v. Merchants', etc., Bank*, 28 N. Y. 655; 86 Am. Dec. 273; *Walrood v. Ball*, 9 Barb. (N. Y.) 271.

The defendant must show the facts upon which he relies at the trial; he cannot afterwards object that the verdict was unwarranted, on the ground that the notes may have been worthless. *Burrows v. Keays*, 37 Mich. 430.

The mere fact that it is proved that the maker has no property from which collection may be enforced by execution, will not be considered in estimating the damages. If the court is satisfied that the note was available for its nominal value to the plaintiff, as would be the case where the holder of such a paper is debtor to the maker, in such case it may be as valuable to him by way of set-off, as if the maker were able to pay and of sound credit. *Rose v. Lewis*, 10 Mich. 483.

Insolvency Subsequent to a Conversion.—In *King v. Ham*, 6 Allen (Mass.) 298, where notes were taken, and upon demand possession was refused, and subsequently the maker became insolvent, the measure of damages was held to be the value of the notes at the time of the conversion with interest thereafter.

2. *Robbins v. Packard*, 31 Vt. 570; 76 Am. Dec. 134; *Stephenson v. Thayer*, 63 Me. 143; *Outhouse v. Outhouse*, 13 Hun (N. Y.) 132.

In *Stephenson v. Thayer*, 63 Me. 143, the case was well stated. *Barrows, J.*, said: "The debtor cannot, after wrongfully depriving his creditors of the evidence of his indebtedment, mitigate the damages to be recovered against him for this act by setting up his own worthlessness. The sum which the defendant himself realizes by the act of conversion must surely be the lowest measure of damages. If a man takes up his own

facie their face value with interest.¹ But in the case of the conversion of policies still current, the measure of damages is to be determined by the jury under all the circumstances of the case.²

7. **Instruments of Title.**—In trover for the conversion of title-deeds the measure of damages is merely nominal,³ unless the

paper in that manner, the amount which he would have been legally bound to pay to retire it regularly, is surely the amount which he has realized by its conversion."

1. **Policies of Insurance.**—An insurance broker, who, without authority, compromised with the insurers for less than the amount recoverable, and gave up the policy, was held liable to the owner for the whole sum and interest. *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557.

So in *Hayes v. Massachusetts, etc., Ins. Co.*, 125 Ill. 626, an insurance company which brought about a surrender of an insurance policy from a guardian for a less sum than the full amount due, the statute forbidding such action by the guardian without the approbation of the court, was held liable for the conversion of the policy in an action by the ward, and the measure of damages was the balance of the principal sum due upon the policy with interest.

In *Watson v. McLean*, 96 E. C. L. 75, it appeared that a debtor made an assignment of his property to trustees for the benefit of creditors. He was possessed at the time of a policy of insurance on his life, the existence of which was unknown to the trustees. The executor of the debtor having secured possession and collected the policy as an asset of his estate, it was held that trover would lie by the assignee for the benefit of creditors, and that the measure of damage was the face value of the policy. Cockburn, C. J., said: "The trustees under the assignment were entitled to have the instrument. The defendant wrongly applies it to her own purposes; she thus converts it to her own use. I think, therefore, that the amount which she receives is the measure of damages, because, if the plaintiffs had had the instrument, they would have had no difficulty in obtaining the amount."

See also *Kohne v. Insurance Co. of N. A.*, 1 Wash. C. C. 93.

2. *Wheeler v. Pereles*, 43 Wis. 333. In *Barney v. Dudley*, 42 Kan. 212; 16 Am. St. Rep. 476, the rule is enunciated as follows: where the insured is still in good health and his life insura-

ble, the measure of damages would be the present value of the amount named in the policy, less the present value of the cost in premiums it would require to procure another policy of like kind and value on the same life, taking into consideration the probable life according to the expectancy tables; but where the insured is not in good health, and his life not insurable, it would be necessary first, to ascertain from the tables, and from proof of his general condition of health and the testimony of experts, his probable length of life, and then to compute the present value of the amount of the benefit named in the policy, and the present value of the premiums to be paid thereon during such life; and where the present value of the benefit is greater than the present value of the premiums to be paid, the difference between such values would be the measure of damages.

3. In *Mowry v. Wood*, 12 Wis. 413, Dixon, J., said: "In most cases where the title is unaffected, and the conduct of the defendant has not been fraudulent or oppressive, but where the deed or other written instrument was lost or destroyed through his mistake, negligence, or slight omission, the more just rule of damages would be such sum as would recompense the plaintiff for any actual loss which he may have sustained and for his trouble and expense in going into a court of equity or elsewhere, to establish and perpetuate the evidence of his title, with the costs of the action. . . . If the taking, loss, or destruction, was wanton or malicious, the jury might add such sum by way of punishing the defendant, as in their judgment the circumstances required. . . . If it should appear that the defendant still possessed the deed or writing, and stubbornly or vexatiously refused to surrender or produce it, damages to the full value of the land, and even beyond, might be given, in order to compel a return, and as a penalty of the obstinacy and vexation."

In *Towle v. Lovet*, 6 Mass. 394, an action was brought by the owner of the land against a stranger for the

plaintiff can show that he has sustained some special injury by reason of the conversion.¹

8. **Interest.**—It is generally accepted that, in trover, in estimating the measure of damages to the value of property at the time of conversion, interest should be added from that time to the entry of judgment, unless it is otherwise provided by statute;² and, in

conversion of a title deed, but the measure of damages was agreed upon by the parties, and was not reported.

In *England*, although the judgment may be for the full value of the land, satisfaction of the damages may be entered on the roll upon the terms of the defendant's delivering up the deeds and paying all the costs, as between attorney and client, incurred by the plaintiff, and submitting to other terms, placing the plaintiff in as good a situation as he was before the cause of action. *Coombe v. Sansom*, 1 D. & R. 201. See also *Loosemore v. Radford*, 9 M. & W. 657.

1. In *Clowes v. Hanley*, 12 Johns. (N. Y.) 484, which was an action for a title bond executed by the defendant himself, the plaintiff was entitled to recover the full value of the land to which he was entitled under the bond, the defendant remaining the owner.

In *Perry v. Frame*, 2 Bos. & P. 451, which was an action for a lease, where it appeared that the defendant had made arrangements with the landlord which amounted to an appropriation of the return, the plaintiff was held entitled to the recovery of full value of such judgment.

Damages for the Conversion of Certificate of Stock.—The measure of damages for the conversion of a mere certificate of stock, unless the ownership of the shares is affected, cannot be placed as the value of the shares which it represents. *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91. See also *Connor v. Hillier*, 11 Rich. (S. Car.) 193; 73 Am. Dec. 105.

2. *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Garrard v. Dawson*, 49 Ga. 434; *Hyde v. Stone*, 7 Wend. (N. Y.) 354; 22 Am. Dec. 582; *Andrews v. Durant*, 18 N. Y. 496; *Parrott v. Knickerbocker*, etc., Ice Co., 46 N. Y. 361; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; 24 Am. Dec. 66; *McDonald v. North*, 47 Barb. (N. Y.) 530; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Win-*

chester v. Craig, 33 Mich. 205; *Robinson v. Barrows*, 48 Me. 186; *Gibs v. Wofford*, 26 Tex. 76; *Ewart v. Kerr*, 2 McMull. (S. Car.) 141; *Bigelow v. Doolittle*, 36 Wis. 115; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Chicago, etc., R. Co. v. Ames*, 40 Ill. 249; *Hill v. Canfield*, 56 Pa. St. 454; *Thrall v. Lathrop*, 30 Vt. 307; 73 Am. Dec. 306; *Winslow v. Norton*, 29 Me. 419; 50 Am. Dec. 601; *Kamerich v. Castleman*, 29 Mo. App. 658; *Shepherd v. McQuilkin*, 2 W. Va. 96; *Arpin v. Burch*, 68 Wis. 619.

In *Elkins v. East India Co.*, 1 P. Wms. 396, where the defendant converted a ship, and sold it, it was said that, "If a man has my money, by way of loan, he ought to answer interest; but if he detains my money from use wrongfully, he ought *à fortiori* to answer interest; and it is still stronger where one, by wrongful act, takes from me my money or my goods which I am trading with, in order to turn them into money." See also *Hatten v. Simpson*, 2 Ves. 722; *Hodgson v. Ambrose*, Dougl. 337.

In *McCormack v. Pennsylvania, etc., R. Co.*, 49 N. Y. 303, *Folger, J.*, said that, "In the action of trover, interest is as necessary a part of a complete indemnity, as the value itself, and in fixing the damages it is not any more in the discretion of the jury than the value."

In *Ewart v. Kerr*, 2 McMull. (S. Car.) 141, where the property was converted and reduced to money in the hands of the defendant, it was said that the smallest measure of damages of trover, was the amount received from the conversion, with interest from that time."

In *England*, the allowance of interest is, by 3 & 4 Wm. IV., ch. 42, § 28, in the discretion of the jury.

North Carolina.—Section 573 of the Code makes it discretionary with the jury whether interest is to be allowed or not; yet after the verdict, the judgment for the damages assessed bears interest, and this is so, although the verdict is for a sum without interest. *Stephens v. Koonce*, 103 N. Car. 266;

the absence of statutory provisions, interest is to be added and not damages for loss of hire.¹

9. Special Damages.—Damages beyond the actual value of the property converted have been allowed the plaintiff when, by reason of the wrongful act of the defendant, he has been subjected to some special loss or injury.² The damage and injury for which compensation is sought in special damages must be such as are proximate,³ that is, resulting immediately from the wrong complained

Patapsco Mfg. Co. v. Magee, 86 N. Car. 350; *McRae v. Malloy*, 87 N. Car. 196.

California.—The rather anomalous rule prevails in this state that the plaintiff, if he recovers, may elect to take judgment either for the value of the property at the time of the conversion, with interest from that time, or, where he has prosecuted the action with reasonable diligence, for the highest market value of the property at any time between the conversion and the verdict, without interest. If he fails to elect, the court may award the damages under either rule. *Barante v. Garratt*, 50 Cal. 112.

Montana.—Under *Montana Comp. Stat.*, ch. 73, regulating interest in the territory, no interest can be recovered upon an unliquidated demand until the amount thereof has been ascertained; and this rule is applicable to trover, which has the characteristics of a suit sounding in damages. *Palmer v. Murray*, 8 Mont. 312; *Isaacs v. McAndrew*, 1 Mont. 437; *Randall v. Greenhood*, 3 Mont. 566; *Bohm v. Dunphy*, 1 Mont. 333.

Bonds.—In *Maury v. Coyle*, 34 Md. 235, where bonds were converted, it was held that the measure of damages was the value of the bonds at the time the demand was made for them, and the value of gold interest thereon, on the day when the same was payable, together with interest on the value of the several installments of such gold interests due semi-annually, and interest on the principal from the time of the conversion. See *supra*, this title, *Choses in Action—Bills and Notes*, etc.

1. So in an action for the conversion of a slave, the defendant could not recover the value of hire by way of damages. *Pope v. Allen*, 19 Mo. 467. So in trespass, *Fail v. Presley*, 50 Ala. 342. But see *Hair v. Little*, 28 Ala. 236.

In *Georgia*, it is provided by section 3564 of the Code, "It shall be the option of the plaintiff, in an ac-

tion to recover personal property, to say upon the trial thereof, whether he will accept an alternative verdict for the property or its value, or whether he will demand a verdict for the property alone and its hire, if any, and it shall be the duty of the court to instruct the jury to render the verdict as the plaintiff may thus elect. . . . In an action of trover the verdict may be in the alternative—that is, it must be for the value of the property sued for, which may be discharged by the return of the property, within a given time specified in the verdict." See also *Schley v. Lyon*, 6 Ga. 530.

In *Tuller v. Carter*, 59 Ga. 395, the following interpretation was put on the above enactment: Where the plaintiff is content to recover the value of the property at the time of its conversion, and proves its value at that date only, he will be entitled to interest to the time of trial; but if he introduces testimony to show its highest value between the conversion and the trial, the measure of damages will be such value, without the interest.

2. *Davis v. Oswell*, 7 C. & P. 804; 32 E. C. L. 744; *Bodley v. Reynolds*, 8 Q. B. 779; *Mowry v. Wood*, 12 Wis. 413. But see *Seymour v. Ives*, 46 Conn. 109, denying the allowance of such damages.

3. Where a carpenter's tools have been converted, and he, by reason thereof, has lost a valuable employment, or been unable to earn his customary wages, damages for such consequences may be recovered. *Bodley v. Reynolds*, 8 Q. B. 779; 8 Ad. & El. N. S. 779; 55 E. C. L. 778.

So, where in an action for the conversion of a horse, the owner was entitled to recover in addition to the value of his own horse at the time of the conversion, the amount which he had been compelled to pay for the hire of other horses in consequence of his having been deprived of the use of his

of and not remote or speculative.¹ To recover such damages, they must be alleged in the declaration.² Where the unlawful taking and conversion was willful and malicious, or attended with peculiarly vexatious circumstances, exemplary or vindictive damages have been allowed.³

own animal. *Davis v. Oswell*, 7 C. & P. 804; 32 E. C. L. 744.

In an action for the wrongful seizure and sale of the plaintiff's stock in trade under legal proceedings, it was held that, while the profits that he was making might not be recovered as such, the amount might be proved and considered by the jury in estimating the injury done to the plaintiff. *Juchter v. Boehm*, 67 Ga. 534.

1. In *Farmers' Bank v. McKee*, 2 Pa. St. 318, where the plaintiff contracted with A to build a vessel, and made advances from time to time, for which A gave as security a bill of sale of the vessel, where the defendant had converted the debt before the vessel was finished, the plaintiffs were held entitled to recover the value of the vessel at the time of the conversion, and not at a subsequent time, nor as special damage the value of freight which the plaintiffs might have earned if the contractor had completed and delivered the vessel to them. *Reid v. Fairbanks*, 13 C. B. 692; 76 E. C. L. 692.

In *Cushing v. Seymour*, 30 Minn. 301, which was an action for the wrongful conversion of a threshing-machine, it was held that the profits which the plaintiff might have made from the performance of particular contracts, if the defendant had not deprived him of the use of the machine, were too conjectural and uncertain to furnish a proper basis of damages for the conversion.

The inconvenience and annoyance to an editor arising from the conversion of a file of newspapers is too speculative and remote. See *Leffingwell v. Gilchrist*, 40 Iowa 416.

Where a traveling bag containing the plaintiff's clothes was converted, he was not entitled to recover special damages from the fact that in consequence of such conversion he, a workman, was compelled to work in unsuitable clothes which were damaged thereby. *Saunders v. Brosius*, 52 Mo. 50.

Expense of Litigation.—In *Hurd v. Hubbell*, 26 Conn. 389, it was said that the expense of litigation not being natural and proximate consequences of a conversion, could not be recovered.

2. *Moon v. Raphael*, 2 Bing. N. Cas. 310; 29 E. C. L. 345; *Hughes v. Quentin*, 8 C. & P. 703; 34 E. C. L. 591; *Davis v. Oswell*, 7 C. & P. 804; *Cushing v. Seymour*, 30 Minn. 301; *Barrelett v. Bellgard*, 71 Ill. 280; *Nunan v. San Francisco*, 38 Cal. 689; *Gove v. Watson*, 61 N. H. 136.

3. *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144; *Neiler v. Kelley*, 69 Pa. St. 409. But see *McDowell v. Murdock*, 1 Nott & M. (S. Car.) 237; 9 Am. Dec. 684. In the absence of evidence of such malice or oppression, punitive damages could not be allowed. *Waller v. Waller*, 76 Iowa 513.

Where the plaintiff complained not only that the defendant took his goods, but that he did so on a false and unfounded claim of right, and that he, the plaintiff, was much annoyed and prejudiced in his business, and believed to be insolvent, it was held that the jury might give vindictive damages for the injury done, over and above the value of the goods seized. *Brewer v. Drew*, 11 M. & W. 629.

In *Hill v. Canfield*, 56 Pa. St. 454, it was said that those cases in which more than compensation may be allowed in trover are those for the conversion of heir-looms, family pictures, and the like, and where there is fraud, violence, or outrage.

In *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, it was held that exemplary damages might be allowed where an agent by false and fraudulent representations to his principal, obtained possession of his principal's goods and converted them to his own use.

In *Bates v. Callender*, 3 Dakota 256, where from the evidence it appeared that the defendant, an officer of the law, under color of authority was guilty of malice and oppression, it was held that the jury might give exemplary damages.

Evidence that the defendant took possession of goods under a contract with the owner's agent, and not by force, is admissible to defeat a claim for exemplary damages. *Slocum v. Putnam* (Tex. 1894), 25 S. W. Rep. 52.

In *Cone v. Lewis*, 64 Tex. 331; 53 Am. Rep. 767, it was held that an aver-

10. Mitigation of Damages—*a*. RETURN OF PROPERTY.—In general, the plaintiff cannot be compelled to accept property offered to be returned; and no tender or offer to restore it will defeat the right of action or mitigate the damages;¹ nor will a mere agreement to receive the property when the injured party thinks fit to disregard his agreement and bring suit for the conversion.² But if the plaintiff does receive the property, whether from the original wrongdoer or from anyone into whose hands it may have subsequently come, the acceptance may be shown in mitigation of damages, but will not defeat the right of action.³ The plaintiff, however, is entitled to damages for the injury which he has

ment that the defendant wrongfully and maliciously converted a dray, the property of the plaintiff, who was the head of a family and a licensed drayman and the owner of no other vehicle, the special injury done his business as a drayman was sufficient to sustain an action of exemplary, as well as actual damages.

1. *Stickney v. Allen*, 10 Gray (Mass.) 352; *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Dec. 337; *Norman v. Rogers*, 29 Ark. 365; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Reynolds v. Schuler*, 5 Cow. (N. Y.) 323; *Gilbert v. Peck*, 43 Mo. App. 577; *Bringard v. Stellwagen*, 41 Mich. 54; *Bromley v. Goodrich*, 40 Wis. 131; 22 Am. Rep. 685; *Morgan v. Kidder*, 55 Vt. 367.

An officer who wrongfully attaches and takes possession of certain picture-frames cannot show, in an action against him by the owner, that on the day after the attachment he tendered to the owner a return of the property in the same condition as when attached. *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Dec. 337.

2. *Norman v. Rogers*, 29 Ark. 365.

3. *Greenfield v. Leavitt*, 17 Pick. (Mass.) 1; 28 Am. Rep. 268; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254; 19 Am. Dec. 286; *Orrock v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456; *Harrington v. Lincoln*, 4 Gray (Mass.) 563; *Delano v. Curtis*, 7 Allen (Mass.) 470; *Perham v. Coney*, 117 Mass. 103; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Dec. 30; *Wheelock v. Wheelwright*, 5 Mass. 104; *Gibbs v. Chase*, 10 Mass. 125; *Barrelett v. Bellgard*, 71 Ill. 280; *Murphy v. Hobbs*, 8 Colo. 17; *Cook v. Loomis*, 26 Conn. 483; *Baldwin v. Porter*, 12 Conn. 473; *Green v. Stephens*, 37 Mo. App. 641; *Sparks v. Purdy*, 11 Mo. 219; *Pollak*

v. Davidson, 87 Ala. 551; *Woods v. McCall*, 67 Ga. 506; *Gove v. Watson*, 61 N. H. 136; *McFadden v. Whitney*, 51 N. J. L. 391; *Hopple v. Higbee*, 23 N. J. L. 342; *Hough v. Rowe*, 51 N. Y. Super. Ct. 207; *Brewster v. Silliman*, 38 N. Y. 423; *Murray v. Burling*, 10 Johns. (N. Y.) 72; *Hanner v. Wilsey*, 17 Wend. (N. Y.) 93; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Bowman v. Teall*, 23 Wend. (N. Y.) 309; 35 Am. Dec. 562; *Torry v. Black*, 58 N. Y. 191; *Weeks v. Simons (C. Pl.)*, 21 N. Y. Supp. 1004; *Stillwell v. Farewell*, 64 Vt. 280; *Ingram v. Rankin*, 47 Wis. 406; 32 Am. Rep. 762.

The burden of proof is on the defendants to show acceptance or consent to the return. *Mears v. Cornwall*, 73 Mich. 78.

What Constitutes a Return.—In *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188, where the defendant, a warehouseman, held corn belonging to the plaintiff which was delivered to G, an agent of the plaintiff, upon his promise to procure the delivery order, and subsequently F obtained the plaintiff's delivery order for himself and indorsed it to G, who forwarded it to the defendants as a delivery order which he had promised to send them, F, being unable to pay, and G never having accounted to the plaintiff for the price of the corn, it was held that, though there had been a technical conversion by the defendant, the plaintiff was entitled only to nominal damages because the property had been technically returned.

In *Dalley v. Crowley*, 5 Lans. (N. Y.) 301, the defendant having induced the plaintiff's wife to leave him, aided her in carrying away the plaintiff's property. The wife afterwards brought the property to the vicinity of the plaintiff's residence and delivered to him railroad checks for it. It was held that the plaintiff virtually accepted the

sustained by the detention of the property and its deterioration in value during the conversion; the measure of damages being, usually, the difference between the value at the time of the conversion

property, and it was error for the trial judge to allow damages for the full value of the property.

Where the plaintiff proved that the defendant took and used his tools, but returned them, it was held to be a conversion, but one for which the jury ought to give small damages, and not the value of the tools so used. *Cook v. Hartle*, 8 C. & P. 568; 34 E. C. L. 528.

In *Baldwin v. Porter*, 12 Conn. 473, where it appeared that the defendant claimed that the plaintiff had regained the property through the agency of another, at an expense much less than the value of the converted property, the refusal to admit evidence to prove it was held an error.

Where goods taken were inclosed in boxes, the mere opening of the box subsequently by the owner to enable a witness to appraise the value of the goods, was not such a resumption of the property as would satisfy the mitigation of damages. *Connah v. Hale*, 23 Wend. (N. Y.) 462.

In *Delano v. Curtis*, 7 Allen (Mass.) 470, in an action for the conversion of machinery in a workshop, where it did not appear that the defendant had converted the property to his own use, or moved the same, or had the actual possession thereof, otherwise than by being in the lawful possession of the workshop, and the alleged conversion consisted in the refusal to allow the plaintiff to remove the same upon demand; a subsequent notice to the plaintiff by the defendant that he had relinquished all claim to the machinery, was considered in mitigation of damages.

Where a sheriff held goods taken in execution, delivered them to the assignees of the bankrupt after an action of trover had been commenced by them, and the assignees accepted the goods without condition, it was held that they could not recover more than nominal damages without alleging special damages in the declaration. *Moon v. Raphael*, 2 Scott 289; 2 Bing. N. Cas. 310; 29 E. C. L. 345.

In *Warder v. Baldwin*, 51 Wis. 450, it was held that if an officer, as soon as he finds that he has, by mistake, levied upon the wrong property, tenders it back to the person from whose possession he took it, leaves it on the prem-

ises, and thereafter asserts no claim to its possession, the damages recovered for the taking should be merely nominal, unless it is shown that the plaintiff has suffered, by reason of the seizure, special damages, apart from the mere value of the property. To the same effect, see also *Farr v. Hunt* (Wis. 1894), 58 N. W. Rep. 377.

In *McCormick v. Pennsylvania Cent. R. Co.*, 80 N. Y. 353, the plaintiff went to the defendant's depot in Philadelphia with his family and nine trunks to take passage to Chicago. He applied to the baggage-master for checks for his baggage, but was informed that he must first procure tickets; while he was absent for that purpose, the baggage-master caused the baggage to be weighed, checked, and put into the baggage car. Upon the return of the plaintiff with his tickets he was informed that under the rules of the company, the tickets were not sufficient to transfer all his baggage, and for the excess, a charge was made, which the plaintiff refused to pay; he demanded his checks; these were refused unless the extra charge was paid; he then demanded his trunks, but the baggage-master refused to deliver them for the reason that they were covered with other baggage and could not be reached before the time for starting the train. The plaintiff declined to go on the train; his baggage went through to Chicago, and the night after its arrival, the depot was set on fire by lightning, and the baggage, except two trunks and some loose articles, was destroyed. The trial court found that there was no reasonable excuse for the refusal to restore the baggage to plaintiff. In an action for the conversion of the baggage, the facts authorized a finding of a conversion at Philadelphia. It appeared that after the plaintiff had determined not to take the train, he called upon the defendant's president and requested him to have the baggage taken off at Pittsburgh, as he intended to stop there. The president gave the necessary directions and the baggage-master telegraphed to Pittsburgh, but the baggage was not stopped. The baggage-master also gave the plaintiff an order for the delivery of the baggage at Pittsburgh without checks. During

and the value when returned, together with any special damages proved.¹ So where the property is accepted at a place other than that where the conversion occurred, the measure of damages is the difference in the value of the property at the time and place where seized and that at the time and place where it was returned to the possession of the plaintiff.² And where the plaintiff has been put to expense and trouble in securing the restoration of his property, he should be allowed a reasonable compensation therefor.³

the same day the plaintiff requested the baggage-master at Philadelphia, to countermand the order to stop the baggage, as he had concluded to go through to Chicago without stopping. It was held that by the plaintiff's acts subsequent to the conversion, he had resumed possession of his property, and that for the original conversion he could receive only nominal damages.

Partial Satisfaction by Joint Tortfeasor.—Satisfaction or payment of partial damages by one tort-feasor in an action of trover inures to the benefit of other joint tort-feasors, not as a matter of defense, but in mitigation of damages. *Muser v. Lewis*, 50 N. Y. Super. Ct. 431; *Heyer v. Flagg*, 6 R. I. 45.

Costs.—Upon a return of the property and its acceptance by the plaintiff, although his right of action is not defeated, he is entitled to special damages or compensation for the deterioration of the property; if he fails to recover such special damages, it has been held that he may be compelled to pay costs as the defeated party. *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188.

1. See *supra*, this title, *Special Damages*; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Renfro v. Hughes*, 60 Ala. 581; *Gove v. Watson*, 61 N. H. 136; *Lazarus v. Ely*, 45 Conn. 504; *Curtis v. Ward*, 20 Conn. 204; *Cook v. Loomis*, 26 Conn. 483; *Murphy v. Hobbs*, 8 Colo. 17.

Whether there is such a difference is a question of fact to be determined by the jury from the evidence, and the court is not authorized to presume its existence. *Barrelett v. Bellgard*, 71 Ill. 280; *Small v. Brainard*, 44 Ill. 355; *Collins v. People*, 48 Ill. 145.

2. *Bates v. Clark*, 95 U. S. 204.

3. *Sherman v. Finch*, 71 Cal. 68; *Sprague v. McKenzie*, 63 Barb. (N. Y.) 60; *Hough v. Rowe*, 51 N. Y. Super. Ct. 209; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Hurlburt v. Green*, 41 Vt. 490; *Ford v. Williams*, 24 N. Y. 359;

Baker v. Freeman, 9 Wend. (N. Y.) 36; 24 Am. Dec. 117; *Ewing v. Blount*, 20 Ala. 694.

In an action for the conversion of a horse, the expense incurred by the plaintiff in traveling to the place where he found the animal, was held not to constitute a part of the injury done by the defendant to the plaintiff, and could not be recovered. *Renfro v. Hughes*, 60 Ala. 581. So in *Williams v. Deen*, 5 Tex. Civ. App. 575, it was held that no damages were recoverable for repeated railway journeys made by the plaintiff in an effort to settle the matter.

In *Collins v. Lowry*, 78 Wis. 329, it was held that the plaintiff therein, having voluntarily accepted a return of the property pending an action to recover damages for the wrongful conversion, could not recover special damages for expenses incurred in obtaining such return. In a later case, *Paroski v. Goldberg*, 80 Wis. 340, it was held that this case was not in conflict with the proposition of the text, and that the language in the opinion of the court, apparently in conflict therewith, had reference only to that particular case.

Reward for Return of Property.—If the restoration of property is obtained from third persons, by the payment of a reasonable reward by the plaintiff, the amount so paid and interest thereon should be deducted from the estimated value of the goods at the time of the return, in assessing damages. *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1; 28 Am. Rep. 268.

Expense of Unsuccessful Suit.—A reasonable expense incurred by the plaintiff in the recovery of the goods is held not to include the expenses of an unsuccessful suit. See *Wilson v. Matthews*, 24 Barb. (N. Y.) 292; *Ewing v. Blount*, 20 Ala. 694.

In *Ross v. Malone* (Ala. 1893), 12 So Rep. 182, it was held that the plaintiff could not prove, as items of damages, the expenses incurred in the

An exception to the general rule prevails in *England*, that is, where the property has come lawfully into the possession of the defendant, and his refusal to surrender was merely technical, without any willful wrong, and the property when offered is in as good condition as when converted, the court will usually order a stay of proceedings upon the payment of the costs up to that time by the defendant.¹ And this rule is adopted in several of the states.²

prosecution of an action of detinue, unless the defendant had been advised of such claim by special averments in the complaint, intimating that such damages would be allowed had they been alleged.

1. 3 *Suth. Dam.* 530; *Pickering v. Trustee*, 7 T. R. 53; *Hayward v. Seaward*, 1 M. & S. 459; 28 E. C. L. 269; *Brunsdon v. Austin*, 1 Tld. Pr. 571; *Tucker v. Wright*, 3 Bing. 601; 13 E. C. L. 64; *Earle v. Holderness*, 4 Bing. 462; 15 E. C. L. 41; *Loosemore v. Radford*, 9 M. & W. 659; *Fisher v. Prince*, 3 Burr. 1363; *Watts v. Phipps*, Bull. N. P. 49.

In *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188, *Bramwell, J.*, said: "A conversion cannot be purged, and if a defendant is guilty of a conversion he must pay some damages. A return of the goods undoubtedly might be shown to reduce the damages in the case of a conversion where the owner not only received back the goods, but where he took them back against his will; in an action of trover and conversion, the practice was for a defendant to apply to the court for a stay of proceedings on a delivery up of the goods, and on the payment of nominal damages and costs, but where the plaintiff refused to accept delivery and insisted on proceeding with his action for substantial damages, he was made to pay the costs of the action. It is clear, therefore, that on the return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act which was called a conversion.

In *Fisher v. Prince*, 3 Burr. 1363, Lord Mansfield made this distinction: "That where trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstance that can enhance the damages, the real value must be the sole measure of the damages and the specific thing demanded may be brought into court; but where there is an uncertainty, either as to the quantity or

quality of the thing demanded, or if there is any tort accompanying it that may enhance the damage above the real value of the thing, and there is no rule whereby to estimate the additional value, it should have been brought in." See *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

In *Tucker v. Wright*, 3 Bing. 601; 13 E. C. L. 64, where the value of the goods converted was not ascertained, the court refused to stay proceedings upon the delivery of the goods to the plaintiff or upon payment of the value thereof. See also *Witten v. Fuller*, 2 W. Bl. 902.

2. *Ward v. Moffett*, 38 Mo. App. 395; *Rogers v. Crombie*, 14 Me. 274; *Tracy v. Good*, 1 Clark (Pa.) 472; *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65; *Thayer v. Manley*, 8 Hun (N. Y.) 550; *Bigelow Co. v. Heintze*, 53 N. J. L. 69; *Churchill v. Welsh*, 47 Wis. 39; *Farr v. Hunt* (Wis. 1894), 58 N. W. Rep. 377; *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282.

So, in *Rutland, etc., R. Co. v. Bank of Middlebury*, 32 Vt. 639, in an action of trover for the conversion of certain railroad bonds, the rule of the English courts was said to be a just rule and the defendant was permitted to bring the bonds into court, and, in the absence of evidence showing any special damages beyond the value of the bonds, only nominal damages were allowed.

In *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500, the right of the defendant to bring the property into court was denied, as not being within the rule.

In *Churchill v. Welsh*, 47 Wis. 39, it was held, that, after suit was brought, the court will permit the defendant to bring the property claimed into court for the plaintiff, with costs up to that time, and will then order a stay of proceedings or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, unless he be able to show that he has been specially damaged by the conversion of the property by the

b. APPROPRIATION TO PLAINTIFF'S USE.—Where the proceeds of the property taken and converted have been appropriated to the use of the plaintiff with his consent, express or implied, or by operation of law, as when goods are taken under legal process against the plaintiff from the hands of the defendant, this may be shown in mitigation of damages.¹ Although a distinction is maintained in some cases, and it is held that the rule does not apply where the process is sued by the trespasser himself,² the

defendant, in addition to its value at the time of the return; or the court will, in proper cases after the verdict, upon a tender of the property, reduce the verdict to nominal damages.

In *Georgia*, where the plaintiff in trover takes an alternative verdict as provided for by section 356 of the Code, the defendant has the right to rely upon such a verdict being rendered as may be discharged by the return of the property sued for, and the charge of the court limiting the finding to the value of the property with interest, is error. *Tuller v. Carter*, 59 Ga. 395.

1. *Wanamaker v. Bowes*, 36 Md. 42; *Thomson v. Baltimore, etc., Steam Co.*, 33 Md. 312; *Squire v. Hollenbeck*, 9 Pick. (Mass.) 557; 20 Am. Dec. 506; *Blake v. Johnson*, 1 N. H. 91; *Yale v. Sanders*, 16 Vt. 243; *Stow v. Yarwood*, 14 Ill. 423; *Bates v. Courtwright*, 36 Ill. 518; *Howard v. Cooper*, 45 N. H. 342; *Smith v. Mitchell*, 12 Mich. 191; *Erie Preserving Co. v. Witherspoon*, 49 Mich. 377.

In *Higgins v. Whitney*, 24 Wend. (N. Y.) 379, where, subsequent to the wrongful taking, the goods were taken from the hands of the tort-feasor by distress for rent, it was held that the defendant might show this fact in mitigation of damages. So in *Sherry v. Schuyler*, 2 Hill (N. Y.) 204; and in *Tripp v. Grounder*, 60 Ill. 474, where goods were distrained for rent and sold by a constable without having been appraised as required by law, and the owner of the goods brought trover for their conversion, it was held that the amount which the defendant had paid upon the plaintiff's rent should be deducted from the value of the goods.

In an action against a judgment creditor for the value of property wrongfully attached by him, it was error to exclude evidence that, after the seizure, the creditor bought the property at a sale on foreclosure of a lien

placed thereon by the plaintiff in favor of another creditor. *Koyer v. White*, (Tex. 1894), 25 S. W. Rep. 46.

Where the plaintiff, owner of a chattel seized for taxes, procured it to be bid off at the auction sale and appropriated it to his own use, he could recover only what he was compelled to pay. *Hurlburt v. Green*, 41 Vt. 490.

Appropriation by Mortgagee.—In an action by a mortgagor against a third person for the conversion of the mortgaged property, it was held that proof that the mortgagee took possession of the property for a breach of condition, should be considered by the jury as an application of the property for the benefit of the mortgagor, although the foreclosure was not complete at the time of the trial, and although the mortgagee had sold a portion of the mortgaged property and transferred another part of it to the defendant. *Dahill v. Booker*, 140 Mass. 308; 54 Am. Dec. 465.

2. See *Edmondson v. Nuttall*, 17 C. B. N. S. 280; 112 E. C. L. 279.

In *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91, where the property was taken upon an illegal process against the owner, for which taking an action was commenced against the creditor who directed it, and afterwards a legal process was sued out on the same property, which had not gone back into the owner's possession, was seized and sold for his debt, it was held that the defendant could not show this fact in mitigation of damages, it being a mere act of his own.

In *Otis v. Jones*, 21 Wend. (N. Y.) 394, where property was taken, the subsequent appropriation of it by a sale under execution in favor of the wrongdoer was held not to mitigate the damages. But the contrary was held in *Lazarus v. Ely*, 45 Conn. 504.

So in *Michigan*. A subsequent sale on a legal process against the owner and in favor of the trespasser cannot be shown to reduce damages; and an appropriation under a mere power

weight of authority is against this distinction, and holds that if the appropriation be under legal process, although in the interest, or at the instance, of the wrongdoer, it may be shown in mitigation of damages.¹

One, however, who seizes property without color of authority, cannot show in mitigation his own unauthorized and unsanctioned

conferred by the owner can have no greater force than a sale. *Dalton v. Laudahn*, 27 Mich. 528. See also *Bringard v. Stellwagen*, 41 Mich. 57. But in *Erie Preserving Co. v. Witherspoon*, 49 Mich. 377, it was said that although the subsequent seizure of the property does not excuse the tort, it will, under some circumstances, when properly pleaded, go in mitigation of damages.

1. *Prescott v. Wright*, 6 Mass. 20; *Caldwell v. Eaton*, 5 Mass. 404; *Daggett v. Adams*, 1 Me. 198; *Board v. Head*, 3 Dana (Ky.) 489; *Morrison v. Crawford*, 7 Oregon 472; *Mississippi Mills v. Meyer*, 83 Tex. 433; *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 446; *Lamb v. Day*, 8 Vt. 30; 30 Am. Dec. 479; *Hopple v. Higbee*, 23 N. J. L. 342; *Briggs v. Gove*, *Crompt. & J.* 36. So in *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396, the defendant, a collector of taxes, who had seized and sold property upon a lawful tax against the plaintiff, was entitled to show in mitigation of damages that he had applied the proceeds of the sale upon the tax. See also *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 446.

And in *Curtis v. Ward*, 20 Conn. 204, where the defendant caused the plaintiff's goods to be attached, and while under attachment the levy was erased, the writ discontinued, and a new writ taken and levied upon the goods, judgment having been obtained in the suit commenced by the second writ, and the goods were taken and sold under execution and applied to a judgment in a suit by the attaching creditor for the conversion as under the first attachment, the defendant was allowed to show in mitigation of damages the application of the proceeds on the attachment.

In *Plevin v. Henshall*, 10 Bing. 24; 25 E. C. L. 17, where after a verdict for the plaintiff, the goods were seized in the hands of the defendant for rent due to A, which the plaintiff was liable to pay, and the defendant paid the rent, the court allowed him to deduct the amount from the verdict.

In *Lamb v. Day*, 8 Vt. 407; 30 Am.

Dec. 479, the plaintiff brought an action against an attaching officer and the plaintiff in attachment, for wrongfully using a horse; the plaintiff in attachment subsequently recovered judgment, and the horse was sold by virtue of an execution in satisfaction of the judgment. The court said: "Placing the liability of the defendants on the footing of the original taking as an act of trespass, still the ultimate disposition of the horse is material to the question of damages, and as the property was applied in the satisfaction of the plaintiff's debt, that the circumstance serves to reduce the damages accordingly." And in *Stewart v. Martin*, 16 Vt. 397, where an action was brought against a constable for an attachment out of his jurisdiction, it was held that the defendant might show, in mitigation of damages, that, having taken the property at a place within his jurisdiction, he attached it there on the same process as the property of the same debtor.

In *Dodson v. Cooper*, 37 Kan. 346, where it appeared in an action brought by the plaintiff, as the owner of a stock of merchandise, against a sheriff who levied upon and took possession of the stock in good faith, as the property of a third party, that the plaintiff had purchased back the goods from a stranger at the sheriff's sale, the measure of damages was the sum thus paid, and in addition such special damages as he had suffered from the unlawful taking in the way of injury or depreciation in value as could be proved.

So where goods were seized for the violation of a statute forbidding their sale within three miles of any place of religious meeting, etc., evidence that an agent of the owner bought them for a nominal price is admissible in mitigation of damages. *Rogers v. Brown*, *Spen.* 119.

In *Wanamaker v. Bowes*, 36 Md. 42, in an action by a mortgagee against a creditor of the mortgagor for a wrongful and illegal seizure of the mortgaged goods, where they were taken under a

application of the fruits of his tort to his demand against the plaintiff, which is not attaching by way of lien or security to the property converted.¹ When seized under legal process, the mere fact of the levy or attachment cannot go in mitigation of damages, but it must also appear that the owner had the benefit of it.²

Although in an action of trover by the rightful administrator against an executor *de son tort*, such an executor cannot defeat the action, he may show in mitigation of damages an appropriation of the funds converted to the debts which the administrator was bound to pay in due course of administration.³ But it is held that the purchaser from the executor, when sued by the rightful

void attachment, it was held that the plaintiff might prove in mitigation of damages, that at the time of the seizure under attachment, there was rent in arrear due upon the premises occupied by the mortgagor and in which the goods were, that, after the seizure by the sheriff and before the removal of the goods, there were filed with him by the landlord a notice and affidavit of such rent in arrear, and that in pursuance of such notice an order of the court passing judgment, the sheriff paid the landlord out of the proceeds of the sale of the property, the amount of the rent in arrear. In this case, Bartol, C. J., said: "While the general rule is, that for the wrongful taking and conversion of the plaintiff's goods, the measure of compensation is the value of the goods, and the wrongdoer will not be allowed voluntarily to appropriate the proceeds to the payment of the plaintiff's debts, or in any way apply them voluntarily to his use without his consent, and claim thereby to reduce the amount of his liability. Yet, if without the agency or act of the defendants, the writs have been by operation and judgment of law applied to the use of the plaintiff, his damages resulting from the unlawful act will be *pro tanto* diminished."

1. Northrup v. McGill, 27 Mich. 234; Edmondson v. Nuttall, 17 C. B. N. S. 280; 112 E. C. L. 279.

A sheriff, who wrongfully levies upon goods and retains his fees from the proceeds, is liable to conversion, even though he causes the proceeds to be formally credited upon an alleged indebtedness. Bringard v. Stellwagen, 41 Mich. 54.

In an action for the conversion of a horse, the defendant was not allowed any deduction for feeding the animal during detention. Wormer v. Biggs, 2 C. & K. 31; 61 E. C. L. 30.

2. Ball v. Liney, 48 N. Y. 6; 8 Am.

Rep. 511; Wehle v. Butler, 61 N. Y. 249; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57. And see Allen v. Coates, 29 Minn. 46.

In Ball v. Liney, 48 N. Y. 6; 8 Am. Rep. 511, Earle, J., said: "After a conversion of property, the title still remains in the owner, and the property can be taken from the wrongdoer on an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrongdoer can state the seizure and sales, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it."

But in Kaley v. Shed, 10 Met. (Mass.) 317, where the defendant in an action for taking and carrying away goods, had promised to return them on the plaintiff's demand, and while preparing to do so they were attached and taken away from him on a writ against the plaintiff, it was held that the measure of damages should be the same as if he had actually returned them, although he did not show that the goods had in fact been applied to the plaintiff's benefit, and although some of the goods were exempt from attachment.

3. See Williams on Executors, vol. 1, p. 4; Parker v. Keqt, 12 Mod. 471; Saam v. Saam, 4 Watts (Pa.) 432; Tobey v. Miller, 54 Me. 480; Dorsett v. Frith, 25 Ga. 537; Weeks v. Gibbs, 9 Mass. 74; Reagan v. Long, 21 Ind. 262.

In Glenn v. Smith, 2 Gill & J. (Md.) 493; 20 Am. Rep. 452, Buchanan, C. J., said, that where the rightful executor or administrator sues the executor *de son tort*, in an action of trover for

administrator, cannot show in mitigation of damages that the administrator has paid such debts.¹

TRUCK ACTS.—(See STORE ORDER ACTS, vol. 23, p. 935.)

TRUCK WAGON.—(See CART, vol. 3, p. 20.)

TRUE.—In one sense that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are; but, in another and broader sense, the word true is often used as a synonym of honest, sincere, not fraudulent.²

TRUE BILL.—(See GRAND JURIES, vol. 9, p. 1; INDICTMENT, vol. 10, p. 510.)

TRUNK.—See note 3.

goods of the deceased, "the defendant cannot plead payment of the debts to the value, or that he has given the goods in satisfaction for the debts. But on the general issue pleaded, he may give in evidence such payments, and they will be recouped in damages if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in due course of administration."

But the executor *de son tort* cannot be justified in applying the assets to the payment of debts which the rightful executor would not have been authorized to pay, and so, in order to mitigate the damages, he must show that he has applied the funds in the same manner that they would have been lawfully applied by the rightful executor. If it appears that he has expended assets in the payment of one particular debt not a lien on them, leaving others unpaid, he will be liable to other creditors. *Gay v. Lemle*, 32 Miss. 309; *Hardy v. Thomas*, 23 Miss. 544; 57 Am. Dec. 152. It is laid down as a rule that the executor *de son tort* cannot give in evidence in mitigation of damages, payment of debts to the value of the goods still in his possession, but only such as were sold. *Lomax on Executors*, 363. See *Hardy v. Thomas*, 23 Miss. 544; 57 Am. Dec. 152.

1. *Carpenter v. Going*, 20 Ala. 587; *Keith v. Ham*, 89 Ala. 590.

In *Mountford v. Gibson*, 4 East 441, it was held that a creditor of the intestate, who received the goods of his debtor after his death from his widow in payment of the debt, cannot protect his possession in an action of trover, where the lawful administrator, upon the grounds of such delivery having been made by one who, by such intermeddling, made

herself executrix *de son tort*, no fact appearing to give color to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated.

2. *Moulor v. American L. Ins. Co.*, 111 U. S. 345. In that case it was held that, as applied to the answers which an applicant for a life-insurance policy must give to the questions propounded by the policy, the latter sense of the term true is the correct one.

In *Clapp v. Massachusetts Ben. Assoc.*, 146 Mass. 530, a similar case, the court said: "The word 'true' is often used as a synonym of honest or sincere, without evasion or fraud." See also *First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Fowkes v. Manchester, etc., L. Assur., etc., Assoc.*, 3 B. & S. 928; 113 E. C. L. 927; *INSURANCE*, vol. 11, p. 278; *LIFE INSURANCE*, vol. 13, p. 629.

True Owner.—As to the meaning of this term in the English Bankruptcy Act, see *Tuck v. Southern Counties Deposit Bank*, 42 Ch. Div. 471; *In re Tamplin*, 38 W. R. 351.

As to true in statute against forgery, see *FORGERY*, vol. 8, p. 495.

True Value.—The words "true value," as used in a revenue law, have been held to mean the actual cost of the goods to the importer at the place from which they were imported, and not the current market value of the goods at such place. *U. S. v. Tappan*, 11 Wheat. (U. S.) 419. See also *VALUE*.

3. In *Potter v. State*, 39 Tex. 388, it was held that "trunk" and "chest" were not synonymous, and that an indictment for the theft of one "trunk or chest" was bad for being in the alternative.

TRUST DEEDS AND POWER OF SALE MORTGAGES.

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I. DEFINITIONS — 1. Trust Deeds.—The only kind of trust deeds embraced within the scope of this article are those which are executed for the purpose of securing the payment of a debt, or the fulfillment of an obligation in the nature of a debt. A trust deed of this kind may be defined as a form of security consisting of a deed of conveyance, wherein the debtor or obligor is the grantor, the creditor or party to be secured is the *cestui que trust*, and a third person, designated as the trustee, is the grantee. The deed specifies the nature of the debt or obligation intended to be secured, and confers upon the trustee, in the event of a default, a power to sell the property thereby conveyed, exercisable upon certain specified conditions, for the purpose of applying the proceeds, so far as necessary, to the satisfaction of the debt. A trust deed of this character is, in substance and effect, a mortgage with power of sale, with the additional feature of the appointment of a third party to hold the title and exercise the power.¹

1. "A deed of trust to secure a debt is in legal effect a mortgage. It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage. Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title to the grantee just as a mortgage does, except in those states where the natural effect of the conveyance is controlled by statute; and in states where a mortgage is considered merely as security, and not a conveyance, a trust deed is apt to be

regarded in this respect just like a mortgage. Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is in the other. The only important difference between them is that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit." Jones, *Mortg.* (4th ed.), § 62. See also § 1769.

"When we use the term 'deed of trust,' we do not mean a case where the grantor parts wholly with his title, giving it to a trustee absolutely, for the purpose of raising a fund to pay debts, though this is, properly speaking, a deed of trust. But we mean cases where the conveyance is to secure a debt in case of default, thus assimilating the transaction to a mortgage, and where the intention of the grantor, instead of parting with his

As an absolute deed may be shown to be a mortgage, so an instrument may be a deed of trust in the nature of a mortgage,

estate, is to retain it in case he performs his legal obligation according to its terms. Instruments of this latter class are also, but less accurately, called deeds of trust. In substance they are mortgages with specific provisions for foreclosing or barring the equity of redemption." Judge Dillon in 2 Am. Law Reg. 642.

"A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts; while the former is a conveyance in trust for the purpose of securing a debt, subject to condition of defeasance." Bartley, J., in *Hoffman v. Mackall*, 5 Ohio St. 124.

The same court has decided that a deed of trust given to secure a debt owed to a third person, and conditioned to be void on payment of the debt, but in case of default giving the grantee power to sell the property at public auction, is not an absolute conveyance in trust, but is in the nature of a mortgage, and the legal title remains in the grantor after default, subject to the trustee's power of sale. *Martin v. Alter*, 42 Ohio St. 94.

Trust Deeds and Mortgages.—"Mortgages containing powers of sale, and deeds of trust to secure a debt, are substantially the same thing at law and in equity. At law, both kinds of deeds purport to convey the legal title to the grantee, creditor or trustee; but in equity, the land, the title and the deeds, stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.' If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes abso-

lute, and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. In some circumstances, a discharge of the mortgage upon payment, or a reconveyance, is not material, as by the terms of the mortgage, and by the law, it becomes null and void. A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes; whether a simple mortgage deed in form, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey or sell, or to do any other thing upon the payment of a certain sum of money. Courts of equity look upon it as a mortgage, and deal with it as such." 2 Perry on Trusts, 602 d.

A deed of trust given by a railroad company, conditioned that upon payment of the funds secured, the estate thereby conveyed shall cease and become void, is in legal effect a mortgage, leaving the title in the mortgagor. *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94.

But a conveyance of lands by a railroad company to trustees, for the sole benefit of certain designated creditors, containing no defeasance clause, and no directions as to how the trust shall be executed, vests an absolute title in the trustees as against the grantor, and cannot be regarded as a mortgage. *Catlett v. Starr*, 70 Tex. 485.

That a trust deed to secure a debt is in no material respect different from a power of sale mortgage, see the language of the courts in the following cases: *Bell v. Carter*, 17 Beav. 11; 22 L. J. Ch. 933; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Shillaber v. Robinson*, 97 U. S. 75; *Woodruff v. Robb*, 19 Ohio 212; *Flint, etc., Co. v. Auditor Gen.*, 41 Mich. 635; *Sargent v. Howe*, 21 Ill. 148; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Fitch v. Wetherbee*, 110 Ill. 475; *Lenox v. Reed*, 12 Kan. 223; *Newman v. Samuels*, 17 Iowa 528; *Kyger v. Riley*, 2 Neb. 20; *Webb v. Hoselton*, 4 Neb. 308; *Hurley v. Estes*, 6 Neb. 386; *Thompson v. Marshall*, 21 Oregon 171; *Wright v. Henderson*, 12 Tex. 43; *McLane v. Paschal*, 47 Tex. 365; *Union Co. v. Sprague*, 14 R. I. 452; *Austin v. Sprague Mfg. Co.*, 14 R. I. 464; *Turner v. Watkins*, 31 Ark. 429; *Myers v. Estell*, 48 Miss. 404; *Hand v. Winn*,

though it does not contain any defeasance clause, and though it authorizes the trustee to take immediate possession and sell.¹ So essentially alike are trust deeds and mortgages, that in those states where it is held that the legal title remains in the mortgagor, the same rule is generally applied in favor of the grantor in a trust deed.²

In *California* and *Florida*, however, it is held that a trust deed, unlike a mortgage, vests the legal title in the trustee, subject, of course, to be defeated by payment of the debt.³ While for all practical purposes trust deeds of this character are mortgages, the courts will sometimes make a distinction between them for the purpose of sustaining the remedy, as where a statute requires all "mortgages" to be foreclosed by suit.⁴

2. Power of Sale Mortgages.—A mortgage with power of sale, is one which confers upon the mortgagee power to sell and convey the mortgaged property, upon certain specified conditions, for the purpose of satisfying the debt or obligation secured. It differs in no respect from an ordinary mortgage, except in enabling the mortgagee to cut off the equity of redemption by sale upon

52 Miss. 788; *Clark v. Wilson*, 53 Miss. 129; *Bartlett v. Teah*, 1 McCrary (U. S.) 176; 1 Fed. Rep. 768; *Southern Pac. R. Co. v. Doyle*, 11 Fed. Rep. 253.

Where a trust deed and a mortgage are executed at the same time, and to secure the same debt, they are to be construed as one instrument. *Wheeler, etc., Mfg. Co. v. Howard*, 28 Fed. Rep. 741.

Trust Deed—What Is.—To secure the payment of a debt to A, the plaintiff gave a deed of land to B and C, C being designated as party of the third part. The deed recited that it was given to secure the debt to A, and provided that in the case of non-payment, and upon the request of A, B and C should sell the property. In an action to enjoin B and C from selling, it was held that the deed conferred a power of sale upon them, and was a trust deed, not a mortgage. *Bateman v. Burr*, 57 Cal. 480.

1. *In re Zwang*, 39 Mo. App. 356.
2. *Newman v. Samuels*, 17 Iowa 528; *Webb v. Hoselton*, 4 Neb. 308; *Hurley v. Estes*, 6 Neb. 386; *Lenox v. Reed*, 12 Kan. 223; *Martin v. Alter*, 42 Ohio St. 94; *McLane v. Paschal*, 47 Tex. 365.

3. *Bateman v. Burr*, 57 Cal. 480; *Soutler v. Miller*, 15 Fla. 625. See also *Elson v. Barrier*, 56 Miss. 394.

4. An instrument executed by a debtor, conveyed land to his creditor "in trust" to secure payment of the

debt, with power to sell on default at public vendue upon giving ten days' notice. The court held that, although the creditor was, himself, the trustee, this was a trust deed, and not a mortgage, and that the Act of Feb. 25th, 1858, providing that "hereafter no mortgage of real estate shall be foreclosed in any other manner than by action in the proper court, provided that nothing herein contained shall be construed to apply to deeds of trust," did not prohibit the exercise of the power of sale. The court observed that, "The proviso needs not to be restricted to that which may be strictly and technically a trust deed. An instrument is, equally, a deed of trust, or one containing or conferring a trust, whether it be for the grantee's own benefit or for that of another." *Fanning v. Kerr*, 7 Iowa 450.

Mortgagee as Trustee.—It has also been held in *California*, that an instrument may be a trust deed and not a mortgage, even though the trustee named was himself the creditor secured. The court observed that, "Whether the conveyance is to be treated as a mortgage or as a deed of trust, must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor, whose debt is to be paid out of the proceeds to arise from the execution of the trust." *More v. Calkins*, 95 Cal. 435. See also *Thompson v. McKay*, 41 Cal. 221.

condition broken, without resorting to any of the usual legal or equitable remedies.¹

II. VALIDITY OF POWERS OF SALE.—It is not surprising, in view of the regard shown by courts of equity for the mortgagor, that the validity of power of sale mortgages as a means of cutting off the equity of redemption, should have been at first seriously doubted, and even denied, upon the ground that such a power gave the mortgagee a great and inequitable advantage, which he would be likely to employ to the oppression of the mortgagor.²

1. *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Taylor v. Chowning*, 3 Leigh (Va.) 654; *Turner v. Watkins*, 31 Ark. 429; *Turner v. Bouchell*, 3 Har. & J. (Md.) 99.

What Constitutes.—The following instrument was held to be a deed conveying a title, and not a mere mortgage with the power of sale: “\$75.00. Georgia, Brooks County. On or by October 1st, after date, I promise to pay Mitchell Brice, or bearer, seventy-five dollars, with interest from maturity at 8 per cent. per annum, and reasonable charges, not less than ten per cent., for attorneys’ fees, if any are incurred in the collection hereof, hereby waiving and expressly renouncing all homestead and exemption rights, for value received. And to secure the payment of said indebtedness I hereby bargain, sell, and convey to the payee of this note, his heirs and assigns, the following property, which is expressly declared to be my individual property, free from any lien whatever, to wit: (Description of the land.) And, in case of failure to pay said indebtedness at the maturity thereof, the payee of this note, his agent, attorney, heirs or assigns, are hereby irrevocably authorized and empowered to seize and take possession of said property, and to sell the same for cash at public outcry at the justice court grounds of the Tallokas district, after having advertised said property at said court grounds for ten days by written or printed notice, and apply the proceeds of said sale to the payment of said indebtedness, and all costs of said sale, including ten per cent. additional for further attorneys’ fees, and the balance, if any, to be subject to my order. And the payee of said note, his agent, attorney, heirs and assigns, are fully authorized to bid at said sale, and to make a fee-simple title to said property to the purchaser or purchasers.” *Brice v. Lane*, 90 Ga. 294.

2. **Early Opinions.**—In 1825, Lord

Eldon is reported to have expressed himself as strongly opposed to conferring a power of sale upon the mortgagee; but he reluctantly added that it would be “too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is for that reason to impeach the transaction.” *Roberts v. Bozon*, Chanc. (Feb. 1825) MS., cited in *Coventry’s Prac. Mortg.*, p. 150; 1 *Powell on Mortg.* (Am. ed.) 9 a, note; 2 *Jones on Mortg.* (4th ed.) 1765.

“Powers of the character under consideration were at first seriously doubted, and by Lord Eldon and others strenuously opposed, as tending to destroy the value of the equity of redemption; as putting the debtor in the power of the creditor, who was thus enabled harshly to take advantage of his necessities; and as investing the mortgagee, where the power was confided to him, with the character of a trustee, in a case where he is not free to act for the exclusive benefit of his *cestui que trust*, for he is, first, a trustee for himself, and second, as to the residue, for the mortgagor.” Judge Dillon in 2 *Am. Law Reg.* 644.

Croft v. Powell, 2 Comyn. 603, is one of the earliest cases involving the consideration of a power of sale given as the security for a debt, and while the validity of the power was not directly passed upon in that case, it met with a very unfavorable reception by the judges. *Coote, Mortg.* 129, referring to this case, says it “was considered as raising considerable ground for doubt, but, so far from it, it will, on consideration, seem to be rather an authority in favor of these powers.”

An early text writer (*Powell on Mortg.* 19) considered the validity of powers of sale “of too doubtful a complexion to be relied on as the source of an irredeemable title.”

In 1813, Kent, C. J., in 10 *Johns.* (N. Y.) 196, declared powers of sale “not

But, notwithstanding the unfriendly reception with which these powers at first met, it was long ago finally settled, and may now be regarded as the accepted doctrine generally, that the mortgagor is competent to confer an absolute power of sale upon the mortgagee, exercisable *in pais*, and with the exercise of which, courts of equity will not interfere, provided the mortgagee acts fairly, and in compliance with its terms;¹ although the foreclosure of mortgages, except by judicial proceedings, is forbidden by

to be in use in *Great Britain*." But a few years later, in his commentaries, he says that they are found in *England* to be so convenient as to become of quite frequent use. 4 Kent's Com. 146.

It was held in the early case of *Taylor v. Chowning*, 3 Leigh (Va.) 654, that the characters of mortgagee and donee of a power to sell were incompatible, and a sale by a mortgagee voidable unless the mortgagor acquiesced in it.

In *Chowning v. Cox*, 1 Rand. (Va.) 306, doubt was cast upon the validity of a mortgagee's power of sale; but the force of this decision was weakened by the criticisms of the judges in *Floyd v. Harrison*, 2 Rob. (Va.) 161.

In an early case in *Mississippi*, the position seems to have been taken that a power of sale conferred upon the mortgagee, could not be executed without the interposition of a court of equity. *Ford v. Russell*, 1 Freem. Ch. (Miss.) 42. But see *Sims v. Hundly*, 2 How. (Miss.) 896.

1. Powers of Sale Valid.—*Dobson v. Rocey*, 8 Seld. (N. Y.) 216; *Elliott v. Wood*, 45 N. Y. 71; *Carson v. Blakey*, 6 Mo. 273; *Destrehan v. Scudder*, 11 Mo. 484; *Hurt v. Kelly*, 43 Mo. 238; *McNees v. Swaney*, 50 Mo. 388; *Clark v. Condit*, 18 N. J. Eq. 358; *Longwith v. Butler*, 8 Ill. 32; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Leffler v. Armstrong*, 4 Iowa 482; *Fanning v. Kerr*, 7 Iowa 450; *Crocker v. Robinson*, 8 Iowa 404; *Boyd v. Ellis*, 11 Iowa 97; *Sims v. Hundly*, 2 How. Miss. 896; *Hyde v. Warren*, 46 Miss. 13; *Fogarty v. Sawyer*, 17 Cal. 589; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Mitchell v. Bogan*, 11 Rich. (S. Car.) 686; *Clay v. Sharpe*, 18 Ves. 346 (1802), reported in *Sugden on Vend. & Pur. Appendix*, p. 21; *Corder v. Morgan*, 18 Ves. 344; *Selby v. Cooling*, 23 Beav. 418.

In the case of *Longwith v. Butler*, 8 Ill. 32, the court, *per* Koerner, J., said: "The first question presented by this record, as to the mortgagee's right to sell under a power of sale, without the aid of a court of chancery,

is one of considerable importance, and about which much diversity of opinion prevails amongst the profession of our state. For this reason it becomes necessary to examine it with care, and to give it due deliberation. At common law, a mortgage vested the legal title in the mortgagee, liable to be defeated upon performance of the condition. After default, the legal estate became absolute. There is no question that, by the consent of both the mortgagor and mortgagee, the harshness of this rule might be mitigated. The parties were at liberty to prevent the absolute forfeiture, by stipulating that the mortgagee, after default, might sell, so as to evolve the real value of the land and have the debt satisfied, and no more. Such a power was a common-law power, an appointment, and, considering the legal estate all the time in the mortgagee, it may be called a power appendant, or annexed to the estate. It seems clear, then, that the power in question would have been a valid one at common law."

In *Webb v. Lewis*, 45 Minn. 285, a mortgage with the power of sale was given after the repeal of the statute authorizing a foreclosure by an advertisement and sale. Subsequently, but before default in the mortgage, a new statute was enacted, substantially the same as the repealed act, but with additional regulations as to procedure, and providing that it should apply to all mortgages executed previous to its passage. Thereafter, the mortgage in question was foreclosed under the power of sale, all the requirements of the new act being complied with. In an action by the mortgagor's grantee to recover possession, it was contended that the power of sale could not be sustained in the absence of a statute; and that the new act was unconstitutional in its retrospective application. In sustaining the sale, the supreme court, *per* Mitchell, J., said: "Powers of sale are not the creatures of statute, but of the convention of the parties. Statutes merely

regulate the manner of their execution. A party may grant a valid power of this kind in the absence of any statute either authorizing its creation or regulating its exercise. The act of 1877, though repealing most of the statutory provisions on the subject, neither prohibited the creation of such powers nor affected the common-law power of parties to make such contracts on such terms as they saw fit. The power in this mortgage is one to sell at public auction. It is true it adds 'agreeably to the statute in such cases made and provided,' that is, the sale shall be conducted in conformity to the provisions of statute, if any, regulating the subject. . . . But if there was in fact no statute at all regulating the matter, the power is nevertheless complete in itself, and capable of being executed without the aid of any statute. A sale at public auction implies a sale in a public place, after reasonable notice of the time and place of sale, so as to secure the presence of bidders and the best possible price for the property. A power in a mortgage to the mortgagee to sell, is in the nature of a trust, and imposes on him, by implication, the duty to execute it in good faith, and to exercise all reasonable diligence to obtain the best price, and doubtless the usual practice in making sales of real property on judicial process, or under powers of sale, would, in the absence of any statute or provision in the mortgage regulating the subject, furnish the test and standard of the mortgagee's duty in the matter of making the sale. These powers are always subject to the control of the courts, if attempted to be exercised in a manner oppressive to the mortgagor. . . . We are therefore of opinion that the power contained in this mortgage was, at the time of its creation, a valid common-law power, capable of being executed even in the absence of any statute regulating the manner of its exercise." The court also held that, as the new act merely required additional things to be done in making the sale, which could in no manner prejudice the mortgagor, and regulated the procedure, it was not objectionable as being retrospective, nor did it impair the obligation of the contract.

In *Butterfield v. Farnham*, 19 Minn. 85, the question was presented, whether a sale under a power in a mortgage was valid, if made conformable to all the requirements of the statute relating to

such foreclosure, but in disregard of certain additional requirements contained in the power, to the effect that the mortgagee, in the case of default, should enter on the premises and make a sale, and render to the mortgagor a true and particular account of the sale and expenses. The statute in question provided that every mortgage containing a power of sale might be foreclosed by an advertisement and sale in the county where the land was situated, upon giving a certain prescribed notice. The court, *per* Ripley, C. J., after referring to the statute, said: "This, in terms, extends to, and includes, all mortgages and all powers of sale whatsoever in any mortgage contained. It is the plainest possible statement that any such mortgage may be foreclosed in the cases mentioned by taking the steps prescribed. It is not disputed that this was within the power of the legislature. It is unnecessary to consider whether or not the statute is imperative; whether, for instance, if the parties contracted for a different mode than that in the statute provided for, a foreclosure conducted according to the contract would or would not be valid. . . . Here no such question arises. The method prescribed by the statute has been followed. Why, then, is not this mortgage foreclosed? Because, says the appellant, the contract required something more. But if the legislature, having the right to say so, has said what shall in every case be sufficient to constitute a valid foreclosure, individuals certainly can have no right to say that a particular foreclosure should be invalid, unless something else was done in addition. There is no difference in principle between a power of sale which requires the mortgagee to take the statutory steps and some additional step, and one which requires him to pursue a course altogether different from that which the statute prescribes. The contract in each case, if it were to be held obligatory upon the party, would amount to a repeal of the statute by individual authority; for it is, in each case, that which the law has said shall be a valid foreclosure, shall not have that effect, but that something else shall. With respect to the first and last matters of objection above mentioned (as to entry by mortgagee, and as to rendering an account of the sale), no question would be made but the power of the sale required more than the statute. With respect to the

first, it may also be remarked that the decisions from *Massachusetts*, cited by the appellant, are inapplicable in the absence there of such a statute as ours. With respect to the requirement, in the power mentioned in the second objection, however (that the sale should be on the premises), it may not at first sight be so obvious that it is a requirement in addition to those of the statute. This will appear to be so, however, upon a little reflection. The statutory requirement is only that it must be in the county, and section 1 declares that a mortgage may be thus foreclosed, *i. e.*, by a public sale made in the county. When it appears, then, that such a sale has been held in the county, the statute is satisfied and the mortgage has been foreclosed in the manner specified. A stipulation that the sale shall take place at a particular place in the county, is a stipulation for more than the law requires. Within the limits of the county, the statute leaves the place of sale, as it leaves the hour of the day (within certain limits), to the mortgagee's option."

The trouble with the above decision is that it attaches undue importance to a statute which was clearly never intended to deprive the mortgagor of the right to impose additional safeguards and restrictions upon the mortgagee's exercise of a power of sale. The statute, solely for the protection of the mortgagor and with a view to proper publicity, lays down a course of procedure which must be observed; but it nowhere says, either expressly or by reasonable implication, that the mortgagor may not in his contract insist upon still further protection and publicity. The court seems to overlook the fact that a power of sale is not a creature of statute, but of contract, and that so long as the parties are competent to create the power, they must be also competent to regulate the manner of its exercise by whatever stipulations they may adopt that are not in violation of the protecting provisions of statute. The logical conclusion from the reasoning of the court in this case would be that the power of sale was a nullity, and could not be exercised at all. The provisions adopted by the parties in respect to the manner of a sale are inseparably connected with the power itself, and if the former cannot stand, the latter must fall with them. This result, however, does not seem to have been urged upon the consideration of the court. See *Webb v. Haeffer*, 53 Md. 187.

In *Pierce v. Grimley*, 77 Mich. 273, the court, by Campbell, J., speaking of statutory provisions regulating the exercise of powers of sale, said: "Parties may add to these conditions, but cannot dispense with them."

Louisiana.—A deed of trust, executed in another state, on property in *Louisiana*, to secure the payment of a debt, is entitled under the jurisprudence of that state, to the legal effect of a conventional mortgage. *Watson v. James*, 15 La. Ann. 386; *Frelson v. Tiner*, 6 La. Ann. 18; *Tillman v. Drake*, 4 La. Ann. 16; *Pickett v. Foster*, 36 Fed. Rep. 514.

In *Missouri*, a mortgage with a power of sale in the mortgagee, or agent to be appointed for that purpose, is valid, though a county is the mortgagee, and the form of the mortgage is entirely different from the form prescribed by statute to be used in mortgages for the benefit of counties. *Mann v. Best*, 62 Mo. 491.

Early New York Statute.—The earliest statutory recognition of power of sale mortgages in this country is found in the *New York Act* of March 19th, 1774, which is to the effect that the rights of *bona fide* purchasers at sales under such powers, shall not be disturbed, nor made subject to any right of redemption.

New Hampshire.—In *Bell v. Twilight*, 22 N. H. 500, the court said: "It may admit of doubt whether such powers to sell, granted in mortgages, are valid under our statutes, which define and fix the right of redemption, and provide easy and prompt methods of foreclosure."

But in the recent case of *Very v. Russell*, 65 N. H. 646, the validity of such powers was fully sustained, by Foster, J.: "The validity of such powers is very generally, if not universally, recognized and declared by the text writers on both sides of the Atlantic, who adduce abundant authorities in support of their propositions. The doctrine seems to rest upon a principle no less broad and fundamental than the right of parties to make for themselves such legal contracts as they choose." After referring to the doubt expressed in *Bell v. Twilight*, 22 N. H. 500, the court observed: "But we are unable to see upon what ground, in the absence of legislative prohibition, the court can put a restriction upon the freedom of the citizen to contract for the sale of his land

upon the terms and in a mode stipulated in a mortgage, any more than upon his liberty to contract for its sale in any other way, or by stipulations contained in any other instrument. The validity of such a power has been very generally affirmed in the other states of the Union. It is recognized in every other *New England* state, although in no one of them is it declared by express statute. . . . Doubtless the power ought not to be recognized in any case unless it is conveyed by an express grant, and in clear and explicit language; and its execution should be jealously watched and declared void for the slightest unfairness or excess, or for anything that prevents competition. But the legal power of the parties to make such a contract must, we think, be upheld; and when, in carrying it out, the above essential conditions are fairly fulfilled, the sale must be held to divest the mortgagor of all his rights in the premises."

The Nevada Practice Act, § 246, declaring that there shall be but one action for the enforcement of a right secured by mortgage, does not deprive a mortgagee of his right to foreclose by a sale under a power in his mortgage. *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313.

In *North Carolina*, powers of sale, though admitted to be valid, are not favored, and the conduct of the mortgagee, in executing the power, is watched with great jealousy. *Mosby v. Hodge*, 76 N. Car. 387; *Kornegay v. Spicer*, 76 N. Car. 95.

Montana.—A recent and exhaustive examination of the history of the power of sale mortgages will be found in the opinion of McConnell, C. J., in the case of *First Nat. Bank v. Bell Silver, etc.*, Min. Co., 7 Mont. 32, which holds that a power of sale given to the mortgagee is not void as against public policy; also that the *Montana* Statute, declaring that "a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the land without foreclosure and sale"—does not prohibit a power of sale mortgage. The word "foreclosure," as used in the act, does not mean exclusively a judicial proceeding. An advertisement and sale under the power is also a foreclosure, within the intendment of the statute.

The *Montana* Statute was copied from

the *California Practice Act* of 1851, 260. In the case of *Fogarty v. Sawyer*, 17 Cal. 589, which was an action of ejectment, wherein the defendant relied for title upon a deed executed under a power of sale in a mortgage, the court, after quoting the section in question, said: "Under this section the mortgage creates a mere lien for the purpose of security, and, as in other cases of lien upon real property, can only be enforced by judicial proceedings, except by the authority of the owners of the property. By virtue of the mortgage alone, the mortgagee can neither acquire the possession nor dispose of the premises. But the existence of the mortgage does not prevent the owner from making an independent contract for the possession, or from authorizing a sale of the premises, the mortgagee consenting thereto, to pay off the debt. Nor is it perceived that there is any legal obstacle to making such contract with the mortgagee, or to clothing him with power of sale. If the owner of the property sees fit to enter into such an agreement with him, or to confer such power upon him, it would be going a great way for the court, for that reason alone, to invalidate the proceedings. The right to dispose both of the possession and estate follows necessarily from the ownership of the property, and this being so, no valid objection can be urged against incorporating the contract and power in the same instrument with the mortgage. They do not become in that way any part of the mortgage, but are as much independent of it as though contained in separate instruments. Some stress is placed by the respondent upon the use of the words 'whatever its terms' in the statute. This language is supposed to prohibit separate stipulations between the parties for the possession, and for the sale of the premises upon default. We do not thus construe the language, but, on the contrary, are clear that it was only intended to control the terms of grant, bargain and sale generally employed in mortgages. . . . We are of opinion that there is nothing in the law of mortgages in this state which prevents the mortgagor from investing the mortgagee with a power to sell the premises upon default in the payment of the debt secured, and when the sale is conducted in accordance with the conditions of power, and is fairly made, a good title will pass to the purchaser upon its consummation by a conveyance."

statute in several of the states,¹ and in one state it seems that the

In *Rhode Island*, it is held that there is nothing in the statute relating to procedure in foreclosure, which can be construed to prohibit parties from contracting independently of the statute; and that a power of sale given to the mortgagee is valid. *Richmond v. Hughes*, 9 R. I. 228.

South Carolina.—In the recent case of *Johnson v. Johnson*, 27 S. Car. 309, the court said: "It has always seemed to us a somewhat anomalous doctrine that a mortgagor of real estate may include in the mortgage a power of the creditor himself to sell the mortgaged premises without any order of foreclosure in a regular proceeding; such power being entirely *ex parte*, and carrying, as claimed, not only the right to ascertain the amount due on the mortgage debt, but to judge of the necessity for a sale, its time, place, terms, etc., and to execute title to the premises so sold. This anomaly is more striking in those states, as in *South Carolina*, where it is expressly provided by statute that a mortgage of real estate is a mere security, and, even after condition broken, the legal title remains in the mortgagor or his heirs. We incline to think that experience in the administration of the law has shown that this effort, by a summary proceeding, to avoid litigation and expense, has really increased both, and demonstrated the wisdom of Lord Eldon when he said: 'How can it be right that such a clause shall be inserted in a deed under which a party is trustee for himself?' . . . While, however, the court will not now set aside a power authorizing the creditor, who is the interested party, to sell lands mortgaged, for the reason that it is the contract of the parties themselves, yet all the authorities agree that as such power may be so easily used for purposes of oppression, the courts should scrutinize sales made under them, very closely." The court held that a power of sale in the mortgage was not a power coupled with an interest, and was revoked by the death of the mortgagor.

In *Maryland*, powers of sale in mortgages are sanctioned by statute, subject to certain restrictions, as that power cannot be given to a mortgagee to sell mortgaged premises outside of the county in which they are situated. *Webb v. Haeffer*, 53 Md. 187.

The right of a mortgagee under his power of sale may be defeated by the

appointment of a trustee in insolvency. *Mackubin v. Boarman*, 54 Md. 385. Not, however, when the mortgagee is a citizen of another state. *Ensor v. Lewis*, 54 Md. 397.

In *Georgia*, the validity of a power of sale attached to mortgages is sustained. See *Robenson v. Vason*, 37 Ga. 66; *Calloway v. People's Bank*, 54 Ga. 441.

In *Michigan*, the power of sale is sanctioned and the manner of its exercise prescribed by statute. See *Grover v. Fox*, 36 Mich. 461; *Lee v. Mason*, 10 Mich. 403; *Hebert v. Bule*, 42 Mich. 489; *Doyle v. Howard*, 16 Mich. 261.

In *Massachusetts*. See *Massachusetts Pub. St.*, ch. 181, § 17.

In *Alabama*. See *Alabama Civil Code* (1886), § 1884.

In *California*. See *California Civil Code*, § 2932.

In *Dakota*. See *Dakota Code of Civ. Pro.*, § 597.

In *Vermont*, a power of sale in a mortgage is practically unknown, and the courts have refused to recognize it "in any case unless it is conveyed by an express grant and in clear and explicit terms." *Wing v. Cooper*, 37 Vt. 169.

1. In *Iowa*, there is but one method by which a mortgage may be foreclosed, that is, by equitable proceedings. *Iowa Rev. Code*, § 3319; *Todd v. Johnson*, 51 Iowa 192. Formerly, however, powers of sale were long recognized and in constant use. See *Fanning v. Kerr*, 7 Iowa 450; *Lowe v. Grinnan*, 19 Iowa 193; *Crocker v. Robinson*, 8 Iowa 404; *Pope v. Durant*, 26 Iowa 233.

In *Indiana*, it is expressly provided that a sale to foreclose a mortgage shall be under judicial proceedings. *Rev. Sts.*, § 1088. But in a trust deed, the power of sale may be conferred, however, on a trustee. *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457.

The mortgagee is not forbidden to act as an agent for the sale where the agency is not created by the mortgage. *Farly v. Eller*, 29 Ind. 322.

In *Oregon*, it is provided by statute that all mortgages "shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by suit." *Hill's Code*, 414. The court holds that this statute prohibits the exercise of a power of sale

exercise of the power of sale is prohibited, although there is no statute expressly so providing.¹

The validity of powers of sale in mortgages is not affected by the rule adopted in a number of the states, that the mortgagee does not take the legal title, but has a mere lien as security for the debt.²

In *England*, powers of sale in mortgages are now so firmly established that they exist by operation of law, even where none is conferred by the mortgage itself.³ Courts of equity will now go so far as to decree specific performance of an agreement to execute a mortgage with an immediate power of sale.⁴

In the civil law, a power of sale in a mortgagee is not only valid, but is implied, and even an express agreement, it seems, will not deprive him of it.⁵

in a trust deed. *Thompson v. Marshall*, 21 Oregon 171.

In *Kansas*, mortgages can be foreclosed by a suit only. See *Samuel v. Holladay*, 1 Woolw. (U. S.) 400.

Texas Homestead.—The *Texas* constitution and statute provide that no lien can be created upon the homestead except for purchase-money, "or for work or materials used in constructing improvements thereon," and the statute relating to the enforcement of such liens, provides that every sale must be upon a judgment foreclosing such lien and ordering the sale of the property. A deed of trust was executed by a husband and wife, upon their homestead, to secure money borrowed for the purpose of building a dwelling thereon, and which was so used. It was held that the deed could not be regarded as a lien for "work or material used," etc., and that a sale under the power passed no title. *Ellerman v. Wurz* (Tex. 1890), 14 S. W. Rep. 333.

A trust deed covering a homestead, executed by both the husband and the wife, given to pay off a subsisting vendor's lien, is valid and enforceable to the extent of the lien so discharged. *Hensel v. International Bldg. & L. Assoc.*, 85 Tex. 215. See also *Batts v. Scott*, 37 Tex. 59; *McLane v. Paschal*, 47 Tex. 365.

On account of the homestead and administration laws of *Texas*, a recent text writer has observed that, "A mortgage or trust deed may thus become of no value, and is a security that does not secure." "No reliance should be placed upon a mortgage or deed of trust upon property in this state under its present laws." *Jones Mortg.* (4th ed.) 1792 and note.

In *Virginia* and *West Virginia*, trust deeds have almost entirely superseded mortgages, said *Rivers, J.*, in *Taylor v. Stearns*, 18 Gratt. (Va.) 244.

1. In *Nebraska*, though no statute can be found expressly prohibiting the exercise of a power of sale, the supreme court seems to hold that the foreclosure must in all cases be by a bill in equity. *Kyger v. Ryley*, 2 Neb. 22; *Webb v. Hoselton*, 4 Neb. 308; *Hurley v. Estes*, 6 Neb. 386; *Comstock v. Michael*, 17 Neb. 298.

The *United States* court in *Nebraska*, follows the ruling of the state supreme court, and reluctantly holds, that a sale of land under a power of sale mortgage is invalid. *Wheeler v. Sexton*, 34 Fed. Rep. 154.

2. *Calloway v. People's Bank*, 54 Ga. 441.

3. **English Statute.**—By Lord Cranworth's Act, 23 and 24 Vict., Ch. 145, a power of sale is conferred upon mortgagees in all cases, even where none is given by the terms of the mortgage; but it is made a condition precedent to the exercise of such power that six months' written notice shall have first been given to the mortgagor or his assigns, or posted on the premises. The act has not proved to be of much practical value, because a special power of sale in a more expeditious manner, is almost universally inserted in mortgages. See *Greenwade's Prac. of Conveyancing*, p. 55; *Fisher on Mortgages*, p. 511; 2 *Jones Mortg.* (4th ed.) 1722.

4. *Hermann v. Hodges*, L. R., 16 Eq. 18; 43 L. J., Ch. 192; *Ashton v. Corrigan*, L. R., 13 Eq. 76; 41 L. J., Ch. 96.

5. 1 Dom. 360.

III. POWER OF SALE AS INCIDENT TO POWER TO MORTGAGE.—

When the power of sale mortgage was comparatively new to the courts, the decided tendency was to hold that a mere authority to execute a mortgage did not, by implication, authorize the granting of a power of sale in connection with the mortgage.¹ More recently, however, the courts have been inclined to hold that a power of sale is such a common incident of a mortgage that authority to insert it will be implied from a power to mortgage.²

IV. FORMAL REQUISITES—1. What Constitutes a Power.—In general, any form of words, showing an intention to create a power of sale upon the happening of a contingency, or any form of instrument imposing duties upon a trustee, which cannot be fully performed without a sale, will be sufficient to create the power.³

1. In *Clarke v. The Royal Panopticon*, 4 Drew. 26; 27 L. J. Ch. 207, the Vice Chancellor ruled that a special power given to a trustee to mortgage did not give him authority to grant a power of sale; and that such powers had not become, in practice, a necessary incident to mortgages.

In *Capron v. Attleborough Bank*, 11 Gray (Mass.) 492, it was held that a stipulation "to give a mortgage" was fully complied with by executing one containing no power of sale. See also *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151.

In *Sanders v. Richards*, 2 Coll. 568, it was held that an executor could not, as such, legally execute a mortgage containing a power of sale. But see the following note.

2. In *Re Chawner's Will*, L. R., 8 Eq. 569, Vice Chancellor Malins said: "I am of the opinion that a power of sale is a necessary incident to a mortgage, and that where a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and, therefore, that the mortgage may contain what mortgages in general do contain, namely, a power of sale."

So, where land was conveyed to a trustee with the power to sell or mortgage, it was held that he was authorized to give a deed of trust on the land to secure his own note given for the grantor's debt. *Ore v. Rode*, 101 Mo. 387.

In *Wilson v. Troup*, 2 Cow. (N. Y.) 195; 14 Am. Dec. 458, it was held by Kent, C. J., that a power to mortgage land in *New York* authorized the execution of a mortgage with the customary power of sale, though it ap-

peared that the owner of the property resided in *Pennsylvania*, where such powers were not common.

Upon the point that powers of sale are fairly incident to mortgages, see also *Bridges v. Longman*, 24 Beav. 27; *Cook v. Dawson*, 29 Beav. 123; *Russell v. Plaice*, 18 Beav. 21; *Cruikshank v. Duffin*, L. R., 13 Eq. 555; *Vane v. Rigden*, L. R., 5 Ch. 663; *Wright v. Bundy*, 11 Ind. 398; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612.

In *Jones Mortg.* (4th ed.) 1768, the author observes that, "It may be anticipated that when the occasion arises, the courts will hold, as have the courts in *England*, that a power of sale is a necessary incident to a mortgage." But the question naturally arises, why a necessary incident? Is a mortgage so incomplete without a power of sale, that the courts will ever hold a party under obligation to insert one where his agreement to mortgage was silent on the point? It may well be doubted whether any court would go so far, at least until the power of sale mortgages shall become universally and exclusively adopted.

42 Vict., ch. 20, provides that a power of sale shall be an implied power in mortgages which do not contain an express power.

3. *Cherry v. Greene*, 115 Ill. 594; *Graeme v. Cullen*, 23 Gratt. (Va.) 266; *DeWolf v. Sprague Mfg. Co.*, 49 Conn. 282.

What Constitutes.—A conveyance, by the terms of which the purchaser is to sell the property and out of the proceeds pay an antecedent debt of the grantor, with the interests and costs of the sale, any surplus to be returned to, and any deficit to be made good by, the

The power may be conferred by an instrument separate from the mortgage;¹ it may even be contained in a deed from the creditor to the debtor, conferring upon a third person power to sell on default in payment of the purchase price;² and it may arise by necessary implication from the terms of the instrument.³

The granting clause in a trust deed, and not the power of sale, governs as to the quantity of property that the trustee may sell.⁴ A power of sale can never be regarded as an indispensable element of a mortgage, and need not be co-extensive with it.⁵

2. Consideration; Debt Secured.—As against creditors, or a purchaser of the property who has not assumed the debt, a trust deed, to secure notes given merely for love and affection is without valuable consideration and cannot be enforced.⁶

A trust deed is valid to secure future advances, to the amount specified;⁷ also to secure an attorney in the payment of a contingent fee.⁸

It is not essential to the validity of a power of sale that it correctly describes the debt intended to be secured; it is sufficient if the description, though indefinite, is capable of being made certain by parol evidence.⁹ A mere discrepancy, even though large,

grantor, is, in legal effect, a power of sale mortgage. *Cannon v. McNab*, 48 Ala. 99.

A provision in a mortgage that, if the mortgagor "shall fail to make payment, the mortgagee shall advertise and sell enough of the estate herein conveyed to pay, etc., and the mortgagor shall direct what shall be sold," is a sufficient power of sale. *Hyman v. Devereux*, 63 N. Car. 624.

Form of Instrument.—The following instrument was held to be a trust deed or mortgage with the power of sale, on default, and not a mere power of attorney: "Know ye that I do hereby appoint George W. Wightman, my true and lawful attorney in fact, and I do hereby authorize and empower him to sell and dispose of my house and lot in the town of Fayetteville, where I now reside, either for cash or on credit, at his pleasure, unless I shall, on or before the first day of May, 1867, pay off and discharge all the claims for which the said George W. Wightman is now liable as my surety, or where I am indebted to him, or Sinclair and Vanderbilt, whose effects have been assigned to said Wightman in trust. And with this power of sale I do hereby convey and assign to the said George W. Wightman and his heirs, such an interest in the aforesaid house and lot as shall not be revocable by me, or by my death, before the

1st day of May, 1867, but shall be in the said Wightman as an estate in trust to pay the said debts, and to dispose of and convey to the purchaser, I hereby confirming the same." *Pemberton v. Simmons*, 100 N. Car. 316.

In *Vermont*, however, the courts refuse to recognize a power of sale unless "conferred by express grant, and in clear and explicit terms." *Wing v. Cooper*, 37 Vt. 169.

English Statutory Form.—By statute 25 and 26 Vict., ch. 53, the following short form of power in a mortgage is given: "C. D. shall have power to sell on default of payment of the principal or interest, or any part thereof respectively."

1. *Alexander v. Caldwell*, 61 Ala. 543; *Brisbane v. Stongton*, 17 Ohio 482.

2. *Moore v. Lackey*, 53 Miss. 85.

3. *Purdie v. Whitney*, 20 Pick. (Mass.) 25; *Mundy v. Vawter*, 3 Gratt. (Va.) 518; *Jackson v. Lawrence*, 117 U. S. 679.

4. *Donnan v. Intelligencer Printing, etc., Co.*, 70 Mo. 168.

5. *Butler v. Ladue*, 12 Mich. 173; *Hyman v. Devereux*, 63 N. Car. 624.

6. *Brooks v. Owens*, 112 Mo. 251.

7. *McCarty v. Chalfant*, 14 W. Va. 531. See *Schultze v. Houfes*, 96 Ill. 335.

8. *Pitzer v. Burns*, 7 W. Va. 63.

9. *Williams v. Monitean Bank*, 72 Mo. 292; *Scott v. Bailey*, 23 Mo. 140; *Riggs v. Armstrong*, 23 W. Va. 760;

between the actual indebtedness and the amount for which the trust deed or mortgage purports to be security, is not *per se* sufficient to render the incumbrances void as to creditors; the actual intent with which it was given is to be inquired into.¹

A trust deed purporting to secure the payment of a certain note is valid, even though the note is never in fact executed, provided the indebtedness exists for which the note was to have been given.² The fact that one or more of a number of notes secured are invalid, does not destroy the power of sale as to the valid notes.³

3. Parties.—A failure to insert the name of the trustees does not invalidate the security, but resort must be had to equity for foreclosure.⁴

Summers v. Darne, 31 Gratt. (Va.) 791;
Keagy v. Trout, 85 Va. 390.

Uncertainty as to the Amount of Debts.—A trust deed recited that it was given to secure "to William H. Lake a debt due to him, . . . the amount whereof cannot now be accurately stated, but believed to be about the sum of \$2,000; to Theodore M. Triplett a debt due to him by the grantor, the amount whereof cannot now be accurately stated, but the principal of which is believed to be about \$2,600; to J. A. Chappelear a debt of about \$648, due by bond on note, on which the said William H. Lake and Theodore M. Triplett are sureties; to Robert Bayly a debt of about \$3,200, due by the grantor, on which the said William H. Lake is surety; and a debt due to Shacklett & Pfeifer for about \$300, due by note and upon account." It also provided that the trustee should, "with all convenient speed, proceed to ascertain accurately the amount of said several debts." It was held that there was nothing in the deed to warrant the inference that the amount of the debts cannot be accurately ascertained within a reasonable time; nor does the fact that the exact amounts are not stated, render the deed fraudulent *per se*. *Norris v. Lake*, 89 Va. 513.

Compound Interest.—A trust deed was given to secure the payment of a bond bearing annual interest, and for several years thereafter interest notes were executed for the annual installments, bearing the same rate of interest as the bond. It was held that as between the parties, the deed was security for the interest on these interest notes, but not so as against subsequent creditors or purchasers. *Barbour v. Tompkins*, 31 W. Va. 410.

1. *Sawyer v. Bradshaw*, 125 Ill. 440. Thus, if the value of the property be less than the actual debt, other creditors are not prejudiced by the act of the parties in making the debt appear larger. *Sawyer v. Bradshaw*, 125 Ill. 440.

2. *Eacho v. Cosby*, 26 Gratt. (Va.) 112.

3. *Cohn v. Ward*, 32 W. Va. 34.

4. *McQuie v. Peay*, 58 Mo. 56.

An insertion of the trustee's name by the beneficiary, after delivery, without the consent of the grantors, was held to render the deed void, in *Hord v. Taubman*, 79 Mo. 101.

Mistake in Designating Trustee.—

The plaintiff borrowed money, for which he gave his note payable to the defendant, the lender, and to secure it, executed a trust deed upon two lots, which were conveyed in trust by mistake to the defendant as trustee, the deed reciting that it was to secure money due and payable to K. The parties were reversed in the trust deed, the property being conveyed to the creditor instead of the trustee. It was evidently the intention to convey to K. as trustee, to secure the defendant, but by its terms the conveyance was to the defendant to secure K. Default having been made, K., assuming to act as the trustee, sold the property under the power, and it was purchased by the defendant. It was held that as K. was not named as the trustee, his act in selling was that of a mere volunteer, and that the defendant took no title; hence that the plaintiff, upon tendering the amount of the debt, was entitled to have his title cleared of the cloud cast upon it by the pretended sale and conveyance. *McMee v. O'Connor*, 3 Colo. App. 113.

Clerical Mistake.—Where a mortgage provided that on default, the party

The omission of the beneficiary's name is not fatal to the power. As against parties having notice of the trust, the name of the actual beneficiary may be supplied by the trustee and the power enforced for his benefit.¹

Where a trust deed is duly acknowledged by the grantor, but his signature is omitted by mistake, it will be treated in equity as a valid lien, and the grantor may remedy the defect by a new deed.²

It is competent for the legislature, by a curative act, to validate previous sales under powers in mortgages wherein the donees of the power were not properly designated by name; and the fact that a suit was pending at the time of the enactment, to determine the validity of such a sale, does not exclude that case from the operation of the act.³ Nor is it essential to the validity of the power in a trust deed that either the trustee or *cestui que trust* should by any formal writing signify their acceptance of it.⁴

4. Acknowledgment.—As between the parties, a trust deed is valid though not acknowledged.⁵ Even though by reason of defective acknowledgment, the deed would not afford constructive notice by its record, yet it is good *inter partes* and as to those having actual notice of its terms.⁶ The trustee, being one of the parties to the conveyance, is disqualified from taking the acknowledgment of the grantor.⁷

5. Seal.—Though the power be conferred by an instrument not under seal, yet a sale, fairly conducted under it, passes such equitable title to the purchaser as will be upheld and enforced.⁸

6. Delivery.—An instrument containing a power of sale is of

of the first part, the mortgagor, might make the sale, the court treated the instrument as though it read "party of the second part." *Gaines v. Allen*, 58 Mo. 537. See also *Woodward v. Jewell*, 140 U. S. 247.

1. *Sleeper v. Iselin*, 62 Iowa 583.

Description of Beneficiaries.—In a trust deed executed by the owner of a butter and cheese factory, to secure the farmers and dairymen who were supplying him with milk, the beneficiaries were described as "sundry persons or patrons," but not designated by name. It was held that the deed was not void for uncertainty; and that it was a security enforceable for the benefit of all who might become patrons of the factory. *First Nat. Bank v. Schireen*, 127 Ill. 573.

2. *Martin v. Nixon*, 92 Mo. 26.

3. *Madigan v. Workingmen's Permanent Bldg., etc., Assoc.*, 73 Md. 317.

4. *Carpenter v. Bowen*, 42 Miss. 28; *Leffler v. Armstrong*, 4 Iowa 482; *Flint v. Clinton Co.*, 12 N. H. 430; *Crocker v. Lowenthal*, 83 Ill. 579; *Hipp*

v. Hutchett, 4 Tex. 20; *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah 319; *Shearer v. Loftin*, 26 Ala. 703; *Martin v. Paxson*, 66 Mo. 260.

5. *Wilson v. Kimmel*, 109 Mo. 260.

6. *Hannah v. Davis*, 112 Mo. 599; *Bennett v. Shipley*, 82 Mo. 448.

7. *Bowden v. Parrish*, 86 Va. 67.

8. *Watson v. Sherman*, 84 Ill. 263; *Jones v. Brewington*, 58 Mo. 210.

It has been held, however, that where a mortgage with a power of sale is not under seal, and the power has been executed by the sale, but the purchaser has refused to complete his bid because of absence of a seal, a decree *pro confesso* in a suit to which the mortgagor and purchaser are parties, requiring the mortgagor to affix his seal, and providing that the mortgage shall have effect as his deed from the date of its delivery, does not render the sale under the power valid; and the mortgagee may disregard it and maintain an action on the mortgage debt. *Springfield Five Cents Sav. Bank v. South Congregational Soc.*, 127 Mass. 516.

no effect until there has been a legal delivery to the grantee.¹ In respect to trust deeds, however, a delivery to the trustee is not necessary.²

V. INTEREST OF GRANTOR IN TRUST DEED.—A deed of trust being, in substance and effect, a mortgage, it necessarily follows that the grantor in such deed, though nominally divested of the legal title, yet retains an equitable interest corresponding to his equity of redemption under a mortgage; also that in those states where such equities are made subject to execution, the grantor's interest under a trust deed may be seized and sold under execution.³ In some of the states, however, the English rule has been adopted, and the grantor's interest held not subject to seizure at law, the creditor's remedy being by proceedings in equity.⁴ The grantor's interest may be thus sold before any default in the trust debt has occurred, or the power of sale has become operative.⁵ But the purchaser at execution sale does not acquire the legal estate, and therefore cannot maintain ejectment, at least so long as the trust deed remains undischarged.⁶

In *North Carolina*, where the grantor's interest is recognized, and held subject to levy, it was decided that this interest could not be considered a *freehold*, within the meaning of an election law imposing a requirement that the voter must be "possessed of a freehold of fifty acres."⁷

Whatever may be the exact nature of the grantor's interest before sale under the power, his interest in, and right to, any surplus remaining from the proceeds of sale after satisfying liens,

1. *Hammerslough v. Cheatham*, 84 Mo. 13.

2. *Walker v. Johnson*, 37 Tex. 127.

3. *Harrison v. Battle*, 1 Dev. Eq. (N. Car.) 541; *Poole v. Glover*, 2 Ired. (N. Car.) 129; *Wright v. Henderson*, 12 Tex. 43. See also *McGregor v. Hall*, 3 Stew. & P. (Ala.) 397, where it is stated that, "The prevalent doctrine in the states of this union is that such interests may be levied on and sold by execution at law."

In 4 Kent's Com. 160, 161, 195 n, it is said that, "In this country the rule has extensively prevailed that an equity of redemption is vendible as real property on an execution at law."

4. *Morris v. Way*, 16 Ohio 469.

In *Arkansas*, the grantor's interest is not subject to levy, although the statute subjects equitable estates to sale for debt. *Pettit v. Johnson*, 15 Ark. 55.

In *Mississippi*, in an early case, the court observed that, "The interest of a grantor in a deed of trust is not analogous to the interest of a mortgagor, and is not the subject of a lien or

execution at law." *McIntyre v. Agricultural Bank*, 1 Freem. Ch. (Miss.) 105.

5. *Pool v. Glover*, 2 Ired. (N. Car.) 129.

6. *Anderson v. Hollman*, 1 Jones (N. Car.) 169; *Thompson v. Ford*, 7 Ired. (N. Car.) 418.

7. See appendix to 5 Ired. Eq. (N. Car.). The following questions were submitted to the supreme court by the senate: "1st. Is the vote of a bargainor or grantor in a deed of trust (to a trustee to secure debts to other persons with power of sale on default) legal? 2d. Is the vote of such trustee legal? 3d. Is the vote of the *cestui que trust* legal?" *Ruffin*, C. J., speaking for the court, replied in substance: 1st. That a bargainor or mortgagor is not a freeholder, and cannot therefore vote—the execution of such an instrument destroying his freehold estate. 2d. The same as to the beneficiary, because he has neither a legal nor equitable right to the land, but only a right to have his debt satisfied out of it. 3d. That a mortgagee or trustee may vote if actu-

is universally admitted, just as in cases of foreclosure of mortgages.¹

VI. POWER IS COUPLED WITH AN INTEREST, AND IRREVOCABLE.—

Under the common-law doctrine that a mortgage vests the legal title in the mortgagee, a power of sale conferred upon him as such, is a power coupled with an interest in the land to which it relates, and therefore irrevocable by any act or change of circumstances on the part of the mortgagor; and, upon principle, the power is equally coupled with an interest in the land, though possibly not in the strictly technical sense of the term, under the equitable doctrine that the mortgagee has merely a lien to secure his debt. The correct principle would seem to be, that, whether the mortgagee's interest be considered as in the land itself or only in the proceeds, the power is essentially coupled with an interest, and not a mere naked power, subject to revocation. It is accordingly held by most authorities that the death of the mortgagor does not revoke or suspend the power, or require the mortgagee to wait for the appointment of an administrator.² And the lunacy of the mortgagor, pending publication of the notice of sale,

ally in possession for the requisite period, but not otherwise.

1. See *infra*, this title, *Surplus Proceeds*.

2. **Power Irrevocable.**—*Hunt v. Rousmaniere*, 8 Wheat. (U. S.) 174; *Strother v. Law*, 54 Ill. 413; *Brewer v. Winchester*, 2 Allen (Mass.) 389; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Cranston v. Crane*, 97 Mass. 459; *Conners v. Holland*, 113 Mass. 50; *Wiswall v. Roos*, 4 Port. (Ala.) 328; *Hyde v. Warren*, 46 Miss. 13; *Collins v. Hopkins*, 7 Iowa 463; *Hodges v. Gill*, 9 Baxt. (Tenn.) 378; *Beatie v. Butler*, 21 Mo. 313; *De Jarnette v. De Giverville*, 56 Mo. 440; *White v. Stephens*, 77 Mo. 452; *Bell v. Twilight*, 22 N. H. 500; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Berry v. Skinner*, 30 Md. 567; *Corder v. Morgan*, 18 Ves. 344.

The power is annexed or appendant to the estate conveyed by the mortgage, and is coupled with an interest. *Pickett v. Jones*, 63 Mo. 105; *McGuire v. Van Pelt*, 55 Ala. 344; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Wilbum v. Spafford*, 4 Sneed (Tenn.) 608; *Hannah v. Carrington*, 18 Ark. 104; *Hill on Trustees*, 88, 338, note.

A leading case on the question, whether a power of sale given to a mortgagee is revocable by the mortgagor, is *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 15; 2 Am. Dec. 281, in which the opinion of the court was rendered by Kent, J., who said: "It is admitted

that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion, the power contained in this mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to the person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. These last powers are subdivided into powers annexed to the estate, and powers in gross. Both are considered as powers with an interest, because the trustee of the power has an interest in the estate, as well as in the exercise of the power. If, as one of the old cases expresses it, the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savors of the land. The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, nor never had, any estate whatever. I

does not suspend the power;¹ nor does the institution of bankruptcy or insolvency proceedings against him.² Where the mortgagor voluntarily goes within the enemy's lines, with the intention of casting his lot with the enemy, the power is neither revoked nor suspended.³ And where the power of sale in a deed of trust is conferred upon the trustee and not upon the creditor, it is held by most courts to be coupled with an interest, and cannot be revoked, the trustee being vested with the legal estate.⁴

In a few of the states, however, the doctrine prevails that, as the mortgagee has no estate in the land, a power of sale to him is

might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority; but I think the point is susceptible of more precise and definite illustration. If a man, by his will, directs his executors to sell his land, this is but a bare authority without interest, for the land, in the meantime, descends to the heir at law, who, until the sale, would at common law be entitled to the profits; and, being but a naked authority, if one executor dies, the power at common law would not survive. But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest; for the executors, in the meantime, take possession of the land and of the profits. In this case, as the estate, so also the trust, would survive to the surviving executor. There is a very striking analogy between this case, of a devise of land to executors to be sold, and a mortgage of land with a power to sell. In both cases the estate passes to the person clothed with the power, and in both cases the power is given in trust, to answer a specific purpose. I cannot discern any distinction between the cases, sufficient to render the power in the one instance naked, and in the other coupled with an interest. It is not a power with interest in the executors, because they may derive a personal benefit from the devise; for a trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question; and where an executor, guardian, or other trustee, is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest and survives. . . . I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the

ground that was taken in the court below." This case has been extensively cited and approved by the courts. *Olcott v. Tioga R. Co.*, 27 N. Y. 566; *Franklin v. Osgood*, 14 Johns. (N. Y.) 553; *Jackson v. Davenport*, 18 Johns. (N. Y.) 300; *Caulfield v. Monger*, 12 Johns. (N. Y.) 347; *Bradstreet v. Clark*, 12 Wend. (N. Y.) 664; *Taylor v. Morris*, 1 N. Y. 358; *Lawrence v. Farmers' L. & F. Co.*, 13 N. Y. 213; *Gardner v. Ogden*, 22 N. Y. 348; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 700; *Hunt v. Rousmaniere*, 2 Mason (U. S.) 244; *Peter v. Beverly*, 10 Pet. (U. S.) 564; *Taylor v. Benham*, 5 How. (U. S.) 269. In *Lockett v. Hill*, 1 Woods (U. S.) 560, *Erskine, J.*, observed that it was the first reported case in this country on the subject.

1. *Berry v. Skinner*, 30 Md. 567; *Encking v. Simmons*, 28 Wis. 272; *Davis v. Lane*, 10 N. H. 156.

2. *McGready v. Harris*, 54 Mo. 137; *Dixon v. Ewart*, 3 Mer. 321; *Hall v. Bliss*, 118 Mass. 554; *Long v. Rogers*, 6 Biss. (U. S.) 416.

3. *Mitchell v. Nodaway County*, 80 Mo. 257; *Bush v. Sherman*, 80 Ill. 160.

The mortgagor's grantee, who had always resided in one of the confederate states, was held subject to the same rule, in *Harper v. Ely*, 56 Ill. 179.

4. *Bancroft v. Ashhurst*, 2 Grant's Cas. (Pa.) 513; *Black v. Gregg*, 58 Mo. 565; *Connors v. Holland*, 113 Mass. 50; *More v. Calkins*, 95 Cal. 435; *Hodges v. Gill*, 9 Baxt. (Tenn.) 378; *Hudgens v. Morrow*, 47 Ark. 515.

Under a trust deed empowering the sheriff of the county to sell in case of the death or disability of the trustee, the sheriff may exercise the power, when the necessity arises, even though the grantor is dead. *White v. Stephens*, 77 Mo. 452.

In *West Virginia*, the court will not necessarily enjoin the execution of a power of sale by the trustee, after the

not coupled with an interest, and therefore does not survive the death of the mortgagor or grantor in a trust deed.¹ It is said to be a "collateral" power, and one which the mortgagor himself cannot revoke during his lifetime.²

In *Illinois*, it has been provided by statute that the death of the grantor or owner of the equity of redemption, under a mortgage or trust deed, terminates the power of sale, and thereafter foreclosure must be had by action.³

A mere power of attorney from a debtor to his creditor, authorizing the latter to sell and convey the property, satisfy his claim out of the proceeds, and account for the balance, is only a naked power, and subject to revocation.⁴

The right of foreclosure under a power of sale, pursuant to the statute in force at the time of its execution, is a vested right which cannot be taken away by subsequent legislation.⁵

VII. THE TRUSTEE ; HIS DUTIES AND LIABILITIES.—The equitable

death of the grantor. The length of time that has elapsed since his death, and the amount of personal estate in the hands of his representatives, applicable to payment of the debt, will be taken into consideration. *Spencer v. Lee*, 19 W. Va. 179.

1. *Darrow v. St. George*, 8 Colo. 592; *Robertson v. Paul*, 16 Tex. 472; *Batts v. Scott*, 37 Tex. 59; *Buchanan v. Moore*, 22 Tex. 537; *McLane v. Paschal*, 47 Tex. 365; *Lathrop v. Brown*, 65 Ga. 312; *Miller v. McDonald*, 72 Ga. 20. But see *Calloway v. People's Bank*, 54 Ga. 441.

In *Robertson v. Paul*, 16 Tex. 472, the principle that the power is not revoked by death, was recognized by the court, but it was considered that its exercise was inconsistent with the statute requiring "claims for money" against the estates of decedents to be proved and allowed, before the administrator could lawfully pay them.

In *Johnson v. Johnson*, 27 S. Car. 309, it is held that a power of sale does not survive the death of the mortgagor, the decision being based on the ground that the legal title does not pass to the mortgagee, whose only interest is in the proceeds of the sale, and not in the property itself. In the course of the opinion the court, *per* McGowan, J., made the following criticism: "We are aware that Mr. Jones (vol. 2, *Mortg.*, § 1794) has expressed the opinion that 'the rule is the same in those states where, by statute or adjudication, a mortgage is regarded as a mere security for the debt, passing no title or estate to the mortgagee; the power

of sale is coupled with an interest, and is irrevocable, just the same as it is where the common-law doctrine, that the mortgage conveys the legal estate still prevails,' and cites as authority for the proposition *Calloway v. Bank*, 54 Ga. 441. But as the learned author in the same book repeatedly declares that the deed of the sale under the power, should be made by the holder of the legal title, we must suppose that he failed to note clearly the great difference as to title between a common-law mortgage, and one executed under a statute such as that in this state." The language criticised above, was omitted by Mr. Jones, in the last edition of his work on mortgages.

2. The case of *Lockett v. Hill*, 1 Woods (U. S.) 552, was decided by the circuit court in *Georgia*, where the equitable theory of mortgages prevails.

Cannot Be Changed Without Consent.—A trust mortgage on railroad property was given to secure bonds equally. The trustee, without foreclosure and without the consent of the plaintiff, one of the secured bondholders, entered into a "reorganization" scheme, by which three mortgages, one covering debts other than the mortgage bonds, and the others being inferior securities, were to be substituted for the trust mortgage, and new bonds issued. It was held that such arrangement was void as to the plaintiff. *Hollister v. Stewart*, 111 N. Y. 644.

3. *Illinois* Rev. St. 1874, ch. 95, § 13.

4. *Mansfield v. Mansfield*, 6 Conn. 559.

5. *O'Brien v. Krenz*, 36 Minn. 136.

principles which govern the conduct and fix the responsibility of trustees generally, apply with full force to trustees with power to sell for the payment of debts. Such a trustee necessarily occupies a position of great trust and confidence between the parties and it is a requirement of the first importance that he shall be unprejudiced and unbiased in favor of either party. He should not be personally interested in the debt secured, nor closely related to either of the parties.¹ If a state of personal ill-will exists between the trustee and the beneficiary, this furnishes ground for his removal by a court of equity.²

It will be presumed that the trustee is not personally interested in the debt; and when the trustee claims to own it, this presumption must be overcome by satisfactory evidence.³ The fact that the person named as trustee is the real owner of the debt secured does not, however, invalidate the power of sale; because the effect of such ownership is merely to render his position that of a mortgagee with power of sale.⁴ The trustee's position is that of agent for the grantor and his privies in estate, as well as for the *cestui que trust*, and in carrying out his trust, he must avoid all partiality toward either side.⁵

All directions contained in a power, in respect to the manner of executing it, must be strictly and fairly complied with.⁶

1. *Long v. Long*, 79 Mo. 644; *Gimbel v. Pignero*, 62 Mo. 240; *In re Mayfield*, 17 Mo. App. 684; *Jones Mortg.* (4th ed.) 1771.

But the mere fact that the trustee, in a deed to secure the purchase price of the land, had acted as attorney in fact for the vendor, in connection with the sale thereof to the trust deed grantor, does not render him incompetent to act as trustee. *Sternberg v. Valentine*, 6 Mo. App. 176.

"The mortgagor is apt to suppose that, in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of the trustee, whose disinterestedness is no more than that of the creditor himself. The trustee is obliged to act, when the creditor, secured by the deed, has a legal right to call for the exercise of the power, and if he neglects or refuses to act, he may be compelled to do so or to give up the trust." *Jones Mortg.* (4th ed.) 1770.

Fraudulent Release by Trustee.—The trustee in a trust deed, to whom had been intrusted for collection, the note secured and indorsed in blank, fraudulently pledged it before maturity to B.,

to secure a personal debt. Subsequently, he obtained the record title, and recorded a release of the trust deed, executed by himself as trustee, and upon the strength of his apparently clear title, he borrowed money secured upon the property. It was held that, as between B. and the other lienors, B. had the better equity, and that the acts of the trustee, after he had obtained the title, could not be regarded as those of a trustee. *Smith v. Perkins*, 8 Biss. (U. S.) 73.

2. *McPherson v. Cox*, 96 U. S. 404. Hostility between the trustee and *cestui que trust*, while of itself not always a sufficient ground of removal, becomes sufficient, where it appears that the trustee's action is probably controlled, or might be controlled, by it. *Gartside v. Gartside*, 113 Mo. 348.

3. *Gimbel v. Pignero*, 62 Mo. 240.
4. *Cassady v. Wallace*, 102 Mo. 575; *Foster v. Latham*, 21 Ill. App. 165.

5. *Graham v. King*, 50 Mo. 22; *Bales v. Perry*, 51 Mo. 449; *Sherwood v. Saxton*, 63 Mo. 78; *Meacham v. Steele*, 93 Ill. 135; *Cassidy v. Cook*, 99 Ill. 385; *Ventres v. Cobb*, 105 Ill. 33; *Williamson v. Stone*, 128 Ill. 129; *Little Rock, etc., R. Co. v. Huntington*, 120 U. S. 160.

6. *Sears v. Livermore*, 17 Iowa 297; *Ingle v. Culbertson*, 43 Iowa 265; *Hall*

Mere notice given to the trustee, at the time of his sale, that his trust deed was executed with intent to defraud, does not make it the trustee's duty to abandon the sale, and leave the parties to determine their rights in equity.¹

For an abuse of his powers, or a neglect to exercise proper diligence, the trustee is personally liable in damages to the party injured;² but he is not liable to any one for mere errors in judgment, where he has not been influenced by passion, prejudice, or corrupt motives.³

The rule of *caveat emptor* cannot be invoked to relieve the trustee from liability for deceit practised upon the purchaser at his sale.⁴

If a sheriff, or other person authorized by statute, acts in place of the trustee in making the sale, he and the sureties on his official bond are liable for his misconduct.⁵

A mortgagee with power of sale is commonly spoken of by the courts as a "trustee" in respect to his duties in the execution of the power. He is not, however, in any proper sense a trustee, because he stands at all times in the position of a creditor whose interests are adverse to the mortgagor; and when he executes the power, he does so solely for his own benefit, and not in a fiduciary capacity. The courts seem to have applied the term "trustee" to him, as being the most convenient word for expressing his admitted obligation to act as a prudent, careful business man would act, in exercising the power, and to refrain from using his privilege in a manner to defeat the rights of others. While he is not in the position of an ordinary trustee, yet it is always incumbent on him to exercise good faith, and to use reasonable diligence to protect the rights of the mortgagor.⁶

v. Towne, 45 Ill. 493; *Smith v. Provin*, 4 Allen (Mass.) 516; *Ormsby v. Taracson*, 3 Litt. (Ky.) 404.

In *Davis v. Hess*, 103 Mo. 31, the court said: "Sales under powers contained in mortgages and deeds of trust have always been regarded by this court as a harsh method of cutting off the equity of redemption, and hence it has been held that the utmost fairness must be observed in the execution of such powers. But, as said in *Waller v. Arnold*, 71 Ill. 350, such strictness and literal compliance should not be exacted as will destroy the power. This would render valueless the security intended to be afforded."

1. *Erwin v. Hall*, 18 Ill. App. 315.

2. *Murrell v. Scott*, 51 Tex. 520; *Sherwood v. Saxton*, 63 Mo. 78.

3. *Webber v. Curtiss*, 104 Ill. 309; *Ventres v. Cobb*, 105 Ill. 33.

4. *Hayes v. Debzell*, 21 Mo. App. 679.

5. *State v. Griffith*, 63 Mo. 545;

White v. Stephens, 77 Mo. 452; *Beal v. Blair*, 33 Iowa 318.

6. *Robertson v. Norris*, 4 Jur. N. S. 155; *Jones v. Mattheie*, 11 Jur. 504; *Adams v. Scott*, 7 W. R. 217; *Kirkwood v. Thompson*, 2 Hem. & M. 392; *Montague v. Dawes*, 14 Allen (Mass.) 369; *Drinan v. Nichols*, 115 Mass. 353; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306; *Clark v. Simmons*, 150 Mass. 357; *Longwith v. Butler*, 8 Ill. 32; *Meacham v. Steele*, 93 Ill. 135; *Bedell v. McClellan*, 11 How. Pr. (N. Y. Supreme Ct.) 172; *Ellsworth v. Lockwood*, 9 Hun (N. Y.) 548; *Howell v. Pool*, 92 N. Car. 450; *Hoffman v. Anthony*, 6 R. I. 282; *Horsely v. Hough*, 38 Md. 130; *Thornton v. Irwin*, 43 Mo. 153; *Markey v. Langley*, 92 U. S. 142.

He is a trustee for the mortgagor, only with respect to the balance of purchase-money or surplus after sale. *Warner v. Jacob*, 20 Ch. Div. 220; *Martinson v. Clowes*, 21 Ch. Div. 857. But

VIII. RIGHT OF ENTRY AND POSSESSION; RENTS AND PROFITS.—A trust deed giving the trustee power to convey the property to the creditor, upon default in payment of the debt, does not entitle the latter to possession without foreclosure and sale.¹

As a general rule, the grantor in a trust deed is entitled to the rents and profits until foreclosure, in the absence of a different stipulation in the deed.² But after a decree has been entered directing sale, the beneficiary is entitled to a receiver for the rents and profits pending the further proceedings.³

The trustee, after default, but without entry by, or attornment to him, cannot enforce the payment of rent from a tenant not a party to the deed.⁴ Nor can he maintain ejectment in order to apply the rents and profits in discharge of the debt, until he has

see *Richmond v. Evans*, 8 Grant's Ch. (Ont.) 508.

In *Matthie v. Edwards*, 2 Coll. 480, Knight Bruce, V. C., said: "The mortgagee having a power of sale, cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion, not to throw away the property, but to act in a prudent and business-like manner, with a view to obtaining as large a price as may fairly and reasonably, with due diligence and attention, be, under the circumstances, obtainable."

He should use every effort which a prudent proprietor would use, to have the sale conducted under circumstances of the greatest advantage. *Richmond v. Evans*, 8 Grant's Ch. (Ont.) 508; *Latch v. Furlong*, 12 Grant's Ch. (Ont.) 303. The fact that he has not sought a higher offer from one or two persons professing to purchase by private contract, before closing with a rival bidder, is not a ground for setting aside, or canceling the contract. *Davey v. Durrant*, 1 DeG. & J. 535.

1. *Fee v. Swingly*, 6 Mont. 506.

2. **Liability for Rents.**—*Easley v. Tarkington*, 5 Baxt. (Tenn.) 592. A trust deed, after the granting clause, contained the words, "together with the net income realized from said property as the rents thereof." There was no express provision for taking possession on default in payment of interest; and no demand was ever made by the trustee, or the beneficiary, for the rents, or for an accounting. It was held that a purchaser, in possession through

a sale under a second trust deed, could not be charged by the first trustee for the rents accruing while he was thus in possession, and prior to any attempt by the trustee to take possession upon default. *In re Life Assoc. of America*, 96 Mo. 632.

Railroad Mortgage.—In *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, a railroad company, to secure its bonds, executed to trustees two mortgages conveying its road and other property, "together with the tolls, rents, and profits." The court, after speaking of the general rule, that until a mortgagee takes possession, the mortgagor is entitled to all the profits, said: "It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagee should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. . . . In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it. But they did neither." See also *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 482; *White v. Wear*, 4 Mo. App. 341; *American Bridge Co. v. Heidelberg*, 94 U. S. 798.

3. *Bidwell v. Paul*, 5 Baxt. (Tenn.) 693.

4. *Forlough v. Bowlin*, 29 Ill. App. 471.

complied with all the provisions of the trust deed in respect to first exhausting other assets of the grantor.¹

A power to a trustee in a mortgage to sell upon request of the mortgagee, does not necessarily imply a right to enter upon the premises for that purpose.²

If necessary for the purposes of the trust, the trustee may, even after the power has been executed, sue for damages done to the estate before the sale. And it seems that the *cestui que trust* may also sue.³

The trustee in a trust deed covering personal property, has the legal title after default, which continues even after a sale by him and before actual delivery to the purchaser; and he can maintain replevin or trover.⁴

IX. THE POWER IS A CUMULATIVE REMEDY.—While the constantly increasing use of powers of sale in mortgages has relieved courts of equity from much labor, they have refused to be ousted of their long-established jurisdiction by the existence of the new remedy; and the doctrine unanimously prevails that the insertion of a power of sale in a mortgage, merely gives to the mortgagee an additional, or cumulative remedy, which, if he desires, he may disregard, and maintain a suit for foreclosure in the usual way.⁵

1. *Davis v. Bessehl*, 88 Mo. 439; 15 Mo. App. 575.

2. *Watson v. Waltham*, 2 Ad. & El. 485; 29 E. C. L. 153; 1 H. & W. 24.

3. In *Johnson v. Houston*, 47 Mo. 227, it is held that after a condition broken, the legal title vests in the trustee, with a right of entry for the purposes of the trust. As to his right to maintain ejectment, see *Siemers v. Schrader*, 88 Mo. 20; 14 Mo. App. 346.

Trustee's Right of Entry.—A trust deed to secure certain bonds was conditioned to be void upon payment of the principal and interest thereof; it was also provided that upon default, the trustees might enter and manage the estate, consisting of unimproved city property, "so long as said default shall continue," and with power to dispose of it for the best interests of all parties; and that, after payment of the bonds, the trustees "shall restore the residue thereof, and all lands, securities and other property, after such payment, to the party of the first part." There was no provision fixing a time for redemption. It was held, that an entry by the trustee would not work a forfeiture by lapse of time, and that the deed by its own terms precluded a strict foreclosure. *Shepard v. Richardson*, 145 Mass. 32. See *Foster v. Boston*, 133

Mass. 143, where the same trust deed was under consideration.

3. *Chouteau v. Boughton*, 100 Mo. 406; *Lancaster v. Connecticut Mut. L. Ins. Co.*, 92 Mo. 460; *Myers v. Hale*, 17 Mo. App. 205.

Suit to Quiet Title.—Under a deed authorizing the trustees to take full possession and control of the lands; to sell the same at public or private sale, for cash or on time, and for such sums and in such manner as they should see fit; to do any and everything with regard thereto, as if their own individual property; and to make good and sufficient warranty deeds thereto; it was held that the trustees, having conveyed the property, were entitled to maintain an action to remove a cloud from the title, and to cancel sales affecting it. *Lerch v. Snyder*, 2 Tex. Civ. App. 421.

4. *Pace v. Pierce*, 49 Mo. 393; *Lacey v. Giboney*, 36 Mo. 320; *Dean v. Davis*, 12 Mo. 112.

5. *Wayne v. Hanham*, 9 Hare 62; *In re Wilkinson*, 41 L. J., Ch. 392; 13 L. R. Eq. 634; *Cockell v. Bacon*, 16 Beav. 158; *Brisbane v. Stoughton*, 17 Ohio 482; *Hurd v. Case*, 32 Ill. 45; *Funk v. McReynolds*, 33 Ill. 496; *Warwick v. Hull*, 102 Ill. 280; *Ryan v. Newcomb*, 125 Ill. 91; *Huston v. Seeley*, 27 Iowa 183; *White v. Savery*, 50 Iowa

If the power be so defective that it cannot be executed, the validity of the mortgage is not thereby affected. Foreclosure can still be had in equity.¹ In this respect there is no distinction made between trust deeds and power of sale mortgages. The *cestui que trust* is entitled to have the deed foreclosed in equity—a method of proceeding which frequently becomes preferable to a sale by the trustee;² for instance, the trustee may decline to act, in which case any party interested may bring suit to foreclose.³

The trustee may and should, upon his own motion, apply to a court of equity to remove impediments to a fair execution of the trust, to remove any cloud that may be hanging over the title, and to adjust accounts, if necessary, in order to ascertain the amount which ought to be raised by the sale, or the amount of prior incumbrances. And if he fails to do this in a proper case, any party interested, whether he be the creditor secured by the

515; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *Fanning v. Kerr*, 7 Iowa 450; *Crocker v. Robinson*, 8 Iowa 404; *Cormerais v. Genella*, 22 Cal. 116; *Fogarty v. Sawyer*, 17 Cal. 589; *Brickell v. Batchelder*, 62 Cal. 623; *Walton v. Cody*, 1 Wis. 420; *Atwater v. Kinman*, Harr. (Mich.) 243; *Morrison v. Bean*, 15 Tex. 267; *Blackwell v. Barnett*, 52 Tex. 326; *Wofford v. Holmes County*, 44 Miss. 579; *Dibrell v. Carlisle*, 48 Miss. 691; *Thompson v. Houze*, 48 Miss. 444; *McAllister v. Plant*, 54 Miss. 106; *McDonald v. Vinson*, 56 Miss. 497; *Marx v. Davis*, 56 Miss. 745; *Green v. Gaston*, 56 Miss. 748; *Marriott v. Givens*, 8 Ala. 694; *America, etc., Mortg. Co. v. McCall*, 96 Ala. 200; *Vaughan v. Marable*, 64 Ala. 60; *Phoenix Mut. L. Ins. Co. v. Grant*, 3 McArthur (D. C.) 42; *Knox v. McCain*, 13 Lea (Tenn.) 197; *Frierson v. Blanton*, 1 Baxt. (Tenn.) 272; *Charleston v. Caulfield*, 19 S. Car. 201; *Denver Brick, etc., Co. v. McAllister*, 6 Colo. 261; *First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32.

Foreclosure in Equity.—When the power does not authorize the mortgagee to purchase at a sale under it, and the mortgagor is insolvent, and a dispute exists as to the validity of the mortgage, by reason of which no sale under the power could be made for a fairly adequate price, a proper case is presented for foreclosure in equity, and for the application of the rents and profits to the payment of the mortgage debt. *American, etc., Mortg. Co. v. McCall*, 96 Ala. 200.

A foreclosure by advertisement of

one of two mortgages of even date, and intended to be simultaneous, is not effectual to determine the rights of a purchaser under such foreclosure as against the holder of the other mortgage; hence a bill in equity is proper to determine the respective rights, and to obtain a sale of the property. *Van Aken v. Gleason*, 34 Mich. 478.

The creditor, for whose benefit a number of trust deeds to several trustees have been given, may maintain one suit to foreclose them all, particularly where some are defective as to the power of sale. Nor does the fact that other persons claim liens on the land, affect the creditor's right to have the interests of all parties settled in one suit. *Grant v. Phoenix Mut. L. Ins. Co.*, 121 U. S. 105.

1. *Bay City State Bank v. Chapelle*, 40 Mich. 447; *Cowles v. Marble*, 37 Mich. 158.

2. *Youngman v. Elmira, etc., R. Co.*, 65 Pa. St. 278; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *Blackwell v. Barnett*, 52 Tex. 326; *Myers v. Estell*, 48 Miss. 372.

Thus, equity will foreclose a deed of trust, where the bill shows that the land has, since the execution of the deed, been subdivided among numerous parties in interest, and serious complications involved. *Phoenix Mut. L. Ins. Co. v. Grant*, 3 McArthur (D. C.) 42.

3. Even though the trust deed was given to secure future advances upon subscriptions not made at the time the deed was executed. *White v. Savery*, 50 Iowa 515.

deed, a subsequent incumbrancer, or the debtor himself, has an undoubted right to make the application.¹

It seems that foreclosure may be had in equity, even before the power to sell has become operative, as where the debt has become due, but default has not continued for the period required to authorize a sale by the trustee.²

If, after foreclosure of a trust deed by a suit in equity to which the trustee was not made a party, he attempts to execute the power, or to assert his legal title, he will be restrained by injunction.³

An abortive attempt to foreclose under the power is no bar to the right to foreclose by action.⁴ On the other hand, the pendency of a suit by the mortgagee to foreclose, does not necessarily deprive him of the right to proceed to execute his power of sale, even against the objection of the owners of the equity of redemption and subsequent incumbrancers.⁵ And the creditor may sell under a trust deed securing his debt, notwithstanding the pendency of a suit between him and his debtor to ascertain the amount due. But in such case the sale will be subject to whatever decree may be entered.⁶ So, the pendency of a suit by the mortgagor to have the mortgage adjudged, satisfied, and canceled, will not prevent the mortgagee from proceeding to sell under his power; he is not obliged to apply to the court in that suit for a decree of foreclosure.⁷ It seems, however, that if the mortgagee makes a junior incumbrancer a party defendant to a suit to foreclose, and pending the suit, exercises his power of sale, the court will allow such junior incumbrancer to redeem from the sale.⁸

A bill by the mortgagee to foreclose will not be entertained after he has elected to exercise his power of sale, and has acquired the rights of the purchaser at the sale.⁹

Where, on a bill to enjoin the mortgagee from selling under the

1. Rossett v. Fisher, 11 Gratt. (Va.) 493; Curry v. Hill, 18 W. Va. 370; Lallance v. Fisher, 29 W. Va. 512.

2. Mercantile Trust Co. v. Missouri, etc., R. Co., 36 Fed. Rep. 221; Chicago, etc., R. Co. v. Fosdick, 106 U. S. 47; Robinson v. Alabama, etc., Mfg. Co., 48 Fed. Rep. 12.

But in Potomac Mfg. Co. v. Evans, 84 Va. 717, where a trust deed, provided for a sale upon default in the payment of interest continuing for six months after maturity and demand, and a suit to foreclose was brought within six months after such demand, a decree of sale was reversed on appeal, notwithstanding it was rendered more than six months after the commencement of the suit.

3. Green v. Gaston, 56 Miss. 748.

4. Rogers v. Benton, 39 Minn. 39.

Foreclosure in Equity After Sale. —

Where the trustee sells under the power, upon default in but one of three notes secured, and the holder of that note purchases all the property at the sale for one-third of its value, with the knowledge that the other notes are outstanding, and the debtor redeems from the sale, equity will again foreclose to protect the other notes. Shields v. Dyer, 86 Tenn. 41. See also Wicks v. Caruthers, 13 Lea (Tenn.) 353; Andrews v. Hobgood, 1 Lea (Tenn.) 693.

5. In re Wilkinson, 41 L. J. Ch. 392; 13 L. R. Eq. 634; Brisbane v. Stoughton, 17 Ohio 482.

6. Jenkins v. International Bank, 111 Ill. 462.

7. Montgomery v. McEwen, 9 Minn. 103.

8. Hurd v. Case, 32 Ill. 45.

9. McLean v. Presley, 56 Ala. 211.

power, he files a cross-bill praying for foreclosure, this will be treated as a waiver and abandonment of any purpose to proceed under the power.¹

An entry by the mortgagee after default for the purpose of foreclosure, and his receipt of the rents and profits, will not prevent him from subsequently exercising the power of sale, to satisfy the unpaid balance of the mortgage debt.²

X. WHO MAY EXERCISE THE POWER—1. **Power Cannot Be Delegated.**—The office of trustee is one of personal trust and confidence, and therefore cannot be delegated, unless authority to do so is expressly granted in the instrument creating the trust.³ The use of the word "assigns" in the *habendum* of a trust deed, will not be construed to authorize the trustee to delegate his power.⁴ An assignment by the trustee of his interest in the debt secured by the trust deed, does not operate as an assignment of the trust.⁵

The trustee must be present and supervise the proceedings during the entire time occupied in making the sale. It is not enough for him to appear at the opening and close, and absent himself during its progress.⁶ But in the absence of evidence of unfairness, a sale will not be set aside because one of two joint trustees was not present, the other having personally conducted it.⁷ But

1. Warrick v. Hull, 102 Ill. 280.

2. Montague v. Dawes, 12 Allen (Mass.) 397.

3. Doe v. Robison, 24 Miss. 688; Flower v. Elwood, 66 Ill. 438; Foster v. Strong, 5 Ill. App. 223; Grover v. Hale, 107 Ill. 638; Brickenkamp v. Rees, 69 Mo. 426; Powell v. Tuttle, 3 N. Y. 397; Landrum v. Union Bank, 63 Mo. 48; Graham v. King, 50 Mo. 22; Spurlock v. Sproule, 72 Mo. 503; Bales v. Perry, 51 Mo. 451; Harper v. Mansfield, 58 Mo. 17; Bitter v. Calhoun (Tex. 1888), 8 S. W. Rep. 523; Singer Mfg. Co. v. Chalmers, 2 Utah 542. See *infra*, this title, *Executors and Administrators*.

Personal Trust.—"The course marked out for the trustee to pursue must be strictly followed by him, for the method of enforcing collection through such deeds is a harsh one. The grantor of the power is entitled to have his directions obeyed, to have the proper notice of sale given, to have it take place at the time and place, and by the person appointed by him. He gives these directions because he thinks that a sale made by the person selected, and under the circumstances stated, will be to his interest and make his property produce the largest amount of money. Of the prescribed conditions, none is more important than that which requires that the trustee shall in person make the

sale. He is chosen because of the confidence the grantor has in his integrity and discretion. The trustee, in making the sale, and during the time the property is under the hammer, is expected to protect the interests of the grantor, to see that no fraud is practised detrimental to his interests, and that no improper bid is accepted, and that the property is not knocked off without giving fair opportunity for it to bring its reasonable value. Perhaps the agent selected by the trustee to attend to this important matter is not one to whom the grantor himself would have intrusted it. He has reposed confidence in the party selected by him, and that confidence cannot be transferred without his consent. The trustee can no more absent himself while the sale is going on, than he can make it at a time or place or for a character of consideration different from that authorized in the deed. These views are so well supported by authority that it is unnecessary to further elaborate them." Willie, C. J., in Fuller v. O'Neal, 69 Tex. 349. See also Perry on Trusts, 402, 499, 602, 779, 780.

4. Whittlesey v. Hughes, 39 Mo. 13.

5. Charter Oak L. Ins. Co. v. Gisborne, 5 Utah 319.

6. Brickenkamp v. Rees, 3 Mo. App. 585; 69 Mo. 426.

7. Smith v. Black, 115 U. S. 308.

the rule under consideration does not apply to mortgagees with a power of sale.¹ The mere fact that the sale is conducted by the attorney in the absence of the mortgagee, will not render the title therefrom void.²

A failure on the part of the trustee to personally supervise and conduct the sale, affords ground for setting it aside at the instance of the holder of the equity, notwithstanding it may have been fairly conducted.³

The mere verbal assent of the grantor and beneficiary to the trustee's being absent from the sale and leaving the conduct of it to a stranger, will not amount to a proper authority to delegate the power.⁴ The objection of lack of authority, or that the trustee was absent from the sale, cannot in any case be considered, unless properly raised by the issues.⁵ The burden of proving that the right to delegate the power existed, and that such delegation was properly made, is, of course, on the party claiming under a sale made by a third person assuming to act for the trustee.⁶

It has been held that the title of an innocent subsequent grantee from the purchaser at a sale under a power, is not affected by the fact that the power was executed by the trustee's agent or attorney,⁷ but there is no good reason why such grantee should have any better title, as against the owner of the equity, than the original purchaser obtained.

While the trustee or mortgagee must personally execute the

Even though the creditor became the purchaser.

1. *Fogarty v. Sawyer*, 23 Cal. 570. In this case the sale was made by an auctioneer.

In *Cranston v. Crane*, 97 Mass. 459, the court said: "We are of opinion that the giving of notice and entry upon the land and the conduct of the auction were all matters which the mortgagee might properly employ others to do under his discretion; that it did not require authority under seal for these purposes." See also *Hubbard v. Jarrell*, 23 Md. 82.

In *Welsh v. Coley*, 82 Ala. 363, it was said: "That the fact that the auctioneer at the sale was purchaser and that the mortgagee was not present, are not sufficient to set the sale aside. At least such is the rule after the acquiescence of nine years." See *Garland v. Watson*, 74 Ala. 323.

2. *Parker v. Banks*, 79 N. Car. 480; *Hoit v. Russell*, 56 N. H. 559; *McHany v. Schenk*, 88 Ill. 357.

At most, such an irregularity in the sale only renders the title voidable, and an application to set it aside should be made within a reasonable time before the rights of innocent third parties

have intervened. *Munn v. Burges*, 70 Ill. 604.

The maker of the power alone can question the irregularity of such sale; a creditor cannot. A delay of over four years in filing a bill to avoid the sale, is fatal to relief in equity. *McHany v. Schenk*, 88 Ill. 357.

In *Texas*, it seems that the contrary is held, and there the mortgagee has no power to appoint another to make the sale of the land as his agent. *Bitter v. Calhoun* (Tex. 1888), 8 S. W. Rep. 523.

In *Crafts v. Daugherty*, 69 Tex. 477, it was held that a sale by an agent of the mortgagee who was not empowered to delegate his authority, though not depriving the mortgagor of the right to redeem, conferred all the mortgagee's rights on the purchaser, and the mortgagor could not maintain an action to try title against such purchaser.

3. *Grover v. Hale*, 107 Ill. 638; *Vail v. Jacoba*, 62 Mo. 130; *Howard v. Thornton*, 50 Mo. 291; *St. Louis v. Priest*, 14 Mo. App. 575; 88 Mo. 612.

4. *Smith v. Lowther*, 35 W. Va. 300.

5. *Kennedy v. Dunn*, 58 Cal. 339.

6. *Littell v. Jones*, 56 Ark. 139.

7. *McHany v. Schenk*, 88 Ill. 357.

power, he may employ others to assist him, by acting as auctioneer,¹ posting the notices of sale,² or doing any other act which does not require the exercise of discretion.

2. Joint Trustees Must Act Jointly.—The equitable doctrine that where a trust is conferred upon two or more persons jointly, all the trustees must unite in executing the trust, applies with full force to grantees in trust deeds and mortgages. No one of the trustees, nor any number less than the whole, can exercise the power, unless expressly authorized by the deed,³ and even then, if they elect to act jointly, as by giving a joint notice of sale, one of them cannot afterwards act alone in making the sale.⁴

The members of a partnership named as mortgagees are regarded as joint trustees, and one partner alone cannot bind the firm or the mortgagor by exercising the power without the concurrence of his copartners.⁵

The trustee who has taken no part in the sale, cannot give it validity by assuming to approve and ratify the acts of the others. The benefit of his counsel and judgment having been lost, he cannot supply it *ex post facto*.⁶

In case of the death of one of the trustees, the survivors may execute the power, even without express provisions therefor in the deed,⁷ and, upon the death of the last surviving trustee, his heir acquires the bare legal title, but not the right to execute the

1. Kennedy v. Dunn, 58 Cal. 339.

Deputy Marshal.—Where a trust deed provided that a sale under the power should be made by the *United States* marshal, it was held that a sale made and conducted wholly by one of his deputies as "auctioneer," was void, and passed no title to the purchaser. *Singer Mfg. Co. v. Chalmers*, 2 Utah 542.

2. Johns v. Sergeant, 45 Miss. 332.

3. Townsend v. Wilson, 3 M & D 261; 1 B. & Ald. 608; Black v. Smith, 4 McArthur (D. C.) 338; Powell v. Tuttle, 3 N. Y. 396; Wilson v. Troup, 2 Cow. (N. Y.) 195; 2 Jones Mortg. (4th ed.) 1790.

Power to Act Separately.—In a trust deed, two persons were named as trustees, "with power to act separately, and each independent of the other." It was also provided that the proceeds of the sale might be paid to the trustees, "or either of them," also, that "the receipts of said second parties, or either of them, shall be conclusive," etc. The power of sale was as follows: In the case of default, etc., "then it shall and may be lawful for the said party of the second part, his heirs, assigns, or successors in trust, to sell and dispose of said

premises, and make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deeds," etc. It was held, that, although the power to act severally was not expressly conferred by the clause creating the power, yet the other provisions were broad enough to cover all the acts done by the trustees under the deed, including an exercise of the power of sale; and that a sale by one of the trustees, followed by his deed in which the other did not join, was valid. The maxim *expressio unius est exclusio alterius* does not apply. *Loveland v. Clark*, 11 Colo. 265. Where the deed authorizes the trustees, "or either of them," to execute the trust, one may act without the concurrence of the other, especially where one has removed beyond the jurisdiction of the state, *Taylor v. Dickinson*, 15 Iowa 483; or refuses to unite in the sale. *Graeme v. Cullen*, 23 Gratt. (Va.) 266.

4. White v. Watkins, 23 Mo. 423.

5. Warr v. Jones, 24 W. R. 695.

6. Black v. Smith, 4 McArthur (D. C.) 338.

7. Franklin v. Osgood, 14 Johns. (N. Y.) 527; Hannah v. Carrington, 18 Ark. 85.

power, which remains in abeyance until the court appoints a new trustee.¹

In respect to joint mortgagees, if the mortgage contains no provision for survivorship, on the death of one of the mortgagees, his personal representative should join in the execution of the power.²

3. Substitutes and Successors in Trust.—The equitable rule is that a trustee who has once accepted the trust will not be allowed to lay it down without the assent of the beneficiary or the decree of a court of equity; and that, if he is within the jurisdiction of the court, he may be compelled to discharge the trust.³

In the absence of provision in the deed for the appointment of a new trustee, a court of equity has jurisdiction to make such appointment upon the death, disability, or refusal of the original trustee, upon petition by the beneficiaries, or the grantor, or both, and they are all necessary parties to such a petition;⁴ as is also a subsequent purchaser from the grantor, who has a direct interest in seeing that the trust is executed by a competent person.⁵

Another equitable ground for removing a trustee and appointing a successor is the existence of personal enmity between the trustee and beneficiary.⁶

The general rule is that unless authority be expressly given by the power, enabling the beneficiary to appoint a substitute trustee, he cannot make such appointment, but must apply to a court of equity for relief;⁷ but it has been held that where the original trustee has removed from the state and become a permanent resident of a foreign country, equity will recognize the appointment of a new trustee by the beneficiaries, and enjoin the other from attempting to execute the power.⁸

It is now the usual practice to insert in instruments creating a power of sale, provisions designating or authorizing the substitution of some other person to execute the power in case of the disability, death, absence, or refusal of the first-named trustee to carry out the trust. Such provisions may be inserted, and the acts of the substitute or successor, in the proper contingency, are as effectual as if they had been done by the original trustee.⁹

1. *Greenleaf v. Queen*, 1 Pet. (U. S.) 138; *Mauldin v. Armistead*, 14 Ala. 702.

2. *Townsend v. Wilson*, 3 Madd. 261; 1 B. & Ald. 608; *Hind v. Poole*, 1 Kay J. 383; 1 Jur. N. S. 371.

3. *Jones Mortgage*, (4th ed.) 1774; *Drane v. Gunter*, 19 Ala. 731; *Sargent v. Howe*, 21 Ill. 148.

4. *Clark v. Wilson*, 53 Miss. 119.

5. *Holden v. Stickney*, 2 McArthur (D. C.) 141.

Under the *Virginia Code* (1873), ch. 174, § 9, authorizing the appointment of a trustee by an order of the court, in place of a deceased trustee, on the mo-

tion of an interested party, such an order, which does not show on whose motion it was made, nor that the proper parties had notice, or were before the court, is invalid. *Pitzer v. Logan*, 85 Va. 374.

6. *McPherson v. Cox*, 96 U. S. 404.

7. *Ready v. Hamm*, 46 Miss. 422; *Clark v. Wilson*, 53 Miss. 119.

8. *Farmers' L. and T. Co. v. Hughes*, 11 Hun (N. Y.) 130.

9. *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Lake v. Brown*, 116 Ill. 83; *Irish v. Antioch College*, 126 Ill. 474; *Bradford v. Jenkins*, 41 Miss. 328.

Whatever conditions and terms the grantor of the trust has seen fit to impose, in respect to its exercise by a successor of the trustee, must be observed strictly in order to render the successor's acts valid.¹

Under a power to appoint a substitute in case the trustee fails or refuses to act, a sale made by such substitute is invalid where the original trustee had never been requested to exercise the power.²

When the court appoints the sheriff to act as trustee, under a provision in the deed, the appointment is a mere ministerial act, and is void if the trust had in fact been extinguished, or the contingency authorizing the appointment had not occurred.³ The sheriff acts officially when so appointed, and hence a sale by his deputy is valid;⁴ but when he acts under a provision in the deed and not by order of court, he does not act in his official capacity, and his official bondsmen are not liable for his failure to account for the proceeds.⁵

If the deed confers upon the beneficiary by name, the power to appoint a new trustee upon the happening of some contingency, such power of appointment is personal or in gross, and cannot be exercised by the beneficiary's assignee, unless by express authority from the grantor.⁶ It is held that authority to the beneficiaries

"The author of every trust has full power to provide for the appointment of a successor or successors in trust, in case the original trustee or trustees refuse to act, die, remove into a foreign jurisdiction, or are removed by a court of competent jurisdiction." *West v. Fitz*, 109 Ill. 442.

G., the trustee under a will, took a mortgage to secure a note belonging to the estate, wherein he was described as the trustee, and a power of sale in the usual form was granted to "G., trustee, his successors and assigns." Subsequently, upon his application, the court released him from his trust under the will, and appointed M. his successor, the mortgage being thereupon assigned by indorsement. It was held that M. was authorized to exercise the power, either as G.'s successor in trust, or by virtue of the assignment of the debt and mortgage. *Western Maryland R., etc., Co. v. Goodwin* (Md. 1893), 26 Atl. Rep. 319, citing *Berry v. Skinner*, 30 Md. 573; *Harnickell v. Orndorff*, 35 Md. 343.

Sale by Sheriff.—A provision that in the case of the trustee's death, a refusal to act, or an absence from the state when a sale is desired, the sheriff of the county may proceed to sell, means that the sheriff may act on the happening of any

one of the three contingencies. *Hickman v. Dill*, 32 Mo. App. 509.

Where a trust deed provides that in case of the absence, inability or refusal of the trustee, the sheriff of the county may make the sale, a sale by the sheriff in accordance with the terms of the deed, and upon the happening of the contingency mentioned, is a sale under the power, and divests the grantor of his title. *McKnight v. Wimer*, 38 Mo. 132, overruling *Miller v. Evans*, 35 Mo. 45.

1. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

2. *Stallings v. Thomas*, 55 Ark. 326.

3. *Hindman v. Piper*, 50 Mo. 202.

4. **Unauthorized Sale by Sheriff.**—*Tatum v. Holliday*, 59 Mo. 422. The *Missouri* Rev. Code (1855), p. 1554, §§ 1, 2, provides that in the case of death or other disability of the trustee, "any person interested in the debt or other liability secured by such deed of trust," may make affidavit thereof to the court, and the court may appoint the sheriff to make the sale. It is held that the debtor is not a "person interested in the debt," and a sale by the sheriff, under an order based on the debtor's affidavit, is void. *State v. Jackson*, 51 Mo. 196.

5. *State v. Davis*, 88 Mo. 585.

6. *Equitable Trust Co. v. Fisher*,

or their "personal representatives" to appoint a substitute, does not extend to an assignee of the debt.¹

The refusal of the trustee to act unless paid for his services, in addition to the regular commissions, constitutes such a failure as justifies the appointment of a new trustee.² So, if the trustee is authorized to appoint a substitute, and, upon his "refusal" to do so in a proper case, the power of appointment is vested in the beneficiary, it is held that the death of the trustee without making an appointment is practically equivalent to a refusal, and authorizes the beneficiary to make it;³ and where the trustee, on being requested to execute the power, replied that it was not convenient for him to do so, that was held equivalent to a positive refusal.⁴

The authority of the substitute depends upon the actual existence of the state of facts contemplated in the power, and hence the validity of his sale is not impaired by a misrecital in his notice, or in his deed to the purchaser, as to the happening of the designated contingency: As, for instance, that he was acting because of the absence of the original trustee, when, in fact, he acted because of the trustee's refusal to execute the power. Unless the trust deed requires it, the reason for the substitution need not be given at all.⁵

A provision in the deed that a third person may act in case of the trustee's "absence from the state," means a permanent removal of his residence.⁶ The *cestui que trust* cannot ignore such a provision; and an appointment by the court in an *ex parte* proceeding, at the instance of the *cestui que trust*, is a nullity as to all parties not before the court.⁷

4. *Assignees of the Debt.*—The power of sale passes by an assignment of the debt or mortgage, when the power is expressly conferred upon the mortgagee, his heirs or assigns,⁸ or, when not so

106 Ill. 189; *Clark v. Willson*, 53 Miss. 119.

1. *Fuller v. Davis*, 63 Miss. 78.

2. *Klein v. Glass*, 53 Tex. 37.

3. *Jacobs v. McClintock*, 53 Tex. 72.

4. *Chase v. Williams*, 74 Mo. 429.

5. *Irish v. Antioch College*, 126 Ill. 474.

6. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

7. *Bacegalupo v. Lallemon*, 7 Mo. App. 594.

Where, however, a trust deed authorized the sheriff of the county to act in the absence of the trustee, and by a subsequent political subdivision, the property was placed outside of the county limits, it was held that the court, in the absence of the trustee, could appoint a substitute upon an *ex parte* application. *Thompson v. Foerstel*, 10 Mo. App. 290.

8. *Harnickell v. Orndorff*, 35 Md. 341; *Berry v. Skinner*, 30 Md. 567; *Bush v. Sherman*, 80 Ill. 160; *Strother v. Law*, 54 Ill. 413; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Pickett v. Jones*, 63 Mo. 195; *Beatie v. Butler*, 21 Mo. 313; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Bell v. Twilight*, 22 N. H. 500; *Brown v. Delaney*, 22 Minn. 349; *Folsom v. Lockwood*, 6 Minn. 186.

When an assignment of a mortgage with a power of sale recited that the power had not been and was not intended to be exercised, and contained a covenant to pay the mortgage debt seven years from that date, with a power of sale in case of default, and also assigned the debt and all powers and remedies for recovering the same, and all the benefits of the mortgage, it was held that the original power of sale was not extinguished by the assignment.

conferred, when it is provided by statute that such persons may exercise the power.¹ And it seems, even in the absence of special provision in the mortgage or by statute, the power of sale, which is a power coupled with an interest, and appendant and annexed to the estate, may pass by a conveyance of all the interest of the mortgagee.² But the contrary is held in some cases.³

So the assignment of the debt secured by the mortgage transfers the power of sale to the assignee.⁴ But the mere assignment of the mortgage, without an assignment of the debt, will not have such effect.⁵ So where the debt is not assignable at law, the assignment of a mortgage passes only the equitable title, and the power of sale remains in and can be exercised only by the mort-

Boyd v. Petrie, 41 L. J. Ch. 378; 7 L. R. Eq. 385.

The power may also be exercised by the personal representative of the assignee, so where the mortgage was transferred and the transferee died intestate, the administrator of the transferee was allowed to sell the estate and procure a conveyance from the heir of the intestate. *Saloway v. Strawbridge*, 25 L. J. Ch. 121.

1. The *Alabama Code* 1886, § 1844, provides that a power of sale given to the mortgagee "may be executed by any person, or the personal representative of any person, who, by assignment or otherwise, becomes entitled to the money thus secured." Under this statute it is not necessary that the mortgage should have been transferred by apt and formal words of conveyance. The assignment of the debt and mortgage, by whatever language, entitles the assignee to execute the power. *McGuire v. Van Pelt*, 55 Ala. 344; *Buell v. Underwood*, 65 Ala. 285; *Wildsmith v. Tracy*, 80 Ala. 263; *Martinez v. Lindsey*, 91 Ala. 334.

An assignment of "all our rights and powers, and title in and to the within mortgage and note," is sufficient to authorize the assignee to execute the power. *Johnson v. Beard*, 93 Ala. 96.

2. *Washb. Real Prop.*, vol. 2, p. 499; 4 *Kent's Com.* 147. See *Berry v. Skinner*, 30 Md. 573; *Pickett v. Jones*, 63 Mo. 109.

In *Cook v. Crawford*, 13 Sim. 99, it was held that a trust or sale vested in A and his heirs, could not be exercised by the assigns of A. But this was overruled in *Osborne v. Rowlett*, 13 Ch. Div. 774, upon the principle that where there is a legal estate with a power annexed to it, that power devolves with the legal estate to which it

is annexed, unless there is something showing a contrary intention.

3. *Flower v. Elwood*, 66 Ill. 438; *Wilson v. Spring*, 64 Ill. 14. And in *Dolbear v. Nordust*, 84 Mo. 619, where the power to sell was given to the mortgagee and upon certain contingencies, as in case of the absence, death, refusal to act, or disability in any wise of the mortgagee, the sheriff was to act, but no mention was made of the assigns, it was held that they could not execute the power.

4. *Strother v. Law*, 54 Ill. 413; *Pardee v. Lindley*, 31 Ill. 174; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1. And see *Carpenter v. Logan*, 16 Wall. (U. S.) 271.

5. *Sanford v. Kane*, 133 Ill. 199; *Pickett v. Jones*, 63 Mo. 199.

In *Hamilton v. Lubukee*, 51 Ill. 415, where a power of sale was given by the mortgage, which was given as a security for notes which were afterwards sold to the mortgagee, his heirs, or assigns, the indorsement of the mortgage did not transfer the power of sale, it not being assignable either at law or by statute.

North Carolina.—The following indorsement upon a mortgage: "For value received I assign and transfer this mortgage to G. H. Simmons," signed by the mortgagee but not sealed, was held not to vest the mortgagee's title in the assignee so as to enable him to exercise the power of sale; and the court refused to aid a purchaser at a sale by such assignee, by compelling the assignee to perform the contract of sale. In the course of the opinion *Shepherd, J.*, said: "It is next insisted by the plaintiff, that, Simmons being the equitable assignee, the court should compel him and the mortgagee to specifically perform the contract of sale. No

gagee himself.¹ The assignee being the proper person to execute the power, he is also authorized to execute a deed to the purchaser at his sale.²

An assignment of the debt and mortgage need not be absolute in order to authorize the assignee to foreclose. An assignment or pledge as collateral security for payment of a debt due the assignee will enable him to execute the power on default, and this without first selling and buying in the securities.³

In several of the states, the statutes regulating foreclosure by advertisement require that all assignments of the mortgage shall have been duly recorded. A failure to comply strictly with this requirement prevents an assignee from making a valid sale under the power.⁴ So essential is the record of assignment regarded, that, if the assignment is not properly acknowledged, or is in any

authority for this position is cited, and we are sure that none can be found in our reports. We feel at liberty, therefore, to consider the policy of decreeing specific performance in such cases. We are of the opinion that the exercise of a power of sale in a mortgage should be watched with great jealousy, and that courts of equity, as well as of law, should require its terms to be strictly pursued. Where this is done, the courts may, in proper cases, decree specific performance, but never in a case like the present, where the court is called upon to establish, as well as to assist, in the execution of a power against a mortgagor who prays that he may be permitted to redeem. Again, we think that to lend the equitable aid of the court in cases like this would tend to produce confusion and uncertainty without any corresponding benefit. It is always in the power of the assignee, if he wishes to execute the power, to take an assignment by deed of the legal estate, and if he fails to do so, neither he nor his purchaser, who loses nothing but a bargain, should be heard to complain. Another objection is, that several notes may be assigned to different persons, each of whom may attempt to execute the power, and thus much trouble and litigation will be invited. There is no equity in favor of such a purchaser, who has paid nothing, and who has not been actually misled by the conduct of the parties. The records are open to his inspection, and he can readily inform himself as to the validity of the power under which the sale is made. Whatever may be the rulings in some of the states, where the mortgage is regarded strictly as a pledge, they can have no application

here, where the distinction between the equitable and the legal estate is still maintained." *Dameron v. Eskridge*, 104 N. Car. 621.

Insolvency of Mortgagor.—In *Maryland*, it is held that when a mortgagor in default applies for the benefit of the insolvency laws, and a trustee in insolvency is appointed and qualifies, the trustee, and not the mortgagee, must execute the power. *Mackubin v. Boardman*, 54 Md. 384. But otherwise, where the mortgagee and a third person to whom the power of sale was given, were residents of another state. *Ensor v. Lewis*, 54 Md. 391.

1. *Mason v. Ainsworth*, 58 Ill. 163.

2. *Heath v. Hall*, 60 Ill. 344.

3. *Jenkins v. International Bank*, 111 Ill. 480; *Holmes v. Turner's Falls Co.*, 150 Mass. 535.

The mere possession of the note and mortgage is not sufficient. *Bausman v. Kelley*, 38 Minn. 197.

Rights of Pledgee.—The holder of a note and mortgage assigned them to C to secure a note. The complainant bought the latter note from C and received also the collateral note and mortgage as security. The mortgagee then assigned his interest in the note and mortgage to the defendant, who proceeded to foreclose by advertisement. It was held that in view of the conflicting equities, such an assignment did not give the defendant a title that would authorize an execution of the power of sale. *Olcott v. Crittenden*, 68 Mich. 230.

4. In *Backus v. Burke*, 48 Minn. 260, a foreclosure sale in the name of the original mortgagee was held void, where the record showed a previous assignment of the mortgage by him, even though the assignment was not in-

other matter of form insufficient to entitle it to record under the recording laws, the fact that it was actually recorded will not authorize the assignee to make a valid sale.¹

If the record of assignment was defective, rendering the assignee's foreclosure void, the right to take advantage of the defect, and to redeem, is one of which the party cannot be deprived by a subsequent curative act.²

5. Executors and Administrators.—When the power is given to a trustee in a trust deed, it is a personal trust and cannot be executed by his administrator, even where the power is in terms granted to the trustee and his "legal representatives."³ But in respect to powers given to mortgagees, the rule is different; the power, being coupled with an interest, passes to the personal representatives of the mortgagee, whether they are expressly designated in the mortgage or not.⁴

In making foreclosure, the administrator need not recite the fact of his appointment or the death of the mortgagee; it is sufficient if he sign the notice as administrator.⁵

Foreclosures by advertisement, made in the name of foreign executors or administrators, of whose appointment or qualification no evidence had been recorded in the county where the mortgaged property was situated, or who had not qualified in the state at all, have been upheld, on the ground that their legal title

tended to be absolute, and at the time of the sale he held an unrecorded reassignment to himself.

Assignment by Attorney.—In *Morrison v. Mendenhall*, 18 Minn. 232, a foreclosure sale by an assignee was sustained, where the assignment, which was duly recorded, had been executed by an attorney in fact whose authority was not of record.

Sufficiency of Record.—An assignment by a writing under seal upon the back of the mortgage, referring to it as "the within described mortgage," and separately recorded in the same book with the mortgage, is a sufficient compliance with the statute requiring all instruments to be recorded "at large and in full, word for word." *Carll v. Taylor*, 15 Minn. 171.

Under a statute requiring "all the assignments" of a mortgage to be recorded, where a mortgage was given to "Beecher & Dean," and the record showed an assignment from one Charles R. Dean to one Solomon I. Beecher, also one from Beecher to Barnes, and from the latter to Elizabeth McKnight, who foreclosed, it was held that as "Beecher & Dean" did not appear to have assigned, the statute had not been complied with, and the sale was a nul-

lity. *Morris v. McKnight*, 1 N. Dak. 266.

1. *Dohm v. Haskin*, 88 Mich. 144; *Lowry v. Mayo*, 41 Minn. 388.

2. *Willis v. Jelineck*, 27 Minn. 18; *O'Brien v. Krenz*, 36 Minn. 136; *Lowry v. Mayo*, 41 Minn. 388.

3. *Warnecke v. Lembcech*, 71 Ill. 91.

4. *Collins v. Hopkins*, 7 Iowa 463; *Berry v. Skinner*, 30 Md. 567; *Harnickell v. Orndorff*, 35 Md. 341.

Legal Representatives.—If the power is to the mortgagee and his "legal representatives," it is properly executed by his administrator. *Merrin v. Lewis*, 90 Ill. 505.

Heirs and Assigns.—So, if the power is to the mortgagee, "his heirs and assigns," his administrator may execute it. *Lewis v. Wells*, 50 Ala. 198. See also *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Bausman v. Kelley*, 38 Minn. 197; *Johnson v. Turner*, 7 Ohio 216; *Look v. Kenney*, 128 Mass. 284.

A power given to the mortgagee "or his executor," vests in the person who qualifies as his executor. There is a sufficient designation of the person. *Yount v. Morrison*, 109 N. Car. 520.

5. *Baldwin v. Allison*, 4 Minn. 25. And if, before the sale, a special admin-

was not so much by virtue of the office as by the terms of the power itself.¹

6. Corporations.—If a corporation has under its charter the right to take mortgage security, there is no reason why it should not also have the right to execute a power of sale under a mortgage, acting through its proper officers. In *Maryland*, however, corporations are denied authority to execute such powers,² though if a power of sale be given to the corporation, its successors and assigns, a natural person to whom the mortgage has been assigned may execute the power.³ But where the power is given to the corporation mortgagee or its attorney (without naming him), it cannot be exercised by a person employed as attorney.⁴

7. Sheriffs and Auctioneers.—It is competent for the legislature to apply to existing mortgages with power of sale, the provisions of a subsequent act requiring sales under such powers to be conducted by the sheriff of the county. Who shall act as auctioneer at a public sale is a mere matter of detail in exercising the power,

istrator is appointed, it will be presumed that the sale was with his approval. *Baldwin v. Allison*, 4 Minn. 25.

1. *Hayes v. Frey*, 54 Wis. 503; *Miller v. Clark*, 56 Mich. 337; *Lee v. Clary*, 38 Mich. 223; *Holcombe v. Richards*, 38 Minn. 38.

In *Minnesota*, By Laws 1876, ch. 41 (Gen. St. 1878, ch. 81), a foreign administrator is now required to file with the Register of Deeds of the county where the land lies, proof of his appointment, before making sale under the power.

In *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45; 11 Am. Dec. 389, Chancellor Kent decided that a power of sale given to a mortgagee, "his executors, administrators, and assigns," could be executed by an administrator appointed in another state, where the mortgagee resided, and without taking out letters of administration in *New York*, where the land was situated. The reasoning of the decision is that while the courts do not recognize a foreign administrator as such, yet they do recognize that his right to execute the power is a matter of contract, and not of jurisdiction.

But in *Sloan v. Frothingham*, 65 Ala. 593, it was held that a sale by a foreign administrator who had not complied with the statutory requirements as to recording his letters of administration and giving a bond, was not merely voidable, but a nullity.

2. *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 175; *Queen City*

Perpetual, etc., Bldg. Assoc. v. Price, 53 Md. 397.

3. In *Chilton v. Brooks*, 71 Md. 445, the court said: "It is contended that the executors acted without authority, because the power was given to the corporation to sell in case of default, and as a corporation cannot execute such power, under the decision of *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 175; *Queen City Perpetual Bldg. Assoc. v. Price*, 53 Md. 398, the corporation could not by assignment give to an assignee a right to do what it could not do—something it could not possess. All that was decided in those cases, adversely to the power in the mortgages there involved, was that the power, being given to a corporation, and to no one else, was void. It is necessary that some one capable of executing the power should be designated as authorized to execute it. For the want of such designation in the 53 Md. case, the power was declared void; and in *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 175, nothing was decided but the inability of a corporation to execute the trust given by the power. In 53 Md., the assignees of the mortgage were not named as clothed with the power, while here they are, by express language, mentioned as authorized to execute it, and in the alternative a designated attorney is authorized to execute it. . . . We think the assignee may execute the power, if the power so states."

4. *Queen City Perpetual Bldg. Assoc. v. Price*, 53 Md. 397; *Frost-*

and the substitution of a public officer does not affect or impair the obligation of the contract.¹

The fact that the person acting as auctioneer at a foreclosure sale under the power was not duly licensed as required by statute, of which fact the mortgagee was ignorant, does not vitiate the sale.²

XI. WHEN POWER BECOMES OPERATIVE—1. Default.—The existence of a default in payment of the debt secured, or some part of it, is ordinarily a condition precedent to the power to institute proceedings culminating in a valid sale, even as to *bona fide* purchasers.³

If a sale is made by the trustee when nothing is due and no default has been made in any of the conditions of the deed, there exists no power to sell, and if the title passes at all, the purchaser will be held in equity as a trustee for the debtor; but that cannot be inquired into in an action at law.⁴ It will not be presumed, after sale, that the contingency upon which the right to sell was to arise, had not occurred. Such lack of power must be averred and proved.⁵ If the power is by its terms exercisable only after default has continued for a specified length of time, no valid sale can be made until such period has fully expired.⁶ Nor can the sale proceedings be commenced before the expiration of the time.⁷

A vendor by warranty deed, with covenants against incumbrances, who takes a trust deed to secure the purchase price, cannot sell under the power until all existing incumbrances have been removed.⁸ But in the absence of such a covenant, the existence of prior incumbrances would not prevent a sale under a

burg Mut. Bldg. Assoc. v. Lowdermilk, 50 Md. 175.

1. Webb v. Lewis, 45 Minn. 285.

2. Learned v. Geer, 139 Mass. 31; Williston v. Morse, 10 Met. (Mass.) 17.

Deputy Sheriff.—In *Michigan*, a deputy sheriff may conduct the sale upon foreclosure by advertisement. How. St. Mich. 8501; Heinmiller v. Hatheway, 60 Mich. 391.

3. Foster v. Boston, 133 Mass. 143; Ettinghouse v. Mutual House Bldg. Assoc., 69 Mo. 52; Long v. Long, 79 Mo. 644; Richards v. Holmes, 18 How. (U. S.) 143; Jackson v. Lawrence, 117 U. S. 679; Gustav Adolph Bldg. Assoc. v. Kratz, 55 Md. 394; Potomac Mfg. Co. v. Evans, 84 Va. 717; Pratt v. Tinkcom, 21 Minn. 142; Chicago, etc., R. Co. v. Kennedy, 70 Ill. 350.

The costs of proceedings to obtain a sale of the mortgaged premises, is such a charge upon the estate as will entitle the mortgagee to proceed to a sale in the case of non-payment, although the principal and interest have been paid.

Thompson v. Holman, 28 Grant's Ch. (Ont.) 35; Paynter v. Carew, 18 Jur. 417.

4. Chapin v. Billings, 91 Ill. 539.

5. Pope v. Durant, 26 Iowa 233.

6. Foster v. Boston, 133 Mass. 143.

Period of Default Cannot Run Concurrently with Period of Notice.—So where the power was to be exercised after default in payment for one month and one month's notice of sale, the period of default and of notice could not run concurrently. Gibbins v. McDougall, 26 Grant's Ch. (Ont.) 214.

But in *Grant v. Canada L. Assur. Co.*, 29 Grant's Ch. (Ont.) 256, where the power of sale was to arise after three months' default without notice, and the mortgagee covenanted with the mortgagor not to exercise the power without one month's notice, it was held that the period of default, and the period of notice could run concurrently. See also *Metters v. Brown*, 9 Jur. N. S. 958.

7. Holden v. Gilbert, 7 Paige (N. Y.) 208.

8. Coffman v. Scoville, 86 Ill. 300.

trust deed given to secure purchase-money, though the conveyance contained covenants of warranty.¹

Where there is a dispute as to the existence of default, the mortgagor may have an injunction to restrain the advertised sale until the question of default can be judicially determined.²

2. Provisions for Accelerating Maturity.—It is competent for the parties to a trust deed or mortgage to stipulate therein that upon non-payment of interest, taxes, or any installment of the principal, the entire debt may be declared due and the power of sale become operative.³ It is now usual to insert in the power a provision for declaring the whole debt due upon default in any payment, but, even in the absence of such a clause, if the power is

1. *Fairman v. Peck*, 87 Ill. 156.

2. *O'Brien v. Oswald*, 45 Minn. 59; *Dickerson v. Hayes*, 26 Minn. 100; *Bidwell v. Whitney*, 4 Minn. 45.

3. *Hoodless v. Reid*, 112 Ill. 105; *Magnusson v. Williams*, 111 Ill. 450; *McLean v. Presley*, 56 Ala. 211; *Pope v. Durant*, 26 Iowa 233; *Bridges v. Ballard* 62 Miss. 237; *Phillips v. Bailey*, 82 Mo. 639; *Meier v. Meier*, 105 Mo. 411.

Due Only For Purpose of Foreclosure.—It is held that, where a trust deed or mortgage provides that in case of default all the notes secured shall become due and payable, whether due on their face or not, the notes not actually due become, under such provision, due only so far as to authorize their payment out of the proceeds of sale. *Morgan v. Martien*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384. Under such circumstances, an action cannot be maintained on the notes not due, according to their terms, at the time the action is commenced. *White v. Miller* (Minn. 1893), 54 N. W. Rep. 736; *McClelland v. Bishop*, 42 Ohio St. 113; *Mallory v. Indiana*, etc., R. Co., 35 N. Y. Super. Ct. 174; *West Shore*, etc., R. Co. *v. Sprague*, 103 U. S. 756. The contrary, however, has been held in the following cases: *Wheeler*, etc., Mfg. Co. *v. Howard*, 28 Fed. Rep. 741; *Noell v. Gaines*, 68 Mo. 649 (see *dissenting* opinion of Hough, J.); *Chambers v. Marks*, 93 Ala. 412.

Clauses Construed.—A mortgage was given by A. to B. to secure payment of eighteen notes, each for \$2,400, two payable each year, and another note for \$48,000, payable ten years after the first two, on condition that B. should obtain a conveyance to A. from certain minor heirs; and the mortgage provided that, if default should be made in payment of any of the \$2,400 notes, or if \$12,000 of the large note should

not be paid in thirty days after maturity, then the whole sum unpaid should become due, and the power of sale operative. It was held that a sale might be made on default in payment of any of the \$2,400 notes, without first tendering the deed from the heirs, but not so as to the large note without such tender. *Gibbons v. Hoag*, 95 Ill. 45.

Where a mortgage provides that on default in payment of any of the notes secured for thirty days, the mortgagee may declare the whole debt due and make the sale, and there is nothing in the mortgage to show that any of the notes were given for unpaid interest, and a sale is made for the amount of all the notes, including one given for unearned interest, the purchaser has the right to regard all the notes as being for principal and rightly declared due. *Wisner v. Chamberlin*, 117 Ill. 568.

And where the mortgage provides that all the notes may be declared due on default in any of them, the fact that the payment of one note, not due, depends upon the mortgagee's procuring an outstanding portion of the title for the mortgagor, will not prevent him from declaring such note due on default in payment of the other notes, and making a valid sale. *Wisner v. Chamberlin*, 117 Ill. 568. See also *Gorham v. Farson*, 119 Ill. 425.

Sale Before Maturity of Principal.—A power of sale upon default in payment "of any part of the aforesaid debt and interest," authorizes the trustee to sell upon failure to pay the interest, though no part of the principal is yet due. *Richards v. Holmes*, 18 How. (U. S.) 143.

Under a mortgage with power of sale in case of default in principal or interest, and directing that out of the

made operative on non-payment of interest or an installment, the entire premises may be sold and the proceeds applied to the unmatured portions of the debt as well as to the portions in default.¹ If the entire mortgaged premises are sold upon default in payment of a portion of the debt, the power is thereby exhausted, and the property cannot be sold again upon non-payment of installments subsequently accruing.²

By claiming in his notice of sale that the whole debt is due, the mortgagee sufficiently declares his election so to consider it, under the provisions of the mortgage.³

If the mortgagee is authorized to declare the whole debt due on default in an installment, his assignee of the debt and mortgage is entitled to exercise the same option.⁴

3. Necessity of Previous Entry.—Usually the mortgage or trust deed contains a provision authorizing an entry by the mortgagee or trustee upon default. Such entry, however, is not a prerequisite to a sale under the power.⁵

proceeds of sale the principal and interest shall be paid, the power may be exercised upon default in payment of interest prior to the maturity of the principal. *Hooper v. Stump* (Arizona, 1887), 14 Pac. Rep. 799.

Non-Payment of Taxes.—A provision in a mortgage that if the taxes should not be paid before sale to enforce them, the mortgagee might "lawfully sell the premises at public auction, and make a deed, rendering the surplus," etc.—gives the right to foreclose for the whole debt, though not due, upon such non-payment of taxes. *Pope v. Durant*, 26 Iowa 233.

1. *McLean v. Presley*, 56 Ala. 211; *Bridges v. Ballard*, 62 Miss. 237; *Fryar v. Fryar*, 62 Miss. 205.

A mortgage to secure a debt payable in installments provided that if any installment should be in default for thirty days, the mortgagee might sell the premises and retain out of the proceeds the entire debt. It was held that to entitle him to retain the entire debt, the proceedings to foreclose must not have been commenced until thirty days after an installment became due. *Holden v. Gilbert*, 7 Paige (N. Y.) 208.

2. *Buford v. Smith*, 7 Mo. 489; *Miles v. Skinner*, 42 Mich. 181.

3. *Fowler v. Woodward*, 26 Minn. 347.

4. *Heath v. Hall*, 60 Ill. 344.

5. *Kiley v. Brewster*, 44 Ill. 186; *Vaughn v. Powell*, 65 Miss. 401; *Clark v. Hawey*, 16 Ont. Rep. 161; *Anderson v. Hanna*, 19 Ont. Rep. 58; *Jones v. Hagler*, 95 Ala. 529.

Even where a trust deed declares

that "it shall be the duty of the party of the third part herein, at the request of the holder of said note, to take into his possession all the property described herein," and to advertise and sell the same, such taking possession is not a condition precedent to the exercise of the power. *Hamilton v. Halpin*, 68 Miss. 99; *Tyler v. Herring*, 67 Miss. 169. If a trust deed provides, that on default it shall be the duty of the trustee, upon request of the creditor, to take possession of the property and sell it, the trustee has no right to possession, even after default, until the creditor has duly requested him to take possession for the purpose of sale. *Bowman v. Roberts*, 58 Miss. 126.

And when possession is justified under a power authorizing the trustee to sell on default and upon request of the mortgagee, it must be alleged that such request was made, and that the entry was for the purpose of the mortgage trusts. *Watson v. Waltham*, 2 Ad. & El. 485; 29 E. C. L. 153; 1 H. & W. 24.

"On principle, it would seem that, according to the strict construction, it would be proper, or, at least, consistent, to construe the clause in favor of the necessity of entry, if there be reason to believe that such entry would, in some way, be towards the advantage of the mortgagor; but that, in the absence of any possible advantage to him it would not be proper or reasonable so to construe it, merely to impose a troublesome condition on his creditor. In practice, there is no doubt whatever that the more liberal view is the

4. Request by Beneficiary to Sell.—The trustee in a deed of trust, having no personal interest in the payment of the debt secured, ought not to exercise the power of sale without being requested by the creditor to do so; but it is held that if the deed does not provide for such request as a condition precedent, the trustee may make a valid sale upon his own motion.¹ Where the exercise of the power is conditioned upon the request of the beneficiary, a sale by the trustee without such request having been made is invalid, except possibly as to innocent purchasers without notice of the irregularity.² Neither can the trustee make a valid sale without the request of the grantor, if that is made one of the conditions of the power.³

A mortgagee who becomes the purchaser at a foreclosure sale, and who, after the expiration of the period of redemption, goes into possession and receives the rents, thereby ratifies the foreclosure, and cannot have it set aside on the ground that he

one that would meet most favor with conveyancers and mortgagees." *Hunter's Sale Under Mortgages* (Ontario, 1892) 52.

In *Roarty v. Mitchell*, 7 Gray (Mass.) 243, a mortgage provided that in default of payment the mortgagee might enter and take possession of the premises immediately, and might sell and dispose of the same on giving notice, etc. It was held in this case that an entry or at least a demand were conditions precedent without which no valid sale could be made under the power.

In *Cranston v. Crane*, 97 Mass. 459, the court had under consideration a power of sale mortgage which provided that upon default, "it should be lawful" for the mortgagee to enter upon the premises and make a sale, etc. It was held not to be necessary for the mortgagee to make the entry at any other time, or in any other manner than on the day of the sale, and for the purpose of the sale; also that the entry could be made by an agent of the mortgagee, under a parol authority.

In *Foster v. Boston*, 133 Mass. 143, where a trust deed given by a land improvement company, conveyed a large quantity of unimproved city property, and provided that upon default the trustee should enter and take possession, and so manage and dispose of the property as to carry out the purposes of the trust, by making sales from time to time, it was held that an entry by the trustees was necessary before they could exercise the power of sale. The previous cases of *Roarty v. Mitchell*, 7 Gray (Mass.) 243, and *Cranston v.*

Crane, 97 Mass. 459, were cited with approval.

1. *Wood v. Augustine*, 61 Mo. 46.

In *Krieger v. Bissell*, 80 Ky. 330, where the holder of a mortgage to secure certain bondholders brought suit as trustee of an express trust, to obtain a sale of the land, without joining the beneficiaries, and the land was sold to him as trustee, the deed giving him by order of the court full power to dispose of the land, it was held that he had a complete legal title, and could sell without the request or permission of the bondholders.

Order of County Court.—In *Missouri*, where a sheriff's deed, executed under a power of sale conferred upon him in a mortgage in favor of the county, failed to recite that a certified copy of the order of the county court directing him to foreclose had been delivered to him, or that the sale was made pursuant to such order, it was held that the deed was not admissible as evidence of title. *Carter v. Reeves*, 75 Mo. 104. See also *Neilson v. Sasse*, 75 Mo. 386.

2. *Magee v. Burch*, 108 Mo. 336; *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723.

The trustee, in a deed requiring the beneficiary to request a sale at least thirty days before the day of sale, proceeded to give notice of the sale without having been requested. Eleven days before the day fixed, such request was made. It was held that the sale should be set aside. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

3. *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723.

never authorized the proceedings.¹ Neither can the mortgagor, in an action for a deficiency, deny the validity of the sale, after having relied upon and confirmed it in court in a former action.²

5. Promise of Forbearance.—An arrangement between the creditor and debtor to extend the time of payment until further notice, even though made without valuable consideration, is sufficient to justify a court of equity in setting aside a sale made in violation of the promise.³

6. Effect of Tender Before Sale.—The owner of the equity of redemption has the right to prevent a sale under the power, by making a tender of the amount due and all accrued costs, at any time before the sale takes place; and if the tender is refused and the sale proceeded with, equity will interfere by injunction or by setting aside the sale.⁴ The offer must be not merely to buy the debt, but to pay it.⁵ The actual proffer of the money is dispensed with if the debtor, being ready and willing to pay, is prevented from actually producing it by the creditor's declaring that he will not receive it.⁶

A trustee, who has the deed and note in his own hands for collection and foreclosure, is the proper person to whom to make the tender.⁷

If the debtor, after advertisement, but before sale, brings a bill to redeem, and offers to pay the amount found due, that is equivalent to a tender before sale, and renders the sale invalid.⁸

XII. DURATION OF POWER; STATUTE OF LIMITATIONS.—The operation of statutes of limitation being merely to bar the remedy by

1. *Blake v. McKusick*, 8 Minn. 338.

Sale Without Request—Ratification.—The fact that the trustee made a sale of the estate without any previous request from the creditor, does not render the sale voidable, where the trustee held the secured note for collection, and his act was ratified and approved by the creditor, before the day of the sale. *Cassady v. Wallace*, 102 Mo. 575.

2. *Blake v. McKusick*, 10 Minn. 251.

3. *Rounsavell v. Crofoot*, 4 Ill. App. 671.

But where the grantee of mortgaged premises has not assumed the debt, a mere voluntary assurance by the holder of the note that he would let the debt run so long as the grantee should keep the interest paid (which the latter did not agree to do), is no bar to a sale under the power after default. *Booth v. Wiley*, 102 Ill. 84.

4. *Burnett v. Denniston*, 6 Johns. Ch. (N. Y.) 35; *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Whelan v. Reilley*, 61 Mo. 565; *Phillips v. Bailey*, 82 Mo. 639; *Hayward v. Munger*, 14 Iowa 516; *Rhodes v. Buckland*, 16 Beav. 212;

Jenkins v. Jones, 6 Jur. N. S. 391; *Whitworth v. Rhodes*, 20 L. J. N. S. Ch. 105.

Interest and Taxes.—Where a trust deed provided that on default in payment of interest as it became due, or in payment of taxes, the whole debt should become due and the property sold to satisfy it, held, that the trustee should not sell where, before the time of sale, the whole amount of overdue interest and taxes was tendered. *Phillips v. Bailey*, 82 Mo. 639. To the same effect, *Flower v. Elwood*, 66 Ill. 438.

5. *Magnusson v. Williams*, 111 Ill. 450.

A sale by the mortgagee will not be set aside, though he himself became the purchaser, merely because a junior incumbrancer had offered before the sale to buy the mortgage note, and demanded an assignment. *Chase v. Williams*, 74 Mo. 429.

6. *Rudolph v. Wagner*, 36 Ala. 702; *McCalley v. Otey* (Ala. 1893), 12 So. Rep. 406.

7. *Hayward v. Munger*, 14 Iowa 516.

8. *Way v. Mullett*, 143 Mass. 49; *Clark v. Griffin*, 148 Mass. 540.

action upon the debt, it is a generally established rule, that a power of sale may be exercised for the purpose of applying the proceeds of sale to the payment of the debt secured, even though an action on the debt would be barred by the statute.¹ The contrary, however, is held in one or two states.²

Where the power is by its own terms limited to a specified time, it ceases absolutely if not executed within that time.³

A statute limiting the right to foreclose by advertisement to ten years after maturity, the act to take effect in one year from its passage, gives a reasonable time as to mortgages already matured, and foreclosures not completed by sale within the year come under the operation of the statute.⁴ But a statutory requirement that every action to foreclose a mortgage shall be commenced within a specified time, has no application to a foreclosure by sale under a power.⁵

XIII. PUBLIC OR PRIVATE SALE.—It is now commonly provided, either by statute or the terms of the power, that a sale under it shall be at public vendue, after specified notice. But in the absence of any such provision, the trustee or mortgagee may, in the exercise of a sound discretion, sell either at public or private sale.⁶

Where a discretion as to the method of sale is vested in the donee of the power, a private sale made fairly and in good faith is valid, without previous notice or advertisement;⁷ but if the power, by its terms, provides for a private sale, it is believed that

The *Massachusetts* Statute of 1888, ch. 433, now regulates the right of sale pending a bill to redeem.

1. *Ople v. Castleman*, 32 Fed. Rep. 511; *Wood v. Augustine*, 61 Mo. 46; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Booker v. Armstrong*, 93 Mo. 49; *Lewis v. Schwenn*, 93 Mo. 26; *Gardner v. Terry*, 99 Mo. 523; *Orr v. Rode*, 101 Mo. 387; *Blackwell v. Barnett*, 52 Tex. 331; *Goldfrank v. Young*, 64 Tex. 432; *Fievel v. Zuber*, 67 Tex. 275.
2. *First Nat. Bank v. Thomas* (Ky. 1887), 3 S. W. Rep. 12; *Emory v. Keighan*, 88 Ill. 482; *Schifferstein v. Allison*, 123 Ill. 664; *Jones v. Lander*, 21 Ill. App. 510.

Where a sale under a power was made more than sixteen years after the debt became due, so that the debt was barred as to all the makers of the note, except the mortgagor, but not as to him, owing to his absence from the state, it was held that the sale was good. *Emory v. Keighan*, 94 Ill. 543.

3. *Lockett v. Hill*, 1 Woods (U.S.) 552.
Limitation in Power.—Where a power of sale given to trustees contained the clause, "provided always that the same shall be sold within eighteen months

from the date hereof," it was held that this was merely directory, and not a limitation upon the power. *Parsons v. Rhodes*, 22 Hun (N. Y.) 80.

4. It is not sufficient to merely commence foreclosure within the year. *Duncan v. Cobb*, 32 Minn. 460; *Archambau v. Green*, 21 Minn. 520.

5. *Golcher v. Brisbin*, 20 Minn. 453.

6. *Mowry v. Sanborn*, 68 N. Y. 153; *Martin v. Paxson*, 66 Mo. 260.

7. *Brouard v. Dumaesque*, 3 Moo. P. C. 457; *Elliot v. Wood*, 45 N. Y. 71; *Lawrence v. Farmers' L. and F. Co.*, 13 N. Y. 200; *Marston v. Brittenham*, 76 Ill. 611.

A mortgagee with power to sell either by public auction or private contract, and a proviso that all arrangements, sales, conveyances, acts, matters, and things made and done under the power, should be as valid without, as if made with the consent of the mortgagor, sold the property at private sale, and agreed that a part of the purchase-money might remain on a mortgage of the property sold. It was held that the sale was valid, as against purchaser and mortgagor, though the mortgagee had not previously attempted to sell at

a sale at public auction would not be justified, as the latter method might not be so advantageous to the debtor as a private sale would be.¹

XIV. PLACE OF MAKING SALE.—Whenever the trust deed or mortgage contains directions as to the particular place where sale under the power is to be made, these constitute a limitation of the power, and must be strictly complied with or the sale will be a nullity. In some of the states, provision is now made by statute, directing all sales to be made at some designated public place, and a compliance with the statute in this respect is essential to a valid sale.² If the instrument creating the power does not specify the place of sale, and there is no statute regulating it, it is not necessary that the sale be made upon the premises; any public place in the county is proper for such purpose.³ Where no place is designated, a discretion is vested in the trustee to make it at such place as he deems most beneficial to the parties interested;⁴ and it has been held that where the trustee is vested with a large discretion in this regard, a sale made by him outside the state in which the property is situated, is not for that reason void, in the absence of anything suggestive of fraud.⁵

In one case, a trustee's sale of property in the city of Washington during the Civil war, which was then occupied by the *United States* for military purposes, so that the public could not enter upon the premises for purposes of examination, was set aside.⁶ A very common provision in the power is that the sale shall be made at the county courthouse, or at some particular door of the courthouse. Doubts as to the proper place have sometimes arisen in cases where the building used as a courthouse at the time of executing the instrument has been destroyed or removed to another location at the time of sale. In all such cases, the true intention of the parties, if it can be ascertained from the instrument, must be allowed to govern; but, unless a contrary intention is shown, the courts are inclined to hold that the public

public auction. *Davey v. Durrant*, 1 De G. & J. 535; 26 L. J. Ch. 830.

Where the trustee is directed to sell the estate "at public auction," he has no power to sell except in that manner, even though the interests of the grantor would be promoted by selling at private sale. *Greenleaf v. Queen*, 1 Pet. (U. S.) 138; *Griffin v. Marine Co.*, 52 Ill. 130.

1. *Jones Mortg.* (4th ed.) 1863. And see *Daniel v. Adams*, Amb. 495.

2. **Effect of Statute on Prior Mortgages.**—The *Illinois* Statute requiring sales under powers to be made in the county where the land is situated, was not intended to apply to instruments executed before its enactment; and where a mortgage was executed prior to that time, extensions of the time of payment

from year to year after the act took effect, did not bring the mortgage within its operation. *McConneaughey v. Borgardus*, 106 Ill. 321.

Sale Out of County.—Under art. 64 of the *Maryland* Code, a power cannot be given to a mortgagee to make sale of the mortgaged premises, outside of the county where they are situated. A mortgage with such a clause contains no valid power of sale, and foreclosure must be had in equity. *Webb v. Haeffer*, 53 Md. 187.

3. *Hess v. Dean*, 66 Tex. 663.

4. *Hess v. Dean*, 66 Tex. 663.

5. *Ingle v. Jones*, 43 Iowa 286; *Ingle v. Culbertson*, 43 Iowa 265.

6. *Green v. Alexander*, 7 D. C. 147. See also *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72.

character of the building, and not a particular locality or spot of ground, was what the parties intended to designate.¹

XV. NOTICE OF SALE UNDER POWER—1. When Necessary.—In the absence of statutory regulation, and of any stipulation in the power, requiring notice of sale to be given, the power may be exercised and a valid sale made without the giving of any notice whatever. But the courts justly regard such a proceeding with suspicion, and will not sustain a sale without notice, if there is

1. Presumption.—Where the testimony was that the sale was made at the courthouse "under the deed of trust," the jury were warranted, in the absence of anything tending to disprove it, in presuming that the sale was made in conformity to the requirements of the deed. *German Bank v. Stumpf*, 73 Mo. 311; 6 Mo. App. 17.

Removal of Courthouse.—Where the sale is required to be made "at the courthouse," and before the day of the sale the courthouse is removed to a different part of the city, the sale must be made at the new location. *Napton v. Hurt*, 70 Mo. 497.

So where the courthouse had been taken down to the first story and was being reconstructed, the sale was properly made at another building temporarily used for courthouse purposes. *Hambright v. Brockman*, 59 Mo. 53.

A trust deed provided for a sale "at the courthouse door;" but at the time of the sale the courthouse had been torn down, and a new one on the same site was almost completed, but not occupied for court purposes. It was held that a sale at the door of the new building was valid, having been well attended, and no one being misled as to the place of sale, although the county court was then held temporarily at the office of the county clerk, in a different locality. *Davis v. Hess*, 103 Mo. 31.

And in a recent case in the same state, where the deed provided for a sale "at the east courthouse door," and at the date of the deed there was a courthouse with an east door; but at the time of the sale it had been partially destroyed by fire, and court was being held temporarily in a building situated in another part of the town, it was held that a sale at the front door of the latter building was made at the wrong place and invalid. *Stewart v. Brown* (Mo. 1891), 16 S. W. Rep. 389. As to the proper place of sale under such circumstances, see the separate opinions of the judges in *Stewart v. Brown*, 112 Mo. 171.

Certain trust deeds provided that sales under the powers should be made "at the courthouse door in the city of Carthage." At the time of the sale, the circuit court was held in the second story of the building known as the courthouse, the first story being occupied as a store room, fronting on the street. The door of the court room was at about the center of the second story, and was reached by an open outside stairway running from the street to a landing or platform in front of the door, over which had been erected a watershed with an opening at the head of the stairway. The sales were made at the opening of this watershed, the trustee standing on the platform, and the bidders standing around him in the shed and on the steps. It was held that it could not be said that the sales were not made at the places specified in the trust deeds. *Maloney v. Webb*, 112 Mo. 575.

Building Used as Courthouse.—The place of sale as described in the notice was, "at the front door of the courthouse in the city of Minneapolis, corner of 2d Ave. S. and 3d St." The county courthouse had been partly destroyed by fire, and the county commissioners had rented a building at the corner of Second avenue, South and Third streets, for the meetings of the courts, and for some of the county officers, and it was so used for some weeks before the date of the notice, and till after the sale. It was held a proper designation of the place of sale, and that the sale was properly made at the front door of the building at the corner of the streets named, though the door leading to the court rooms which were in the second story, was at the rear of the building on Third street, eighty feet from the front. *Johnson v. Cocks*, 37 Minn. 530.

Under a trust deed calling for a sale "at the courthouse door," a sale at the door of a building commonly used as a courthouse, was held to be a sufficient compliance with the deed, it

the least evidence of unfairness.¹ And where no length of time is specified for the notice required, it must be one which, under all the circumstances, is reasonable.²

2. Form and Sufficiency.—It is considered that the principal object of publishing notice of sale is not so much to notify the grantor or mortgagor, as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained.³ Accordingly, the notice should contain such facts as are reasonably sufficient to apprise the public of the description of the property to be sold, and the time, place, and terms of sale.⁴

The object being to attract bidders, any untrue statement in the notice as to the condition of the title, or the existence of adverse claims, by which bidding would naturally be discouraged, will warrant setting aside the sale.⁵ Generally, if the notice contains erroneous statements of matters not required to be stated, and which are calculated to mislead and deter bidders, the result will be to render the sale voidable, unless the false statement was caused by an honest mistake, and has been corrected by a timely publication before the sale.⁶

The notice should contain recitals showing that there has been a default, by virtue of which the power of sale has become operative; though it does not seem to have been held that such an omission would necessarily vitiate the sale.⁷ It should also show on its face that the purpose is to foreclose and sell, by virtue of the power;⁸ but it need not expressly state that the mortgage is to be foreclosed, if it announces a sale in accordance with statu-

appearing that the county had no regular public court building, and that the building in question was commonly called "the courthouse." *Moore v. Isabel*, 40 Iowa 383.

A provision for a sale "at the north door of the courthouse in said city of Chicago," does not restrict the sale to the then existing site of the courthouse; and in case of its destruction by fire, the sale may be made at the north door of a building used as a courthouse in another part of the city. *Alden v. Goldie*, 82 Ill. 350. See *Waller v. Arnold*, 71 Ill. 350, where it was held that a sale might be made at the ruins of the old courthouse.

Sale at Wrong Door.—Though a trust deed provides for a sale at the east door of the courthouse, yet a sale at the south door is not void, in the absence of evidence that the irregularity resulted in any injury to the debtor. *Hickey v. Behrens*, 75 Tex. 488.

1. *Miller v. Cook*, L. R., 10 Eq. 647; *Re Gilchrish*, 11 Ont. Rep. 537; *Re British Canadian Loan, etc., Co.*, 16 Ont. Rep. 15; *Martin v. Paxson*, 66

Mo. 260; *Mowry v. Sanborn*, 68 N. Y. 153.

2. *Massey v. Sladen*, L. R., 4 Exch. 13.

3. *De Jarnett v. De Giverville*, 56 Mo. 440.

4. *Powers v. Kruckhoff*, 41 Mo. 425; *Stephenson v. January*, 49 Mo. 465.

5. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

Cumulative Securities.—A mortgagor subsequently gave a deed of trust covering the same property, to secure the same debt. A sale having been made under the deed, it was held that the record of the two instruments afforded notice to the world that both securities were for the same debt, and that the trustee was not bound to give notice of that fact in his advertisement of sale. *Weld v. Rees*, 48 Ill. 428.

6. *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51.

7. *Bush v. Sherman*, 80 Ill. 160.

That such an omission is not a material defect, see *Model Lodging House Assoc. v. Boston*, 114 Mass. 133; *King v. Bronson*, 122 Mass. 122.

8. *Judd v. O'Brien*, 21 N. Y. 186.

tory requirements;¹ nor is it necessary to state in the notice that the subscriber has lawful right or authority to exercise the power; the right, if it exists, is independent of any such recital.²

A failure to state in the notice that the sale will be made at public vendue, does not vitiate it, if it can be fairly understood from all its terms to refer to a public sale.³ And even though the notice does not expressly state that the property will be sold, the omission may be cured by recitals in the notice clearly showing that a sale at public auction is intended.⁴

Where the power itself specifies what notice shall be given, a fair compliance with its terms is all that is necessary, unless the matter is further regulated by statute.⁵

3. Presumption of Validity.—It will be presumed, not only as against the mortgagor, but also as against all persons claiming under him, that a sale under a mortgage or trust deed was advertised as required by the terms of the power;⁶ and the burden of proof rests upon the party attacking the sale, to rebut this presumption.⁷

A party who attacks a sale under a trust deed, on the ground that it is fraudulent as against creditors, will not be permitted to take advantage of defects in the notice of sale, which are not pleaded.⁸

4. Several Notices in One.—It has been held that where several trust deeds, each covering a different tract of land, are given to secure separate notes, the parties being the same in all, the trustee may in one advertisement give notice that he will sell under each deed the tract covered by it.⁹ But the better practice in such cases would be to give a separate notice under each power.

5. Who Entitled to Notice—*a.* THE MORTGAGOR.—The general

1. *Leet v. McMaster*, 51 Barb. (N. Y.) 236.

Sufficient Notice of Sale.—The following notice was held to sufficiently indicate a mortgage sale under a power: "Mortgage sale. By virtue and in pursuance of a mortgage made and delivered," etc., "dated December 8th, 1847, the undersigned will sell," etc. *White v. McClellan*, 62 Md. 347.

The Wisconsin Statute, regulating foreclosures by sale, requires the notice to state, among other things, the amount claimed to be due, a description of the mortgaged property, and "the time and place of sale." It is held that where the notice states that a sale will be made at a time and place specified, it is sufficient, though not expressly stating that the mortgage "will be foreclosed by a sale of the mortgaged premises." *Maxwell v. Newton*, 65 Wis. 261.

2. *Budenbecker v. Prescott*, 3 Hun (N. Y.) 419.

3. So held, where the notice merely stated that the trustee would "sell the estate for cash" at the courthouse door. *Powers v. Kruckhoff*, 41 Mo. 425.

4. *Nau v. Brunette*, 79 Wis. 664. In this case the notice recited that by virtue of the power, etc., "the said mortgaged premises at public auction, for cash, to the highest bidder." The omission of the words "will be sold," was held not fatal.

5. *Johns v. Sergeant*, 45 Miss. 332; *Bush v. Sherman*, 80 Ill. 160. A notice that, unless payment be made, the mortgagee will institute legal proceedings to gain possession, is not sufficient to support a sale. *Bartlett v. Jull*, 28 Grant's Ch. (Ont.) 140.

6. *Dryden v. Stephens*, 19 W. Va. 1; *Burke v. Adair*, 23 W. Va. 139.

7. *Tartt v. Clayton*, 109 Ill. 579; *Burke v. Adair*, 23 W. Va. 139.

8. *Sawyer v. Bradshaw*, 125 Ill. 440.

9. *Tyler v. Massachusetts Mut. L.*

rule is that notice to the mortgagor or grantor in a trust deed, of intention to foreclose under the power of sale, or of time and place of sale, is not necessary, unless stipulated for in the instrument itself, or directed by statute to be given.¹ Neither is it necessary to notify the mortgagor of the intention to exercise an option to declare the whole debt due upon default in payment of an installment, or of interest.² The party exercising the power must, however, give personal notice whenever his previous conduct or statements have been such as to warrant the debtor, or party claiming under him, in believing that no sale would be made until he had received such notice. Though an assurance of this kind may not have the support of a valuable consideration, a sale in violation of it would be strong evidence of bad faith.³

A statutory requirement of service of notice upon the mortgagor or his "personal representative," is satisfied as to the interest of a deceased mortgagor's heir, by serving a notice upon such

Ins. Co., 108 Ill. 58. See also *Mason v. Goodnow*, 41 Minn. 9.

1. *Hoodless v. Reid*, 112 Ill. 105; *Bridgers v. Morris*, 90 N. Car. 32; *Manning v. Elliott*, 92 N. Car. 48; *Carver v. Brady*, 104 N. Car. 219, *overruling* *Capehart v. Biggs*, 77 N. Car. 261; *Princeton, etc., Co. v. Munson*, 60 Ill. 371; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Irish v. Antioch College*, 126 Ill. 474; *Ritchie v. Judd*, 137 Ill. 453.

2. *Hoodless v. Reid*, 112 Ill. 105.

3. **Promise to Give Notice.**—If the creditor has promised the debtor, after default, that he need not pay until payment is demanded, and that personal notice will be given him, a sale by the trustee without making any demand, and without any other notice than an advertisement published in an obscure newspaper which the debtor did not see, should be set aside as in fraud of his rights. *Clevinger v. Ross*, 109 Ill. 349.

Where the mortgagee may have thrown persons claiming under the mortgagor, off their guard by applying for relief in chancery, he should notify the mortgagor, or his assigns, of his intentions, before proceeding to sell under his power. But if a specific demand for payment is duly made upon the mortgagor or second mortgagee, such persons cannot claim that they were lulled into security by the pendency of the bill. *Tartt v. Clayton*, 109 Ill. 579.

Where the trustee had promised the holder of a subsequent mortgage, who accepted such mortgage on the strength of that promise, that he would give the

mortgagee notice of default under the trust deed, before taking any steps to execute the power of sale, and afterwards he sold the property without notifying the mortgagee, who remained in ignorance of the sale, it was held that the sale was unfair, and that the mortgagee could redeem as against a purchaser with knowledge of the facts. *Cassady v. Wallace*, 102 Mo. 575.

Action for Damages.—A mortgagor may recover damages for such costs as he has been put to, by reason of failure to give notice of a sale when notice is required. *Cockburn v. Edwards*, 18 Ch. Div. 449.

A voluntary promise made by the holder of a mortgage, to the mortgagor's vendee, that he would not sell under the power without giving him personal notice, and a subsequent assignment of the mortgage to one who falsely represented that said vendee desired it, and who advertised the mortgage sale in an obscure paper, and sold the property during the vendee's absence, are not sufficient grounds to support an action at law against the assignee and purchaser at his sale, though the vendee had been forced to pay such purchaser an exorbitant sum to obtain a clear title. *Randall v. Hazelton*, 12 Allen (Mass.) 412. See also *Wicks v. Caruthers*, 13 Lea (Tenn.) 353.

Persons Under Disabilities.—Notice may be served on the persons indicated in the power, although such persons are under disabilities, as upon an infant. *Bartlett v. Jull*, 28 Grant's Ch. (Ont.) 140; *Tracy v. Lawrence*, 2 Dend. 403, or a lunatic, *Mellerst v. Keen*,

heir where there is no executor or administrator.¹ But a general agent of a mortgagor cannot be considered as his personal representative, within the meaning of the statute.²

Where a mortgagor has given a mortgage with a power of sale, to be exercised after notice to himself, he cannot, by an arrangement with the mortgagee, after conveying his equity of redemption, waive his right to notice, so as to enable the mortgagee to exercise the power without notice.³

b. SUBSEQUENT INCUMBRANCERS AND PURCHASERS.—Parties to whom the mortgagor has subsequently mortgaged or conveyed his equity of redemption are not in privity with the first mortgagee, and are not ordinarily entitled to personal notice of his intention to exercise the power of sale;⁴ but if such parties have, by law, a right to receive notice, the insufficiency of service thereof upon any of them, affects the validity of the sale only as to those not properly served and others claiming under them.⁵

A subsequent mortgagee entitled to notice may maintain an action for damages against the mortgagee selling without notice.⁶

c. PERSON IN POSSESSION.—In *Minnesota*, the statute requires a copy of the notice of sale to be served on the "person in possession" of the mortgaged premises, at least four weeks before the day of sale, in the same manner as summonses are served in civil actions,⁷ and it is held that a failure to comply with this statute, where the premises are occupied, renders the foreclosure null and void as to all parties;⁸ also, that the subsequent waiver, by the person in possession at the time notice should have been served, of the failure to serve it upon him, cannot validate the sale as against other parties interested.⁹ It is not necessary that the notice should be served on the mortgagor's wife, where both are in occupation of the premises as a homestead.¹⁰

27 Beav. 236; *Robertson v. Lockie*, 15 Sim. 285.

1. *Bond v. Finn*, 51 Hun (N. Y.) 507. But executors and administrators are intended by the term "personal representatives." *Anderson v. Austin*, 34 Barb. (N. Y.) 319.

2. *Jones v. Tainter*, 15 Minn. 512; *Atkinson v. Duffy*, 16 Minn. 45.

3. *Forster v. Hoggart*, 15 Q. B. 155; 15 Ad. & El. 155; 69 E. C. L. 154.

4. *Robbins v. Arnold*, 11 Ill. App. 434; *Bennett v. Healey*, 6 Minn. 240.

Where a trust deed contains a waiver of personal notice to the grantor, a failure to give notice to third parties to whom the land had been transferred prior to the sale, is no ground for setting it aside. *Cleaver v. Green*, 107 Ill. 67.

But where a mortgage contained a power to sell upon notice to a "mortgagor, his executors, administrators or assigns," the subsequent mortgagee

was held to be entitled to notice as an assign, notwithstanding the fact that the mortgagor was still living, and was served with notice. *Hoole v. Smith*, 17 Ch. Div. 435. And in *Bartlett v. Jull*, 28 Grant's Ch. (Ont.) 140, it was held that where the notice was required to be given to the mortgagee, his heirs, executors, or administrators, notice must be given to the mortgagor, if alive, if not, then to his heirs and personal representatives.

5. *Yonker v. Treadwell* (Supreme Ct.), 4 N. Y. Supp. 674.

6. *Hoole v. Smith*, 17 Ch. Div. 434.

7. In *Minnesota* 1878, ch. 81, p. 5, the statute has reference merely to the mode of service, and not to the persons by whom it may be made. The mortgagee himself may serve the notice. *Kirkpatrick v. Lewis*, 46 Minn. 164.

8. *Casey v. M'Intyre*, 45 Minn. 526.

9. *Casey v. M'Intyre*, 45 Minn. 526.

10. *Coles v. Yorks*, 28 Minn. 464.

6. Signing the Notice.—It is usual and proper, but not indispensable, unless made so by statute, for the mortgagee or trustee to personally sign the notice of sale under the power.¹ While a signature may not be necessary, yet, if the notice is signed improperly or without authority, it may be void, as where the notice is made in the name of a deceased mortgagee and purports to be by his authority. In such case, the defect cannot be cured by proof that, in fact, the notice was given by authority, and for the benefit of another person.²

The mere act of signing is not a matter involving the exercise of judgment, and may be done by an agent or attorney of the mortgagee or trustee.³

7. Description of Parties.—In some of the states, the notice is required to give the names of the original parties, the present holders of the security, etc. Trifling defects, such as the omission of a middle initial of a party's name, are not permitted to vitiate an otherwise sufficient notice,⁴ nor are slight errors in spelling the name of the mortgagee;⁵ but it is otherwise, if a wrong name be given as that of the mortgagor.⁶

Where the name of "the last assignee" is required to be given, this means an actual holder of the security; and it is not necessary to give the name of one to whom the mortgage had been transferred, as collateral security for a debt which was fully paid before publication of the notice.⁷

If not controlled by statute, an assignee may foreclose by giving a notice which mentions neither the record of the assignment nor the name of the assignee.⁸

It has been held that an omission to give the names of either mortgagor or mortgagee, is cured by a correct reference to the book and page of the record, because anyone desiring to learn the names can do so by inspecting the record.⁹

1. **Signatures Not Necessary.**—Fitzpatrick v. Fitzpatrick, 6 R. I. 64.

2. Bausman v. Kelley, 38 Minn. 197; Welsh v. Covley, 44 Minn. 446. See also White v. Secor, 58 Iowa 533.

In Bausman v. Kelley, 38 Minn. 197, the court said: "It is an essential quality of a notice that it appear to be given by competent authority (*citing* Niles v. Ransford, 1 Mich. 338; 51 Am. Dec. 95; Roche v. Farnsworth, 106 Mass. 509), and a notice which upon its face is declared to be the act of a designated person, and which, as such, would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person, not even standing in a relation or privity with the person in whose name the notice was given. A notice by a mere stranger can effect nothing."

3. Munson v. Ensor, 94 Mo. 504.

The signing of a notice of sale under a mortgage given to I. C., agent for A. B., as "I. C., agent for A. B., A. B. mortgagee in fact," is a sufficient signing by the mortgagee. Menard v. Crowe, 20 Minn. 448.

4. White v. McClellan, 62 Md. 347.

5. Bacon v. Northwestern Mut. L. Ins. Co., 131 U. S. 258; Reading v. Waterman, 46 Mich. 107.

6. Barrett v. Clary, 38 Mich. 223.

Name of Mortgagor.—A wife's mortgage on her own land is not invalidated by her husband's joining in its execution; nor is notice of a foreclosure sale rendered void by the fact that she is described therein merely as his wife. Yale v. Stevenson, 58 Mich. 537.

7. White v. McClellan, 62 Md. 347.

8. Woonsocket Sav. Inst. v. American Worsted Co., 13 R. I. 255.

9. Colgan v. McNamara, 16 R. I. 554.

In one case, a notice which named the mortgagor, but not the mortgagee, and was not signed by the latter, and contained no reference to the record, was sustained.¹

It is not necessary that the notice should state the names of subsequent mortgagees or purchasers of the equity of redemption.²

8. Description of Mortgage.—Statutory provisions in respect to the description of the mortgage must be strictly followed in the notice; thus, where the statute required the notice to state "the date of the mortgage, and when recorded," a notice which omitted to give the date of recording was pronounced fatally defective, notwithstanding it gave the place, book, and page of the record, by reference to which the exact date could be ascertained.³ On the other hand, if the date and place of recording are correctly given in the notice, it is not bad because of an error in stating the number of the record book.⁴

Other courts have held that a mistake in giving the date of the execution of the mortgage, was cured by a correct description of the date of recording and the book and page of the record.⁵

9. Description of the Property.—In respect to the description of the premises intended to be sold, it is generally held that the notice of sale is sufficient if it follows the description contained in the mortgage or trust deed.⁶

The office of a description in the notice is merely to furnish information to the public by means of which, the location, and character of the property to be sold can be ascertained with reasonable certainty, and if the description is sufficiently accurate for such purpose, it is good, even though it contains some inaccuracies and is not as full and complete as a careful conveyancer would have drawn it in a deed.⁷

The notice should contain some reference to the general char-

But where, in addition to the omission of the names, the notice gave the wrong page of the record, it was held insufficient. *Hoffman v. Anthony*, 6 R. I. 282.

1. *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64.

2. *Learned v. Foster*, 117 Mass. 365; *Dyer v. Shurtleff*, 112 Mass. 165, *criticising* *Roche v. Farnsworth*, 106 Mass. 509. And see *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; *Bridenbecker v. Prescott*, 3 Hun (N. Y.) 419.

3. *Martin v. Baldwin*, 30 Minn. 537. *Compare Morgan v. Joy* (Mo. 1894), 26 S. W. Rep. 670.

4. *Judd v. O'Brien*, 21 N. Y. 186.

But where the notice omitted not only the names of the parties, but also the date of execution, and gave the wrong page of the record, it was held insufficient. *Hoffman v. Anthony*, 6 R. I. 282.

5. *Reading v. Waterman*, 46 Mich. 107; *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258.

6. *Wilson v. Page*, 76 Me. 279; *Robinson v. Amateur Assoc.*, 14 S. Car. 148; *Loveland v. Clark*, 11 Colo. 265; *Miller v. Lanham*, 35 Neb. 886.

A notice of sale describing the premises by metes and bounds, as described in the mortgage, and referring by book and page to the registry of deeds, and to a plan recorded in the office of the superintendent of public lands, contains a sufficient description. *Stickney v. Evans*, 127 Mass. 202.

7. *Loveland v. Clark*, 11 Colo. 265.

Undivided Interest.—In *Johnson v. Cocks*, 37 Minn. 530, where a notice of a sale described the property as, "The undivided half of lots two and three in block two, lot eight in block four," etc., it was held that the words "undivided half" applied only to lots two and

acter of the property, as, for instance, whether it is a farm or a town lot,¹ but if the notice describes the land otherwise with reasonable certainty, it is good, though omitting the name of the town.²

Care should be taken to avoid confusion as to whether the premises referred to are the ones intended to be sold, or are given merely to fix the place of sale.³

It has been held that a notice describing a much larger quantity of land than that covered by the mortgage, is bad, on the ground that persons who might be disposed to purchase the quantity described in the mortgage, might not want so large a tract as was embraced in the notice, and therefore would not attend the sale.⁴

It is of much greater importance that the notice shall correctly state the nature of the estate in the property intended to be sold, inasmuch as statements of this character will have a controlling influence over the bidding. If the sale is to be made subject to another incumbrance, the amount thereof must be correctly given; and a false statement that the premises are subject to another mortgage, will warrant setting aside the sale.⁵

three, and that the objection that the notice purported to sell only the undivided half of the other lots described, was not tenable.

Realty and Personality.—In ejectment by the purchaser of land at foreclosure sale, under a mortgage covering both realty and personality, it cannot be objected that the notice of sale insufficiently described the personality, where the realty was described with sufficient particularity. *First Nat. Bank v. Bell Silver, etc., Min. Co.,* 8 Mont. 32.

1. *Rathbone v. Clarke,* 9 Abb. Pr. (N. Y.) 66 n.

Where the notice correctly described the lot to be sold, and stated that all the improvements thereon would be sold with it, but incorrectly stated the number of houses, it was held sufficiently accurate, no one appearing to have been misled. *Sumrall v. Chaffin,* 48 Mo. 402.

2. *Dickerson v. Small,* 64 Md. 395.

3. A notice stated that there "will be sold at public auction for breach of the condition contained in said mortgage," at a time specified, "on the premises which are described as follows, viz.: a certain piece of land," describing it by metes and bounds. It was held that it was sufficiently clear from the notice, that the premises so described were to be sold, and not merely the *locus* upon which the sale was to be made. *Streeter v. Ilsey,* 151 Mass. 291.

4. *Fenner v. Tucker,* 6 R. I. 551.

Excessive Description.—A mortgage described the property as a certain lot, less the west twenty-five feet thereof, which amounted to about one-eighth of the entire lot. The notice of sale described the lot, but omitted the exception. It was held that, in the absence of evidence, that the variance affected the result, it could not be said to be misleading or prejudicial to any party interested. *Schoch v. Birdsall,* 48 Minn. 441.

5. *Burnet v. Denniston,* 5 Johns. Ch. (N. Y.) 35.

Sale Free from Prior Liens.—A foreclosure sale under a fourth mortgage, purporting to be of the entire estate, free from all incumbrances, is void as against the mortgagor. The mortgagee has no right to sell a greater interest than that covered by his mortgage, any more than he would have to sell a less interest. *Donahue v. Chase,* 130 Mass. 137. See also *O'Connell v. Kelly,* 114 Mass. 97; *Alden v. Wilkins,* 117 Mass. 216; *Morton v. Hall,* 118 Mass. 511; *Cook v. Basley,* 123 Mass. 396.

In *Dearnaley v. Chase,* 136 Mass. 288, a sale under a second mortgage given to one Slater, purported to be of the entire estate, not merely the equity of redemption, the purchasers assuming the prior mortgage as part of the purchase price. On a bill to redeem, the court said: "We are of opinion that this was not a valid execution of

If the mortgage is a first lien covering the entire estate, a notice stating merely that "all the equity of redemption" will be sold, is bad, because it suggests prior or continuing incumbrances, and tends to keep bidders from attending.¹

10. Stating Amount Due.—The common practice, whether regulated by statute or not, is to embody in the notice of sale, a statement of the amount claimed to be due under the mortgage. But unless made so by statute, it does not seem to have been held that such statement is essential to a valid notice. Nor is there apparently any good reason for requiring it. The debtor must be supposed to know how much is due, and intending bidders cannot be particularly concerned further than to satisfy themselves that a default has occurred, and that the power of sale has become operative. The state of the account can have no effect upon the purchaser's title, and hence will not influence his bid.²

Under statutes requiring the notice to state the amount claimed to be due, all that is demanded of the party exercising the power is, that he shall make the statement honestly and in good faith. The notice will not be invalidated by an excessive claim, if the mistake was caused by a misconstruction of the contract, or by an erroneous computation.³

An excessive claim is to be considered according to its magni-

the power in the mortgage to Slater, so as to foreclose the mortgage. He had a right to sell what was conveyed to him by his mortgage, which was the land subject to the prior mortgage, or, in other words, the equity of redemption from that mortgage, but no right to sell the entire estate as unincumbered, requiring the purchaser to assume the first mortgage as part of the consideration, if he chose to have it remain upon the property." The court, however, held that the deed to the purchaser operated as an assignment of the Slater mortgage and debt.

1. In *Fowle v. Merrill*, 10 Allen (Mass.) 350, the court, in holding such a notice fatally defective, said: "It offered to the public only the mortgagor's interest in the premises, and did not include the mortgagee's. The power was to sell the whole estate, including the equity of redemption, and gave no authority to sell the equity of redemption alone. If only the equity were to be sold, it is difficult to see what would become of the mortgage. Certainly a person who might wish to purchase would only infer from the advertisement that he could buy an estate on which the incumbrance would continue. As the notice of sale was not in conformity with the power of sale in the mortgage deed, the attempted sale in pursuance of it was in-

effectual, and passed no title which can bar the right of redemption."

In *Callaghan v. O'Brien*, 136 Mass. 378, the notice of sale was of "all and singular the premises described in said mortgage, namely, a certain parcel of land," describing it, and stating that "the above premises are to be sold subject to taxes." The terms of sale referred to the premises as "frame building and land," etc. It was held that it was the intention to sell the land, and not merely an equity of redemption, and that the purchaser must have so understood. On failure of the mortgagee to give a good title, the purchaser was entitled to recover his deposit.

2. See *Miller v. Evans*, 35 Mo. 45; *Stratton v. Reisdorph*, 35 Neb. 314.

3. *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Miller v. Evans*, 35 Mo. 45; *Bowman v. Ash*, 36 Ill. App. 115; *Hamilton v. Lubukee*, 51 Ill. 415; *Butterfield v. Farnham*, 19 Minn. 85.

Excessive Claims.—The question of the effect of an excessive claim in the notice has been before the supreme court of *Minnesota* a number of times, and the rule stated in the text is now firmly established.

In the earliest case, *Spencer v. Annan*, 4 Minn. 542, where the notice claimed \$1,606.60, when in fact but

tude or the apparent want of good faith, if an attempt is made to redeem.¹

Where the notice is required to specify the amount claimed to be due "at the date of the notice," it is not indispensable that a date be affixed to the published notice. The time of its first publication will be regarded as its date.²

Where the mortgagee is authorized to declare the principal debt due upon default in payment of interest or an installment of principal, a recital of such default, and that the option has been exercised to declare the whole debt due and payable, sufficiently shows the amount claimed, to be due.³

If one mortgage covering several different tracts, is intended as a separate mortgage upon each tract for a specified portion of the debt, with the right to foreclose as to each tract upon default in payment of its portion, one notice of sale may be made to include as many tracts as are covered by the sums in default, but it must state separately the amount claimed to be due upon each of such tracts.⁴

Under a statute requiring the notice to state the amount of taxes, if any, paid by the mortgagee,⁵ it is not necessary to give the year and levy, the date of payment, nor to state that the party holds the tax receipts.⁶

11. Stating Place of Sale.—(See also sub-title, *Place of Making Sale*).—The place where the sale is to be made should be

\$964.62 was due under the contract, the court set the sale aside.

In *Ramsey v. Merriam*, 6 Minn. 168, the amount claimed in the notice was \$16,870, and the mortgagor contended that but \$16,385 was due, the balance being disputed items of interest and exchange; but the court refused to disturb the sale.

In *Butterfield v. Farnham*, 19 Minn. 85, it was held that, in the absence of evidence of injury or fraudulent intent, a claim of \$34,251.28, being an excess of \$7,335.68 over the amount actually due, did not vitiate the sale. See also *Bowers v. Hechtman*, 45 Minn. 238.

1. *Millard v. Truax*, 50 Mich. 343; *Damon v. Deeves*, 62 Mich. 465; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Mowry v. Sanborn*, 62 Barb. (N. Y.) 223.

2. *Ramsey v. Merriam*, 6 Minn. 168. 3. *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill. 390.

4. *Bitzer v. Campbell*, 47 Minn. 221; *Mason v. Goodnow*, 41 Minn. 9.

In *Child v. Morgan*, 51 Minn. 116, a mortgage covering three lots was given to secure a note of \$700, the condition of defeasance being that the mortgagor should pay that sum, "said

\$700 to be a specific lien of \$233.33 on each of the above described lots, releasable at any time by the payment of said amount of \$233.33, together with accrued interest." The court held that this was in effect a separate mortgage of \$233.33 upon each lot separately; that a notice of foreclosure, stating only the amount of the entire debt claimed to be due, without specifying the amount due separately on any of the three lots, was insufficient, and a sale of the three lots together for a gross sum was invalid; also, that the sale was not aided by the fact that the lots were first offered separately, but without receiving any bid. See also *Hull v. King*, 38 Minn. 349.

5. *Minnesota Gen. St.* (1878), ch. 81. 6. *Jones v. Cooper*, 8 Minn. 334.

A notice stated the amount of debt and interest claimed to be due, and that the premises would be sold, "to pay said debt and interest, and the taxes, if any, on said premises." It was held that this notice was not to be construed as claiming that anything was then due for taxes previously paid, but merely that the proceeds of the sale, if sufficient, would be applied, so far as necessary, to the payment of any taxes

designated in the notice with sufficient certainty to enable the public to find the locality without seeking other information. If the designated place has, in fact, no existence, the notice is of no effect, and no valid sale can be made under it.¹ Whatever provisions are contained in the mortgage or deed as to the place of sale, must be followed in the notice.²

Under a statute requiring the "place of sale" to be given, it is sufficient to designate it as in front of the office of the register of deeds of the county, without giving the location of his office,³ and if the notice itself cannot be produced, parol evidence is admissible to show that the place of sale was properly designated.⁴

12. Date and Hour of Sale—Adjournment.—A notice which omitted to fix any date for the sale, would be no notice at all; and for the same reason, the giving of an impossible or unreasonable date would invalidate the sale, unless it can be seen to a reasonable certainty that the date given was the result of mistake, and of such a character that no one would be misled by it.⁵ A notice which gives the date and hour of sale, but omits the year, is cured

on the premises which might be due, and payable at the date of sale; and that the notice was sufficient. *Kirkpatrick v. Lewis*, 46 Minn. 164.

1. In *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125, a notice of a mortgage sale named as the place of sale "the front door of the courthouse in the village of Crookston," when in fact there was no courthouse, nor any place known as a courthouse, in that village. The court held that the mortgagee might treat the whole proceeding as a nullity, and proceed anew to execute a power.

2. In *Colcord v. Bettinson*, 131 Mass. 233, it appeared that, subsequent to the incorporation of the south part of Malden as the town of Everett, the plaintiff, who owned and lived upon land in the latter place, mortgaged it to the defendant, describing herself as of Malden, and the property as situated in the south part of Malden. The mortgage provided that, upon default, and upon publishing a notice of sale in a newspaper printed in the county, a sale of the premises might be made "at public auction, in said Malden." The notice of sale was published in a newspaper printed in Everett, and stated that the sale would take place on the premises described in the mortgage, "to wit, a lot of land in the south part of Malden." The sale took place, as advertised, on the premises in the town of Everett. The land was de-

scribed in the notice by metes and bounds, and the date of the mortgage, together with the book and page where recorded, were also given. It was held that the notice was sufficient, and that the sale was made at the place required by the mortgage.

3. *Merrill v. Nelson*, 18 Minn. 366.

4. *Wilkerson v. Allen*, 67 Mo. 502.

5. See *Fenner v. Tucker*, 6 R. I. 551, where the giving of the wrong year was held to invalidate a sale.

Harmless Mistakes.—In *Jensen v. Weinlander*, 25 Wis. 477, it is held that a published notice of sale to take place in the year 1761, instead of 1861, which was the year the notice was published, does not render the sale void, as the mistake could have misled no one.

In *Gray v. Shaw*, 14 Mo. 341, where a notice dated December 7th, advertised a sale to take place "on the 28th day of December next," it was held that a sale on the 28th of the same December was valid, as the date given could not have deceived intending purchasers.

Dating the notice of sale April 23d, 1858, instead of 1868, the year of the sale, is a mistake obvious on inspection, and does not invalidate the proceedings. *Mowry v. Sanborn*, 68 N. Y. 153.

Sale After Death of Grantor.—The *Missouri Statute* (Wag. St., p. 94), forbidding a trustee's sale within nine months after the death of the grantor, refers to trust deeds executed by the decedent, and not to those executed by

by the date printed in the newspaper as the date of its issue.¹ The hour of sale should in all cases be given, but it does not seem to be of so much importance as the date; and if neither the statute nor the instrument requires the hour to be stated in the notice, its omission will not invalidate the sale, particularly where there is laches in raising the objection.² Even where by statute the "time of sale" is required to be stated, it seems that a notice stating the day, but not the hour of sale, will not necessarily invalidate the foreclosure.³

In the absence of a showing that anyone was prejudiced, a notice that the sale would take place "between the hours of 10 o'clock a. m. and 4 o'clock p. m." is not fatally indefinite.⁴

It has been held that where there is a local custom by which sales are almost invariably made after one o'clock in the afternoon, a sale at eleven in the forenoon was irregular.⁵

If the sale is advertised for a certain hour, it should begin promptly at that hour, but if intending purchasers are not shown to have left on account of the delay, a valid sale may be made at any time during the following hour. Thus, the hour of twelve will be deemed to last until one o'clock if the attendance continues.⁶ But a sale made before the hour stated in the notice, is equivalent to a sale without any notice, and is void.⁷

Statutory provisions requiring notice of sale to be published for a certain length of time prior to the date of sale, are construed

third persons on the same property. *Lass v. Sternberg*, 50 Mo. 124.

1. *Parmly v. Walker*, 102 Ill. 617. In this case the notice called for a sale on "Wednesday, 28th of August at 11 o'clock a. m." The newspaper in which it was published was dated 1878.

2. *Meier v. Meier*, 105 Mo. 411; *Hamilton v. Lubukee*, 51 Ill. 415; *Thorwarth v. Armstrong*, 20 Minn. 464; 2 *Jones Mortg.* (4th ed.), § 1846.

3. The *Minnesota Rev. St.* requires sales under powers to take place "between the hours of nine o'clock in the forenoon and the setting of the sun;" and also requires the notice to state the "time and place of sale." A notice under this statute, specifying merely the day of sale without designating any hour, was acquiesced in for twelve years after the sale, and the court refused to interfere. *Berry, J.*, speaking for the court, said: "It cannot be said that such a notice does not specify the time of sale, and apprise the mortgagor and the public thereof. It can only be said that it does not specify the time with as much particularity as it ought to do, by designating the hour of sale according to common usage and the better practice. The indefiniteness of

the notice was then, at most, an irregularity, and whatever the mortgagor might have done upon reasonable application, such irregularity cannot be permitted to overthrow a sale which, so far as appears, has never been attacked until the present action was instituted, nearly twelve years after the sale took place." *Menard v. Crowe*, 20 Minn. 448.

4. *Northrop v. Cooper*, 23 Kan. 432.

5. *Holdsworth v. Shannon*, 113 Mo. 508.

6. *Lester v. Citizens' Sav. Bank*, 17 R. I. 88; *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151.

Sale After Hour.—Where the trustee appeared at the place of sale at ten o'clock a. m., the hour stated in the notice, and opened the sale by reading the notice, and remained in charge until the consummation of the sale, which was after eleven o'clock, but delayed the proceedings in order to enable complainants to apply for an injunction restraining the sale, it was held that the delay did not invalidate the sale. *Erwin v. Hall*, 18 Ill. App. 315.

7. *Richards v. Finnegan*, 45 Minn. 208. In this case it was held that the notice of sale, stating the hour as eleven

as not requiring the sale to occur immediately after the expiration of the period of publication. An interval of two weeks would not be unreasonable or affect the validity of the sale.¹

While the date of sale may, in a proper case, be changed, pending the publication of the notice,² yet if the owner or other parties interested are misled by reason of the change, and lose the opportunity of attending the sale by not learning of the substituted date, the sale will be set aside.³

A sale is not necessarily invalid because made on a legal holiday, other than Sunday.⁴

A trustee, mortgagee, or public officer charged with the duty of making sales under powers, has always by implication the power to adjourn the sale to a future day or from time to time, if, in his judgment, the interests of the parties will be promoted by so doing,⁵ and if he sees that a proper sale cannot be made at the time advertised, it would be not merely his privilege, but his duty, to postpone the sale.⁶

While it is sometimes the duty of the trustee or mortgagee, in order to prevent a sacrifice of the property, to adjourn the sale to a more favorable time,⁷ yet he must in all cases give adequate notice of the adjournment, and must strictly comply with the statutory requirements, or the terms of the power, as to posting and publishing the new notice.⁸ But it seems that the notice of the adjourned sale need not be so minute and specific in matters

o'clock a. m., and the sheriff's certificate reciting that at the time stated in the notice he sold the property "at 10 o'clock a. m.," are sufficient to put a purchaser on inquiry as to the hour of sale, and that the mortgagor is not estopped by having taken no steps to clear the record.

1. Goenen v. Schroeder, 18 Minn. 66.

2. Banning v. Armstrong, 7 Minn. 46.

3. Dana v. Farrington, 4 Minn. 433.

4. *Washington's Birthday*.—Though February 22nd is by statute made a public holiday, upon which all judicial business and service of process are prohibited, yet a sale on that day under a trust deed is valid. *Stewart v. Brown*, 112 Mo. 171.

5. *Richards v. Holmes*, 18 How. (U. S.) 143; *Fairfax v. Hopkins*, 2 Cranch (C. C.) 134; *Tinkom v. Purdy*, 5 Johns. (N. Y.) 345; *Miller v. Hull*, 4 Den. (N. Y.) 104; *Westgate v. Handlin*, 7 How. Pr. (N. Y.) 372; *Warren v. Leland*, 9 Mass. 265; *Hosmer v. Sargent*, 8 Allen (Mass.) 97; *Dexter v. Shepard*, 117 Mass. 480; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306; *Russell v. Richards*, 11 Me. 371; *Johnston v. Easton*, 3 Ired. Eq. (N. Car.) 330; *Meyer v.*

Jefferson Ins. Co., 5 Mo. App. 245; *Vail v. Jacobs*, 62 Mo. 130; *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co.*, 52 Ill. 130; *Davey v. Durrant*, 1 De G. & J. 535.

6. *Fairfax v. Hopkins*, 2 Cranch (C. C.) 134. See also cases cited in the following notes:

Mortgagee Not Bound to Adjourn.—If the mortgagee conducts the sale openly and fairly, he is under no obligation to postpone it for the purpose of obtaining a better price, and the mortgagor cannot complain of his not doing so. *Davey v. Durrant*, 1 De G. & J. 535; *Franklin v. Greene*, 2 Allen (Mass.) 519.

7. *Vail v. Jacobs*, 62 Mo. 130; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Judge v. Booge*, 47 Mo. 544.

A postponement for three years of a sale under a trust deed, does not raise any presumption of fraud, when no possession of the land, or other benefit from it, is reserved to the grantor. *Starke v. Etheridge*, 71 N. Car. 240.

8. *Richards v. Holmes*, 18 How. (U. S.) 143; *Jackson v. Clark*, 7 Johns. (N. Y.) 217; *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co.*, 52 Ill. 130; *Bennett v. Brundage*, 8 Minn. 432;

of description and recitals as the original advertisement. If it clearly describes the property and gives the time and place of sale, it will be sufficient,¹ and it need not be published for the same length of time as the original notice, unless so required by statute or the terms of the power.²

If the sale is properly commenced on the day advertised, and is not completed at the close of that day, it may be continued to the next day without a new publication;³ but the trustee should publicly announce his intention to resume it, and if upon the failure of a bidder to comply with the terms of sale, he allows the bidders to disperse without proclamation that he will proceed to resell, it is his duty to publish a new notice.⁴ The time of adjournment as announced by the trustee should correspond with that afterwards published, as a change in the date might mislead intending purchasers and render the sale invalid.⁵

After the publication of a notice of postponement, the mortgagee or trustee cannot ignore it and proceed to sell at the date originally given.⁶

13. Publication of Notice.—Unless required by statute or the terms of the power, the trustee or mortgagee need not publish any notice, but may make a private sale.⁷

When public notice is required by the deed, however, the sale may be set aside for failure to advertise.⁸

If the grantor expressly consents that the trustee may sell upon a shorter notice than that required by the deed, he becomes estopped to attack the sale on the ground of insufficient notice.⁹ It has been held, however, that such a requirement cannot be changed by the oral consent of the parties.¹⁰

The fact that communication between the mortgagee's residence

Hosmer v. Sargent, 8 Allen (Mass.) 97; *Dexter v. Shepard*, 117 Mass. 480.

1. *Richards v. Holmes*, 18 How. (U. S.) 143; *Dexter v. Shepard*, 117 Mass. 480.

2. *Jackson v. Clark*, 7 Johns. (N. Y.) 217; *Sayles v. Smith*, 12 Wend. (N. Y.) 57; *Westgate v. Handlin*, 7 How. Pr. (N. Y.) 372; *Dana v. Farrington*, 4 Minn. 433.

3. *Lallance v. Fisher*, 29 W. Va. 512.

4. *Judge v. Booge*, 47 Mo. 545; *Davis v. Hess*, 103 Mo. 31.

5. *Miller v. Hull*, 4 Den. (N. Y.) 104; *Jackson v. Clarke*, 7 Johns. (N. Y.) 217; *Jones Mortg.* (4th ed.) 1873.

6. *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

7. *Mowry v. Sanborn*, 68 N. Y. 153; *Martin v. Paxson*, 66 Mo. 260; *Davey v. Durrant*, 1 De G. & J. 553; 2 *Jones Mortg.* (4th ed.) 1821.

If the power authorizes a private sale, there is no objection to the mortgagee entering into a contract for sale

before the expiration of the notice required by the mortgage, and though the purchase cannot be completed until after the expiration of the stipulated notice, the contract will be valid, provided that it be made conditional upon non-redemption in the meantime. *Major v. Ward*, 5 Hare 598; *Ford v. Heely*, 3 Jur. N. S. 1111.

8. *Davey v. Durrant*, 1 De G. & J. 535; *Richmond v. Evans*, 8 Grant's Ch. (Ont.) 508.

9. *Manlsby v. Barker*, 3 Mackey (D. C.) 165.

But in *Cornell v. Newkirk*, 144 Ill. 246, the court said: "We are inclined to the opinion that the statute requiring the notice to be published once in each week for four successive weeks should control the mortgagee in giving notice, although the mortgagor had provided for a different notice by the terms of the mortgage."

10. *Baldrige v. Walton*, 1 Mo. 520. See *CONTRACT*, vol. 3, p. 829.

and the place where publication of notice of sale is required by the deed to be made, is cut off by the existence of war, will not justify a sale made without such publication. If the power cannot be complied with, it is for the time suspended.¹

Where a trust deed requires notice to be published in newspapers printed in two designated counties, a sale under a notice published in only one county, is void. The purchaser must take notice of such requirement, particularly where the deed has been recorded.²

The publication is sufficient if made at the place designated in the mortgage, notwithstanding an error in the record as to such designation. The mortgagee cannot be affected by the fault of the recording officer.³

An unreasonable delay on the part of the owner in attacking a sale under a power, upon the ground that the notice was not properly published, will bar him from disputing the sufficiency of the publication.⁴

In many of the states, it is now provided by statute that a notice of intention to sell shall be published for a specified length of time in some newspaper. Such provisions must, of course, be strictly complied with in order to make a valid execution of the power.⁵ The statute in force at the time of publishing notice of

1. *Bigler v. Waller*, 14 W all. (U. S.) 297.

2. *Thornburg v. Jones*, 36 Mo. 514. See also *Green v. Alexander*, 7 D. C. 147.

Clerical Error.—A mortgage required the notice of sale to be published "in a newspaper printed in the Chicago Times." The words "Chicago Times" were written in a blank space evidently intended for the name of the city or town where the newspaper was published. It was held that a publication in the *Chicago Times* was proper. *Strother v. Law*, 54 Ill. 413.

In *Watson v. Sherman*, 84 Ill. 263, a mortgage provided that a sale under the power could be made by advertising the same for a specified period in a newspaper published in a certain town, "by posting up written or printed notices in four public places" in the county. The court held that the word "by" was intended for "or," and that the notice might be given in either mode.

3. *Colgan v. McNamara*, 16 R. I. 554.

4. *Bergan v. Bennett*, 1 Cai. Cas. (N. Y.) 1; 2 Am. Dec. 281 (delay of sixteen years).

In *Minnesota*, no foreclosure sale shall be set aside for defect in notice or publication unless the action calling it in question shall be commenced within

five years from the date of the sale. *Russell v. Lumber Co.*, 45 Minn. 376; *Morgan v. Carter* (Minn. 1893), 55 N. W. Rep. 1117.

5. *Bacon v. Kennedy*, 56 Mich. 329; *Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96; *Mowry v. Sanborn*, 72 N. Y. 534; *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Van Slyke v. Sheldon*, 9 Barb. (N. Y.) 278.

If the notice is not published for the whole period required by the statute, the sale is invalid. *Mercantile Trust Co. v. South Park Residence Co.* (Ky.), 22 S. W. Rep. 314; *Cornell v. Newkirk*, 144 Ill. 241.

When Statute Governs.—Under a trust deed providing that sale might be made on default after giving such reasonable notice "as might be usual or provided by law in the State of *New York*," it was held that the *New York* Statute on the subject of notice must be complied with. *Shillaber v. Robinson*, 97 U.S. 68.

Court Designating Newspaper.—The *Missouri* Statute (Rev. St. 1889, 312), requiring circuit court judges to act as a board for the purpose of awarding to newspapers the publication of "all advertisements, judicial notices, and orders of publication required by law to be made," does not apply to the publica-

sale, and not the one in force when the mortgage was executed, governs as to the form, contents, and period of publication. The application of a new statute to an existing mortgage affects only the remedy, and does not impair the contract.¹

Statutory provisions regulating foreclosures under powers of sale, have no extra-territorial force, and cannot be invoked to restrain a sale made within the state, of land situated in another state. Accordingly, the courts of *New York* have refused to interfere with the sale upon notice published in the city of New York, in compliance with the terms of a mortgage on land in *Colorado*, and not shown to be in violation of any law of the latter state, though such method of publication would, under the *New York* statute, render the sale of property in *New York* invalid.²

Where the statute prescribes the contents of a notice of sale, and the manner of its publication, these requirements cannot be varied by the terms of the power.³ And if the original publication is insufficient, it cannot be cured by postponing the sale and publishing notice of that fact, where neither notice is published for the statutory length of time.⁴

Under a statute prescribing publication of notice, in case none was provided for by the terms of the power, the statute may be followed where the method of publication agreed upon in the power cannot possibly be carried out, as for want of a daily paper in the county.⁵

When notices are required to be published in a "newspaper," one printed in the English language is always intended, unless the contrary is expressed.⁶

It is not clearly settled what is requisite to constitute a "newspaper" within the meaning of statutes or powers requiring notices of sale to be published in some newspaper. The term itself implies that the paper shall be devoted to some extent to the publication of current general news items; but it seems that if a few such items are regularly and in good faith published, the paper is none the less a newspaper because it is chiefly devoted to the interests of some special class or religious denomination.⁷

tion of notices of sale under powers in trust deeds; and such notices may be published in a paper other than the one designated as official by the judges. *Dart v. Bagley*, 110 Mo. 42.

Cost of Publication.—Where the statute requires notice of a sale to be published in "one or more" newspapers for a specified time, and a notice is properly published in one paper, and also for a part of the required time in another, the cost of the latter publication cannot be charged against the property. *Brown v. Ogg*, 85 Ind. 234.

1. *Atkinson v. Duffy*, 16 Minn. 45.

2. *Carpenter v. Black Hawk Gold*

Min. Co., 65 N. Y. 43. See also *Central Gold Min. Co. v. Platt*, 3 Daly (N. Y.) 263; *Elliott v. Wood*, 45 N. Y. 71.

3. *Shillaber v. Robinson*, 97 U. S. 68; *Butterfield v. Farnham*, 19 Minn. 85; *Elliott v. Wood*, 45 N. Y. 71; *Lee v. Mason*, 10 Mich. 403; *Hebert v. Bulte*, 42 Mich. 489.

4. *Pratt v. Tinkcom*, 21 Minn. 142.

5. *Warehime v. Carroll County Bldg. Assoc.*, 44 Md. 512.

6. *Graham v. King*, 50 Mo. 22.

7. **Newspaper.**—A weekly paper, called the *Northwestern Presbyterian*, chiefly devoted to religious matters pertaining to the Presbyterian denom-

Unless the statute or power otherwise provides, a weekly newspaper is a proper medium for the publication; and where the notice is to be published in a "public newspaper" for a given number of weeks, it may be published once a week in a daily paper.¹

A journal of limited circulation, devoted to legal matters and advertising, has been held to be a proper medium of publication.²

Evidence of the extent of circulation of the paper in which the notice of sale was published, is not necessary, unless the proper issues have been raised upon the question of circulation.³

If a proper paper is selected, a change in its name, and its removal to another part of the county pending publication of the notice, does not affect the validity of the publication,⁴ nor does its consolidation with another paper, during the period of publication, if there is no interruption in the successive publications.⁵

If a daily paper is employed, the notice need not necessarily be inserted in each day's issue, but may be published at weekly intervals; but it is not permissible to change the publication from the daily issue to a weekly reprint of the same paper.⁶

It is not essential to the validity of the publication that the notice shall be published in all of the editions of the paper struck off on the days of its publication, provided that the edition in which it does appear is a *bona fide* one,⁷ neither is it requisite that the notice be published in the Sunday editions of a daily paper,

ination, but containing in each issue a column of the general news of the day, is a "newspaper" within the meaning of Gen. St. Minn. (1878), ch. 81, in which notices of foreclosure sales may be published. *Hull v. King*, 38 Minn. 349.

1. *Thurston v. Miller*, 10 R. I. 358; *Harris, Petitioner*, 14 R. I. 637.

Daily Newspaper Not Necessary.—Where a trust deed required an advertisement of the sale "in some newspaper" for at least twenty days, it was held that a notice given by four insertions in a weekly paper, beginning more than twenty days before the sale, was sufficient, and that notice in a daily paper was not necessary. *Campbell v. Tagge*, 30 Iowa 305; *Leffler v. Armstrong*, 4 Iowa 482.

In Baltimore.—As to publication of notices of sale in daily papers in the city of Baltimore, under local laws, see *Chilton v. Brooks*, 71 Md. 445.

2. *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Taylor v. Reid*, 103 Ill. 349.

3. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

It is not necessary that the newspaper in which the notice is published should have a general circulation in any

particular city or portion of the county. *Smith v. Foxworthy* (Neb.), 57 N. W. Rep. 994.

4. *Perkins v. Keller*, 43 Mich. 53.

5. *Wilkerson v. Eilers*, 114 Mo. 245.

6. In *Stine v. Wilkson*, 10 Mo. 75, "twenty days' previous notice" of the time of sale was required. One notice was published in a daily newspaper twenty-one days before the sale, and after that, the notice was published in a weekly edition, or reprint of the same paper, and taken out of the daily edition. This was held insufficient, the court saying: "Would one publication of a notice by a sheriff of an intended sale of real estate, under execution, made in a newspaper twenty days before the sale, be held to be a compliance with the statute which directs him to give twenty days' previous notice of the time, etc., by an advertisement in some newspaper printed in the county? We apprehend that such is not the general understanding, nor the practice in the county, but that such notices are continuous to the day of sale." Cited with approval in *German Bank v. Stumpf*, 73 Mo. 311.

7. *Everson v. Johnson*, 22 Hun (N. Y.) 115.

because the law does not presume that secular business receives public attention on that day.¹

Under a trust deed providing for a sale "after first advertising the time, place, and terms thereof for five days," a Sunday occurring between the first and last publications is to be counted as one of the five days required.²

It will be presumed, in the absence of proof, that the first publication in a daily paper was made on the day the notice bears date.³

If the deed or statute directs the notice to be published in a newspaper "printed" in the county, a sale cannot be supported merely by proof that the paper was "published" there.⁴

If the power does not designate the paper in which the notice is to be published, the choice of a paper rests with the trustee or mortgagee.⁵ In making such choice, he must act in good faith; and where, though nominally complying with the terms of the power, he purposely selects an obscure paper, printed in a remote part of the county, and the debtor's interests are prejudiced thereby, the court will set aside the sale.⁶ The mere fact that the mortgagee selected for publication of the notice, a paper which was not adapted to giving the proposed sale so much publicity, or to procuring the presence of so many bidders, as another paper published nearer the premises would have done, is no evidence of a fraudulent purpose. All that can be required is that the paper selected shall have a *bona fide* circulation.⁷

The trustee, if not restrained by the deed, may, in the exercise of a fair discretion, publish notice in a newspaper located in another state.⁸

The publication, whether required by the statute, or by the terms of the power, must be continuous during the specified period; in other words, there must be no interval between the expiration of one publication and the commencement of the next.⁹ A

1. Kellogg v. Carrico, 47 Mo. 157; Cushman v. Stone, 69 Ill. 516; Graham v. Fitts, 53 Miss. 307.

2. Bowles v. Brauer, 89 Va. 466.

3. Kopmeier v. O'Neil, 47 Wis. 593.

4. Hollis v. Hollis, 84 Me. 96; Bragdon v. Hatch, 77 Me. 433.

5. Singleton v. Scott, 11 Iowa 589.

Designating Newspaper.—A provision in a trust deed that a notice of the sale should be published in some newspaper published in the county of Morgan or an adjoining county, is not void for uncertainty. It gives the trustee discretion to choose a paper published in any one of the counties embraced in the description. Martin v. Paxson, 66 Mo. 260.

6. Webber v. Curtiss, 104 Ill. 309; Ingle v. Culbertson, 43 Iowa 265; Thompson v. Heywood, 129 Mass. 401.

7. Maxwell v. Newton, 65 Wis. 261.

8. Ingle v. Jones, 43 Iowa 286. See also Ingle v. Culbertson, 43 Iowa 265.

9. Cushman v. Stone, 69 Ill. 516; Stine v. Wilkson, 10 Mo. 75; Kellogg v. Carrico, 47 Mo. 157.

In Washington v. Bassett, 15 R. I. 563, where the mortgage required "twenty days' notice of such sale in some one of the public newspapers printed in said city of Providence," and the sale took place August 12th under a notice published in a daily paper on July 22d, 25th, 29th and August 1st, 5th, 8th and 11th, it was held that the notice was insufficient, not having been published continuously for twenty days in the paper selected.

In German Bank v. Stumpf, 73 Mo. 311, where a trust deed provided for giving thirty days' notice of sale, and it

single insertion of the notice, however, may sometimes be sufficient if the power does not seem to contemplate a continuous publication.¹

It is not necessary that the sale be advertised to take place on a day immediately following the expiration of the required period of publication. A publication for a greater length of time than required, or a publication expiring some little time before the day of sale, cannot prejudice any rights of the parties interested.²

Conversely, under a statute requiring at least thirty days' notice, it is not necessary that the last publication shall be at least thirty days before the sale.³

In determining whether the publication was begun the required length of time before the sale, the first day of publication should be excluded, but the day of sale may be included.⁴

Where the notice is required to be published for a certain number of days or weeks, the full number must intervene between the first day of publication and the day of sale, the latter being counted. A sale before that time would be premature and void,

was shown that the sale was made under a notice, the first publication of which occurred more than thirty days before the sale, but which was published only twenty-seven times, it was held that the sale would not be disturbed, no injury or inadequacy of price being shown to have resulted.

1. *Jenkins v. Pierce*, 98 Ill. 646. In *Weld v. Rees*, 48 Ill. 428, where the deed provided for a sale "after publishing a notice in a newspaper published in the city of Chicago ten days before the day of such sale," it was held that one insertion ten days before the sale was sufficient, as the language used seemed to exclude the idea that the notice should be published continuously for that length of time. But the court said that there might have been a question as to its sufficiency if "notice for ten days" had been required.

2. *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

In *Taylor v. Reid*, 103 Ill. 349, the court intimated that if the publication had expired an unreasonably long time before the day of sale, it would have the same effect as no notice whatever.

Where the last day of publication was required to be ten days before the sale, it was held that while the last notice could not be less, it might lawfully be more, than ten days before the sale, subject only to the qualification that the interval must not be unreasonable. *Tooke v. Newman*, 75 Ill. 215.

Failure to Publish on Day of Sale.—In *Patterson v. Miller*, 52 Md. 388, it

appeared that in consequence of a failure to publish the notice on the day of the proposed sale, a public impression was produced that the sale would not occur. It was held that a sale made on that day, at which an inadequate price was realized, should be set aside. Ordinarily, however, such an impression would not exist merely because the notice was not seen on the day of the sale.

3. *Taylor v. Reid*, 103 Ill. 349. See also *First Nat. Bank v. Bell Silver, etc., Min. Co.*, 8 Mont. 32.

Under a trust deed providing that a sale might be made after "giving thirty days' notice" by posting a notice at the place of sale, "and by advertising the same in some newspaper published in the city of Austin, Texas, for at least thirty days prior to the day of sale, such publication to be made four times in succession in said paper," it was held that thirty days must elapse between the first and the last insertion and the day of sale. *Howard v. Fulton*, 79 Tex. 231.

4. *Magnusson v. Williams*, 111 Ill. 450; *Worley v. Naylor*, 6 Minn. 192; *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

The first day of publication is to be excluded, and the last (being the day of sale) is to be included in making up the prescribed number of days. *Bowles v. Brauer*, 89 Va. 466.

Under a trust deed requiring ten days' notice of sale, where the first publication was made on the 8th day of October, a sale on the 18th was held void,

even though the notice had been published the requisite number of times.¹

In *New York*, where the notice is required to be published once each week for twelve successive weeks, it has been held that the first publication need not be eighty-four days before the sale, if the requisite number of weekly publications be made.²

It has been held that the word month in the *New York* statute relating to the publication of notices, means a lunar month.³

Of course the publication should not begin until default has occurred; hence, a publication begun on the same day the debt becomes due, is premature and void. It should not appear until the next day.⁴ If, by the terms of the power, the sale is not to be made until after default has continued for a stated time, the required period of publication cannot begin until the period of continued default has elapsed. The two periods are not synchronous, but successive.⁵

Mere clerical errors in the publication, such as could not have misled anyone, will not justify setting aside the sale.⁶

The statutes usually provide for filing an affidavit of publication; the power to make a valid sale, however, does not depend upon the affidavit, but upon the fact of publication, and this may

there having been only nine days' publication, excluding the first. *Lerch v. Snyder*, 2 Tex. Civ. App. 421.

1. *Siemers v. Schrader*, 88 Mo. 20; *Enochs v. Miller*, 60 Miss. 19.

In *Bacon v. Kennedy*, 56 Mich. 329, the court, per Campbell, J., said: "The only question in this case is whether a statutory foreclosure is valid where the sale was made on a notice which, although published twelve times in separate weeks, provided for selling on a day less than twelve weeks from the first publication. The statute does not say that the notice shall merely be published twelve times, once a week, but once a week 'for twelve successive weeks.' The object of this was manifestly to give that full interval between the first notice and the sale." See also *Gantz v. Toles*, 40 Mich. 725.

2. *George v. Arthur*, 2 Hun (N. Y.) 406; *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

A publication beginning December 7th and ending March 1st next, is not a compliance with the statute requiring twelve weeks' publication. *Bunce v. Reed*, 16 Barb. (N. Y.) 347. But under a statute requiring six weeks' publication, a notice published on August 3d and each week thereafter up to and including September 14th—the day of sale—was held sufficient. *Worley v. Naylor*, 6 Minn. 192.

Constitutionality of Statute.—The *New York* Act of 1842, reducing the period of publishing the notice of sale from twenty-four weeks to twelve weeks, is not unconstitutional as to its operation upon mortgages existing at the time of its enactment. *James v. Stull*, 9 Barb. (N. Y.) 482.

In *Massachusetts*, it has been held that where the power is to sell the land "by public auction, first publishing a notice of the time and place of sale, once each week for three successive weeks," it is not necessary that the first day of publication shall be twenty-one days before the day of sale. *Dexter v. Shepard*, 117 Mass. 480; *Frothingham v. March*, 1 Mass. 247.

3. *Loring v. Halling*, 15 Johns. (N. Y.) 119.

4. *Pratt v. Tinkcom*, 21 Minn. 142.

5. In *Macon*, etc., *R. Co. v. Georgia R. Co.*, 63 Ga. 103, however, the only valid objection to the sale being that the advertisement was premature, and the required period of default having elapsed pending the suit, the court ordered the sale to proceed upon a new notice published for the required length of time.

6. *Mitchell v. Nodaway County*, 80 Mo. 257. See also *Turner v. Stine*, 18 Mo. 583; *Curd v. Lackland*, 49 Mo. 451; *Draper v. Bryson*, 17 Mo. 71; *Houck v. Cross*, 67 Mo. 151.

be shown independently of the affidavit which is merely *prima facie* evidence.¹ It is no objection to the publisher's affidavit that the copy of notice attached does not appear to have been actually cut from the newspaper in which publication was made. That it is a true copy is sufficient.²

An omission in the purchaser's deed of a recital that the sale was advertised as required by the terms of the power, may be supplied by evidence *aliunde*.³

It has been held that the burden of proving that proper notice of a sale under a power was given, is upon the party claiming under the sale, even where he is defendant and the bill affirmatively charges that there was no publication.⁴

14. New Publication.—A sale is not invalidated by the fact that it was twice advertised, where the second notice was rendered necessary by reason of a defect in the first which was abandoned, and no one is shown to have been misled by the substituted publication.⁵

15. Posting Notices.—It is sometimes provided that the notices of sale shall be posted in public places before the sale. Such requirements, whether by statute or the terms of the power, must be strictly complied with; and it will not answer to post the notices and immediately take them down, thereby preventing the public from obtaining the proper information.⁶ When the notice has been once properly posted as required by the statute or power, it will be presumed, until the contrary is shown, that it remained posted up to the day of sale.⁷ But even though it be shown that the notices did not remain posted during all the time, this would not affect the validity of the sale in the absence of fraud. Unless expressly required, it is not the duty of the party executing the power, to guard against removal or destruction of the notices.⁸

When the notice is required by the terms of the power to be posted in a particular place, no other place, however public, will suffice; and it makes no difference that the trustee is prevented by the owner of the place designated, from posting the notice there;⁹ nor is it any excuse that there was no such place as the one specified. The proper remedy in such case is to obtain judicial foreclosure.¹⁰

1. *Mowry v. Sanborn*, 72 N. Y. 534, reversing *Mowry v. Sanborn*, 11 Hun (N. Y.) 545. Such provision is merely for the protection of those claiming under the sale, and to prevent litigation. *Field v. Gooding*, 106 Mass. 310.

2. *Goenen v. Schroeder*, 18 Minn. 66.

3. *Allen v. DeGroodt*, 105 Mo. 442.

4. *Gibson v. Jones*, 5 Leigh (Va.) 403. But see *Simson v. Eckstein*, 22 Cal. 581, which holds that a purchaser at a sale under a power in a mortgage, need not show in the first instance, as against a purchaser from the mort-

gagor, subsequent to the sale, that notice thereof was properly given.

5. *Ritchie v. Judd*, 137 Ill. 453.

6. *Culbertson v. Young*, 50 Mich. 190.

What is a Public Place.—The side of a public square in a town or city. *Carter v. Abshire*, 48 Mo. 300. A courthouse, and not exclusively the front part of it. *Campbell v. Wheeler*, 69 Iowa 588.

7. *Hornby v. Cramer*, 12 How. Pr. (N. Y.) 490.

8. *Graham v. Fitts*, 53 Miss. 307.

9. *Sears v. Livermore*, 17 Iowa 297.

10. *In Dutton v. Cotton*, 10 Iowa

A requirement that the notice shall be posted "at the courthouse door," has been held to be sufficiently complied with by posting it in the courthouse corridor, about forty feet from the front door, at the side of a stairway leading to the court room, upon a bulletin board furnished by the county for posting notices of sheriff's sales.¹

A notice posted on the inside of the post-office door, where it was visible to the public except on Sundays, was held sufficient; the law does not contemplate that such notices shall be seen on Sunday.²

Under a requirement that notices shall be posted in three public places in the county, it is permissible to post two—and possibly all three—notice in different places in the same city or village.³

A local custom among auctioneers of posting notices upon the doors or in the windows of houses to be sold, stating the time and place of sale, does not have the force of law or contract, and a sale made without observing such custom is valid.⁴

The act of posting notices may be done by an agent of the trustee.⁵

XVI. RESALE UNDER POWER.—If, by reason of irregularities in the proceedings, a mortgagee's or trustee's sale is ineffectual and void, it is considered that the power has never been exercised, and a new sale under it may be made.⁶ As, if the bidder to whom the property is struck off refuses to pay the amount of

408, a statute required that one of the notices of sale should be posted at the place of holding the last term of the district court. At the time of posting the notices under a mortgage, no term of court had ever been held in the county, but the notices were posted in three public places in the county, one of which was the office of the clerk of the district court. In holding that the sale was invalid, the court, per Lowe, C. J., said: "The power to deprive a man of his property without the intervention of the processes of the law of procedure, is, to some extent, an extraordinary, not to say a severe, power, which should not be exercised except in the particular method prescribed by law. If we sustain the sheriff's sale and deed in this case, we would go beyond the law and sanction an omission to comply with one of its important requirements. This we are unwilling to do, particularly as the plaintiff had another plain remedy which we think he should have pursued. In the absence, however, of such a remedy, and rather than that there should be a failure of justice, we do not say that, under some circumstances, we would not so

construe the existing law in question as to advance the remedy, if a different construction should have the effect to defeat and destroy a right. Yet, under the circumstances attending this case, we think it safest to hold that, inasmuch as the sheriff, without any fault of his, did not do those things which, under the law, conferred upon him the power to sell, that the title of the defendant to the premises mortgaged was never divested."

1. *Howard v. Fulton*, 79 Tex. 231.

2. *Graham v. Fitts*, 53 Miss. 307.

3. In *Graham v. Fitts*, 53 Miss. 307, two notices were posted in the same town, one on the courthouse door and the other on the post-office door, within one hundred and fifty yards of each other. This was held unobjectionable.

4. *Chilton v. Brooks*, 69 Md. 584.

5. *Tyler v. Herring*, 67 Miss. 169.

6. *Stockpole v. Robbins*, 47 Barb. (N. Y.) 212; *Morse v. Byam*, 55 Mich. 594; *Ohnsburg v. Turner*, 87 Mo. 127; *Ohnsorg v. Turner*, 13 Mo. App. 533; *Martin v. Baldwin*, 30 Minn. 537; *Bot-tineau v. Aetna L. Ins. Co.*, 31 Minn. 125; *Enochs v. Miller*, 60 Miss. 19; *Bigler v. Waller*, 14 Wall. (U. S.) 297;

his bid, or fails to comply with the terms of sale, the person conducting the sale may immediately, before the bidders have dispersed, announce his intention to resell, and call for other bids,¹ or he may, in the exercise of a sound discretion, strike off the property to the next highest bidder.² But the sale cannot be proceeded with, even on the same day, if in the meantime the bidders have dispersed. In such case, a new advertisement is necessary.³

At a trustee's sale for cash, where the debtor himself is the

Shillaber v. Robinson, 97 U. S. 68; *Lanier v. McIntosh* (Mo. 1893), 23 S. W. Rep. 787.

Doubts having arisen as to the validity of a trustee's conveyance, the purchaser deeded back to the trustee, who again sold the property to the same purchaser, giving him a deed reciting the facts, and purporting to convey all the interest of the grantor in the trust deed. It was held that whether the first sale and deed were void or not, the purchaser was invested with the legal and equitable title. *Fulton v. Johnson*, 24 W. Va. 95.

Power Exhausted by First Sale.—A trust deed required the trustee to give ninety days' notice before selling. He advertised and made a sale in all respects regular and valid, except that only eighty-nine days' notice was given. The plaintiff became the purchaser and received a deed from the trustee. Subsequently, the trustee on discovering the defect in the notice, re-advertised, giving ninety-five days' notice, again sold the property to the plaintiff, and gave him another deed. In ejectment brought against the debtor's grantee, it was held that while the first sale and deed were ineffectual to deprive the debtor of his equitable estate, the trustee nevertheless divested himself of his legal title under the trust deed; that the first sale extinguished the power of sale so far as the original trustee was concerned; and that his attempted resale and second conveyance was a nullity, and did not cut off the right of redemption. The court, per Helm, J., said: "An effort on his part to exercise the power originally vested in him, by an attempted resale or a second deed, is of no more force and effect than if the same proceedings were taken by one who had never been connected with the power." The court also observed that in such cases, "Appropriate equitable relief is usually obtained in one of the following modes:

the cumulative remedy of a regular judicial foreclosure and sale is allowed; or a decree is entered requiring the grantee to execute the power in accordance with the terms of the trust deed, as the trustee should have done; or the execution of the power is, by decree, devolved upon a new trustee appointed for the purpose." *Stephens v. Clay*, 17 Colo. 489, citing *Wells v. Caywood*, 3 Colo. 487; *Koester v. Burke*, 81 Ill. 436; *Doe v. Robinson*, 24 Miss. 688; *Huckabee v. Billingsly*, 16 Ala. 414; *Taylor v. King*, 6 Munf. (Va.) 358; *Cranston v. Crane*, 97 Mass. 459; *Fulton v. Johnson*, 24 W. Va. 95.

Where, at a foreclosure sale, the sheriff sold the premises to the highest bidder, the mortgagee, for \$500, and, about fifteen minutes later, having in the meantime sold another tract, he again offered the premises first sold and they were bid in by the same mortgagee for \$542, it was held that the power was exhausted by the first sale, and the second was a nullity. *Paquin v. Braley*, 10 Minn. 379.

1. *Fall River Sav. Bank v. Sullivan*, 131 Mass. 537.

At a trustee's sale, the premises were struck off to the highest bidder, who, upon being asked by the trustee what she could do, replied that she did not know, and soon after went away without tendering the purchase price or getting a deed, and did not return; whereupon the property was again offered for sale by the trustee and struck off to the plaintiff at a higher price. It was held that the trustee's conduct was not oppressive; the sale being for cash, he had a right to demand immediate payment; and it was proper for him to resell before the bidders dispersed, and thus avoid the necessity of re-advertising. *Davis v. Hess*, 103 Mo. 31.

2. *Dover v. Kennerly*, 38 Mo. 469.

3. *Barnard v. Duncan*, 38 Mo. 170; *Dover v. Kennerly*, 38 Mo. 469; *Judge v. Booge*, 47 Mo. 544.

highest bidder, but is unable to produce the money, he is not in a position to complain of the carrying out of an arrangement publicly made at the time between the trustee and all the other bidders and parties in interest, to the effect that if the debtor failed to raise the money within three days, the trustee should convey the property to the next highest bidder.¹

If the trustee is directed by the power to make a public sale only on a particular day named, and he sells on that day, but fails to compel the purchaser to complete his purchase, it seems that his power is exhausted and he cannot resell on a later day, even after a new advertisement.² Where, upon the failure of the successful bidder to complete his purchase, the trustee makes a resale, the measure of damages as against the first purchaser is not conclusively the difference of price between the two sales; but if the second sale was made after due notice, and was fairly conducted, such difference of price may be taken as the *prima facie* measure of damages.³ The party aggrieved by the trustee's wrongful act in releasing a responsible purchaser and reselling for a lower price, is not bound to repudiate the second sale and enforce the liability of the first purchaser; but he may abide by the resale and sue the trustee for the difference in price between the two sales.⁴

In some of the states it is provided by statute, that where the mortgage is given to secure the payment of installments, each installment shall be regarded as a separate mortgage and may be foreclosed as such; and that a redemption from a sale for an installment shall not prevent a subsequent foreclosure sale for other installments. But if the premises consist of a single tract, the statutes contemplate but one sale, from the proceeds of which the entire debt secured, though not all due, shall be paid.⁵

XVII. WHO MAY PURCHASE AT THE SALE—1. *The Mortgagee*—*a. IN GENERAL*.—A mortgagee with power of sale is not allowed to become the purchaser, either directly or indirectly, at his own sale, unless expressly authorized to do so by the power itself or

1. *Maloney v. Webb*, 112 Mo. 575.

2. *Simmons v. Baynard*, 30 Fed. Rep. 532 (*distinguishing Richards v. Holmes*, 18 How. (U. S.) 147); *Olcott v. Bynum*, 17 Wall. (U. S.) 46; *Markey v. Langley*, 92 U. S. 148.

3. *Barnard v. Duncan*, 38 Mo. 170; *Gardner v. Armstrong*, 31 Mo. 536.

4. *Sherwood v. Saxton*, 63 Mo. 78.

Collusive Resale.—The grantor in a trust deed having fled from the state, the trustee sold the property under the power, and the defendants became the purchasers at a price sufficient to pay the trust debt and leave a surplus. The defendants, after receiving a deed from the trustee, became apprehensive that they would be compelled to pay this surplus to other creditors of the

grantor, and thereupon conveyed the property back to the trustee, and induced him to resell it under the power, at which resale they were the successful bidders for an insignificant sum, and received a new deed from the trustee. It was held that the second sale was a nullity, and that the defendants were liable to the grantor for the surplus arising from the first sale. *Gair v. Tuttle*, 49 Fed. Rep. 108.

5. *Dakota Code Civ. Proc.* (1883), 597-615; *Michigan Anno. St.* (1882), 8497-8515 (see *McCurdy v. Clark*, 27 Mich. 445; *Miles v. Skinner*, 42 Mich. 181; *Bridgman v. Johnson*, 44 Mich. 491); *Wisconsin Rev. St.* (1878), ch. 152, 3523-3543; *Kelly's St. Minnesota* (1891), 5371, 5372. For the construc-

by statute.¹ The fact that the sale is made by the mortgagee ostensibly to a third person who acts as bidder, will not save the transaction, if it appears that the mortgagee was only carrying out a prearranged plan to get the title for himself, through the

tion of this statute see *Daniels v. Smith*, 4 Minn. 172; *Shorts v. Cheadle*, 8 Minn. 67; *Watkins v. Hackett*, 20 Minn. 106; *Towler v. Johnson*, 26 Minn. 338; *Standish v. Vosberg*, 27 Minn. 175; *Martin v. Sprague*, 29 Minn. 53.

1. *Michoud v. Girod*, 4 How. (U. S.) 503; *Lockett v. Hill*, 1 Woods (U. S.) 552; *Korns v. Shaffer*, 27 Md. 83; *Dobson v. Racey*, 8 N. Y. 216; *Bergan v. Bennett*, 1 Cal. Cas. (N. Y.) 1; 2 Am. Dec. 281; *Joyner v. Farmer*, 78 N. Car. 196; *Froneberger v. Lewis*, 79 N. Car. 371; *Sumner v. Sessoms*, 94 N. Car. 371; *Gibson v. Barbour*, 100 N. Car. 192; *Simpson v. Simpson*, 107 N. Car. 552; *Whitehead v. Hellen*, 76 N. Car. 99; *Howell v. Pool*, 92 N. Car. 450; *Garland v. Watson*, 74 Ala. 324; *Thomas v. Jones*, 84 Ala. 302; *Ezzell v. Watson*, 83 Ala. 120; *McCall v. Mash*, 89 Ala. 487; *Byrd v. Clarke*, 52 Miss. 623; *Hyde v. Warren*, 46 Miss. 13; *Parmenter v. Walker*, 9 R. I. 225; *Hyndman v. Hyndman*, 19 Vt. 9; *Enckling v. Simmons*, 28 Wis. 272; *Patten v. Pearson*, 57 Me. 428; *Emmons v. Hawn*, 75 Ind. 356; *Moore v. Thompson*, 40 Mo. App. 195; *Rutherford v. Williams*, 42 Mo. 18; *Thornton v. Irwin*, 43 Mo. 153; *McNees v. Swaney*, 50 Mo. 388; *Moore v. Ryan*, 31 Mo. App. 474; *Blockley v. Fowler*, 21 Cal. 326; *Allen v. Chatfield*, 8 Minn. 435; *Kern v. Chalfant*, 7 Minn. 487; *Mapps v. Sharpe*, 32 Ill. 13; *Griffin v. Marine Co.*, 52 Ill. 130; *Roberts v. Fleming*, 53 Ill. 106; *Burr v. Borden*, 61 Ill. 389; *Nichols v. Otto*, 132 Ill. 91; *Gibbons v. Hoag*, 95 Ill. 45; *Snyder v. Greaves* (N. J. 1891), 21 Atl. Rep. 291; *Very v. Russell*, 65 N. H. 646; *Downes v. Grazebrook*, 3 Mer. 200; *In re Bloye*, 1 Mac. & G. 488.

Reason of Mortgagee's Disability.—The disability of the mortgagee to become the purchaser at his own sale, has recently been explained by Lord Justice Lindley, upon a simpler ground than the relation of trust, as follows:

"A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an

exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction." *Farrar v. Farrar*, 40 Ch. Div. 409.

In *New York*, the mortgagee is by statute permitted to purchase in good faith. 3 Rev. St. (6th ed.), p. 847, § 7. Independently of the statute, it has been held that his purchase is not void if no unfair advantage was taken. *Elliott v. Wood*, 53 Barb. (N. Y.) 285; *affirmed* in 45 N. Y. 71; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Bergan v. Bennett*, 1 Cal. Cas. (N. Y.) 1; 2 Am. Dec. 281; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51. See also *Lansing v. Goellet*, 9 Cow. (N. Y.) 346; *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431.

Under the *Maryland* Code, art. 66, authorizing the mortgagee, or his legal representatives, to purchase at a sale under the power, the executors of an assignee of the mortgage may lawfully purchase. *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601.

In *Minnesota*, the statute (Kelly's St. 1891, § 5351) provides that the mortgagee, his assigns, or his or their legal representatives, "may fairly and in good faith purchase the premises," at a sale conducted by the sheriff. But if the mortgagee's own agent makes the sale, the statutory permission does not apply. *Allen v. Chatfield*, 8 Minn. 435.

In *Michigan*, the statute is the same as in *Minnesota*. Annot. St. 1882, 8497-8515.

In *Rhode Island*, to render a purchase by the holder of the mortgage, valid, a notice is required by statute to be served on the mortgagor, or upon the person holding the equity of redemption. *McLaughlin v. Hanley*, 12 R. I. 61.

In *Wisconsin*, the statute (3531) allows the mortgagee to purchase at his own sale, provided he acts fairly and in good faith. See *Maxwell v. Newton*, 65 Wis. 261.

Where the property was bid in by the mortgagee for less than half its value, and then sold by him to the defendant, both parties knowing that the mortgagor was insane, the sale was held fraudulent and void. Even if the fact

agency of the nominal bidder.¹ But where the sale is made to the mortgagee through the medium of a third person, and the property is subsequently conveyed to a *bona fide* purchaser without notice, the mortgagor will not be allowed to redeem after the statutory period as against him.² The mortgagee cannot even sell to a partnership of which he is a member. He has no right to become the purchaser either in severalty, joint tenancy or otherwise.³

In an action by the purchaser at a sale under the power, to recover possession from the mortgagor, the latter is not entitled to an instruction that the burden is on the purchaser to prove that he was not the partner or agent of the mortgagee at the sale.⁴

Not only the mortgagee, but also his solicitor or the attorney who acts for him in conducting the sale, is disqualified from purchasing. As to the latter, it was remarked by Lord Eldon that he was, upon principle, the individual of all others, disabled.⁵ The same disability attaches to the mortgagee's agent. He cannot purchase either for himself or for some one else.⁶ A pledgee of the mortgage, who exercises the power, cannot purchase, not only because he is acting as mortgagee, but also, because he occupies the position of trustee as to both mortgagor and mortgagee.⁷ Of course after the mortgagee has exercised the power

of insanity had not been known, equity would set aside the sale upon a showing that no injustice would be done, and that the parties could be placed in *statu quo*. *Encking v. Simmons*, 28 Wis. 272.

1. *Simpson v. Simpson*, 107 N. Car. 552; *Nichols v. Otto*, 132 Ill. 91; *Gibbons v. Hoag*, 95 Ill. 45; *Parmenter v. Walker*, 9 R. I. 225; *Very v. Russell*, 65 N. H. 646; *Lockett v. Hill*, 1 Woods (U. S.) 552; *Elliott v. Pool*, 3 Jones Eq. (N. Car.) 17.

Presumption of Collusion.—The mere fact that nearly two years after the sale, the purchaser conveyed the property to the mortgagee, does not create a sufficiently strong presumption that the former was acting for the latter at the sale, to overcome the positive testimony of both to the contrary. *Burr v. Borden*, 61 Ill. 389.

2. *Burns v. Thayer*, 115 Mass. 89; *Montague v. Dawes*, 12 Allen (Mass.) 397; *Dexter v. Shepard*, 117 Mass. 480; *Gibbons v. Hoag*, 95 Ill. 45; *Very v. Russell*, 65 N. H. 646; *Benham v. Rowe*, 2 Cal. 387; *Blockley v. Fowler*, 21 Cal. 326; *Robinson v. Cullom*, 41 Ala. 693; *Rutherford v. Williams*, 42 Mo. 18; *Thurston v. Prentiss*, 1 Mich. 193; *Niles v. Ransford*, 1 Mich. 338.

3. *Lockett v. Hill*, 1 Woods (U. S.) 552; *Mapps v. Sharpe*, 32 Ill. 13.

4. *McMillan v. Baxley*, 112 N. Car. 578.

5. *Ex p. Bennett*, 10 Ves. 381; *Ex p. James*, 8 Ves. 337. See also *Downes v. Grazebrook*, 3 Mer. 200; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Whitcomb v. Minchin*, 5 Madd. Ch. 91; *Orme v. Wright*, 3 Jur. 19; *York Building Co. v. Mackenzie*, 8 Bro. P. C. 42; *Parnell v. Tyler*, 2 L. J. U. S. Ch. 195; *Martinson v. Clowes*, 21 Ch. Div. 860; *Campbell v. Swan*, 48 Barb. (N. Y.) 109; *Gardner v. Ogden*, 22 N. Y. 327; *Dyer v. Shurtleff*, 112 Mass. 165; *Howard v. Harding*, 18 Grant's Ch. (Ont.) 181.

He cannot become such purchaser either personally or through his clerk. *Ellis v. Dellabough*, 15 Grant's Ch. (Ont.) 583. Nor can the clerk purchase for his own benefit. *Hobday v. Peters*, 28 Beav. 349.

6. *Orme v. Wright*, 3 Jur. 19; *Hoit v. Russell*, 56 N. H. 559; *Gibson v. Barbour*, 100 N. Car. 192; *Adams v. Sayre*, 76 Ala. 509; *Thompson v. Holman*, 28 Grant's Ch. (Ont.) 35.

An officer of a building society cannot become a purchaser at a sale under a power in a mortgage given to the society. *Martinson v. Clowes*, 21 Ch. Div. 857.

7. *Callan v. Wilson*, 127 U. S. 540. See *infra*, this title, *The Trustee*.

and made a sale in good faith to a third person, his duties as trustee are at an end, and he may thereafter deal with the property the same as anyone else.¹ The rule that the mortgagee shall not be allowed to become the purchaser is intended not merely to remedy actual wrong, but to prevent the possibility of it; and hence the actual *bona fides* of the sale, or the fairness of the price, is no defense.² In a few states, however, the doctrine prevails that a purchase by the mortgagee is not *ipso facto* voidable, but becomes so upon proof of any unfair advantage taken by the mortgagee.³

b. EFFECT OF PURCHASE BY MORTGAGEE.—The mortgagee's title as purchaser is not absolutely void, but only voidable, and other creditors cannot impeach it. It is good against all the world,

1. *Munn v. Burges*, 70 Ill. 604.

Assignment of Bid to Mortgagee.—The purchasers at a sale under a mortgage power, subsequently notified the mortgagee that they were unable to pay the purchase price, whereupon he agreed to take the property at the amount of their bid. There was no arrangement or understanding between the mortgagee and the purchasers at the time of the sale, except that he agreed to give them a reasonable time to pay the purchase-money. No deed was executed, no money paid, nor was possession taken by the mortgagee. It was held that this was not an indirect purchase by the mortgagee at his own sale, and that the foreclosure was valid, and cut off the equity of redemption. *Durden v. Whetstone*, 92 Ala. 480.

2. *Moore v. Thompson*, 40 Mo. App. 195; *Thornton v. Irwin*, 43 Mo. 153; *Blockley v. Fowler*, 21 Cal. 326; *Rutherford v. Williams*, 42 Mo. 18.

Actual Fraud Immaterial.—In *Very v. Russell*, 65 N. H. 646, the court, by Foster, J., said: "We think it would be dangerous, even when no fraud is shown, to hold the sale valid in such cases, and that the safer course is to discourage every appearance or suspicion of fraud, by adopting strictly the rule as above expressed, that a purchase of the mortgaged estate by the mortgagee must, as to the mortgagor, be regarded as *ipso facto* fraudulent and void."

3. *Howards v. Davis*, 6 Tex. 174; *Connolly v. Hammond*, 51 Tex. 635; *Marsh v. Hubbard*, 50 Tex. 203; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255; *Robinson v. Amateur Assoc.*, 14 S. Car. 148; *Mills v. Williams*, 16 S. Car. 593. And see *Elliott v. Wood*, 53 Barb. (N. Y.) 285;

Edmiston v. Brucker, 40 Hun (N. Y.) 256; *Matthews v. Daniels* (Ark. 1893), 21 S. W. Rep. 469.

In *Howards v. Davis*, 6 Tex. 174, the court, in holding that a mortgagee could buy at his own sale, said: "A mortgagee is a trustee, but in a qualified sense. He does not hold for the benefit of others, but for himself. He is a *cestui que trust* as well as trustee. He has an interest in the property. It is pledged expressly to secure his claim, and, were he deprived of the power to purchase, he might suffer a great loss by its sale at a low price. He has an interest that the bid shall amount to his incumbrance, and that the property be not sacrificed, to the injury as well of the mortgagor as the defeat of his own claim, as this may be the only fund for the discharge of his debt. Sales at foreclosures, whether under a power or by decree, are open and public, and are made after long notice, and it is to the interest of the mortgagor that the mortgagee shall enter into the competition at the sale."

In *Bohn v. Davis*, 75 Tex. 24, the question was whether the trustee in a deed given to secure several creditors, among them the trustee, could himself purchase at his own sale. The court, by Henry J., after stating the rule as to mortgages, said: "We see no substantial reason why the rule should not embrace such cases as this. If by any means the trust is abused as to the other beneficiaries by the trustee, they have their remedy. In this case they make no complaint."

A mortgagee may purchase the mortgage premises at the sale under a foreclosure by advertisement. *Lewis v. Duane*, 69 Hun (N. Y.) 28; *Moritz v. St. Paul* (Minn.), 54 N. W. Rep. 370.

except the owner of the equity of redemption.¹ The mortgagee himself cannot be heard to repudiate it.² The rule may be stated to be that an unauthorized purchase by the mortgagee arms the mortgagor or his successors in title with an option to have the sale declared invalid and the right of redemption established,³ or to ratify and affirm the sale, and receive the benefit of it.⁴ It may be confirmed either by release under seal, estoppel, or laches.⁵

If the mortgagor, with knowledge that the sale was made to the mortgagee, acquiesces in it and treats it as valid, he cannot afterwards repudiate it.⁶

A delay of sixteen years on the part of the mortgagor precludes relief, on the ground of laches.⁷

What is a reasonable time for disaffirming has been limited by some courts, by analogy, to the statutory period of redemption after the sale.⁸

A sale to the mortgagee, under the power, after the debt has been fully paid, may be set aside at any time within ten years.⁹

1. *Kern v. Chalfant*, 7 Minn. 487; *Allen v. Ransom*, 44 Mo. 263; *Reddick v. Gressman*, 49 Mo. 389; *Emmons v. Hawn*, 75 Ind. 356; *Martinez v. Lindsey*, 91 Ala. 334; *Comer v. Sheehan*, 74 Ala. 458; *Cooper v. Hornsby*, 71 Ala. 65; *Harris v. Miller*, 71 Ala. 26; *Spain v. Watt*, 16 Grant's Ch. (Ont.) 260.

2. *Whitehead v. Whitehurst*, 108 N. Car. 458.

3. *Dobson v. Racey*, 8 N. Y. 216; *Blockley v. Fowler*, 21 Colo. 326; *Benham v. Rowe*, 2 Cal. 387; *Byrd v. Clarke*, 52 Miss. 623; *McNees v. Swaney*, 50 Mo. 388; *Thornton v. Irwin*, 43 Mo. 153; *Nichols v. Otto*, 132 Ill. 91; *Moore v. Titman*, 44 Ill. 367; *Ross v. Demoss*, 45 Ill. 447; *Hall v. Towne*, 45 Ill. 493; *Roberts v. Fleming*, 53 Ill. 196; *Harper v. Ely*, 56 Ill. 179; *Waite v. Dennison*, 51 Ill. 319; *Brothers v. Brothers*, 7 Ired. Eq. (N. Car.) 150; *Garland v. Watson*, 74 Ala. 324; *Harris v. Miller*, 71 Ala. 26; *Downs v. Hopkins*, 65 Ala. 508; *Ezzell v. Watson*, 83 Ala. 120; *Thomas v. Jones*, 84 Ala. 302; *Knox v. Armistead*, 87 Ala. 511; *Alexander v. Hill*, 88 Ala. 487; *Craddock v. American, etc., Mortg. Co.*, 88 Ala. 281; *Durden v. Whetstone*, 92 Ala. 480; *Gibson v. Barbour*, 100 N. Car. 192; *Froneberger v. Lewis*, 79 N. Car. 426; *Joyner v. Farmer*, 78 N. Car. 196; *Summer v. Sessoms*, 94 N. Car. 371.

Election to Rescind—Judicial Foreclosure.—Where the mortgagee has elected in court to treat a mortgage sale under the power as a nullity, because the mortgagee took an assign-

ment of the purchaser's bid, the mortgagor cannot be heard to claim that the mortgagee has exercised the power and therefore is not entitled to a decree of foreclosure. *Martin v. McNeely*, 101 N. Car. 634.

4. *Garland v. Watson*, 74 Ala. 323.

5. *Joyner v. Farmer*, 78 N. Car. 196; *Brunson v. Morgan*, 84 Ala. 598.

6. *Moore v. Ryan*, 31 Mo. App. 474. In *Dawkins v. Patterson*, 87 N. Car. 384, where the mortgagee bought in the property for the full amount of the debt, and the mortgagor assented to the sale by an agreement, under which he was given a year to redeem, and the evidence showed that the sale was fairly and honestly conducted, the court refused to disturb it.

7. *Bergan v. Bennett*, 1 Cai. Cas. (N. Y.) 1; 2 Am. Dec. 281.

So, of a delay of fourteen years, during which time the rights of third persons had intervened. *Brunson v. Morgan*, 84 Ala. 598. See also *Learned v. Foster*, 117 Mass. 365.

8. *Comer v. Sheehan*, 74 Ala. 452; *Ezzell v. Watson*, 83 Ala. 120; *Alexander v. Hill*, 88 Ala. 487.

Disaffirmance by Infants.—The infant heirs of the mortgagor, who was dead at the time of the foreclosure sale, at which the mortgagee became the purchaser, should be allowed to disaffirm the sale at any time within two years (the statutory period of redemption) after coming of age, provided twenty years had not elapsed since the sale. *Alexander v. Hill*, 88 Ala. 487.

9. *Askew v. Sanders*, 84 Ala. 356.

In *Alabama*, it is held that the mortgagee himself may bring a suit in equity, to have the defect in his title, arising from the mortgagor's right of disaffirmance, removed by a confirmation of the sale, if the mortgagor so elects, or by a resale under decree of court.¹ Until the mortgagor has elected to disaffirm the sale, he has legal title in the property capable of being conveyed.² And after conveying all his interest in the land to a third person, he has no longer any right to either affirm or disaffirm the sale on the ground that the mortgagee was the purchaser.³ The mortgagor will not be allowed to disaffirm under a bill to set aside the sale, containing no allegation as to the state of the accounts, nor offering to pay what may be due.⁴

If the mortgagor and mortgagee, after the maturity of the mortgage, make an arrangement by which the latter is to become the purchaser at foreclosure sale, this will, if possible, be construed as intended to keep the equity of redemption from being cut off by the sale.⁵

After wrongfully purchasing at his own sale, the mortgagee may perfect his title by obtaining a conveyance from the holder of an outstanding and superior title.⁶

c. PERMISSION TO PURCHASE.—A provision in the power, that the mortgagee may purchase at his own sale, is valid, and protects the mortgagee, provided the sale was fairly conducted.⁷ But authority of this character must be clear and unambiguous, or it will not protect him.⁸ A purchase by the mortgagee under permission is "a transaction which the law would watch with jealousy;"⁹ and the mortgagee will be held "to the strictest good faith, and the utmost diligence for the protection of the rights of the debtor."¹⁰

A previous arrangement between the mortgagee and a third person, by which the latter is to bid on behalf of the former, at least the amount of the debt and costs, has no tendency to prevent competition and does not invalidate the sale.¹¹

1. *Craddock v. American Freehold, etc., Co.*, 88 Ala. 281; *Alexander v. Hill*, 88 Ala. 487.

2. *McCall v. Mash*, 89 Ala. 487; *Bernstein v. Humes*, 60 Ala. 582.

3. *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163; *McCall v. Mash*, 89 Ala. 487.

4. *Garland v. Watson*, 74 Ala. 323.

5. *McNees v. Swaney*, 50 Mo. 388. See also *Snyder v. Greaves* (N. J. 1891), 21 Atl. Rep. 291.

6. *Roberts v. Fleming*, 53 Ill. 196; *Walthall v. Rives*, 34 Ala. 91; *Harri-son v. Roberts*, 6 Fla. 711.

7. *Matthews v. Daniels* (Ark. 1893), 21 S. W. Rep. 469; *Ellenbogen v. Grif-fey*, 55 Ark. 266; *Montague v. Dawes*, 12 Allen (Mass.) 397; *Montague v. Dawes*,

14 Allen (Mass.) 369; *Hall v. Bliss*, 118 Mass. 554; *Kennedy v. Dunn*, 58 Cal. 339; *Knox v. Armistead*, 87 Ala. 511; *Griffin v. Marine Co.*, 52 Ill. 130; *Elliott v. Wood*, 45 N. Y. 71; *Waters v. Groom*, 11 Cl. & F. 684.

8. In *Griffin v. Marine Co.*, 52 Ill. 130, a mortgage provided that the mortgagee "may become the purchaser at such sale, provided his bid for said property or any portion thereof." It was held that this clause was too unintelligible to justify the mortgagee in purchasing.

9. *Dexter v. Shepard*, 117 Mass. 480.

10. *Montague v. Dawes*, 14 Allen (Mass.) 369.

11. *Dexter v. Shepard*, 117 Mass. 480.

If the mortgagee acts in good faith in conducting his sale, and is authorized to purchase, the facts that no other bidders were present, and that the mortgagee's bid was made through an agent, do not render the sale invalid, nor does the fact that the property brought less than its market value.¹

Where the mortgagee lawfully becomes the purchaser at his own sale, he may either execute a deed to a third person and have the latter convey back to him,² or he may execute the deed directly to himself as purchaser, which would operate as an appointment, by the donee of the power, to his own use;³ and when the mortgagee sells to himself under a permission in the power, he is bound to complete the purchase, the same as if he were a stranger to the mortgage. He cannot, by ignoring the sale, and failing to execute a deed to himself as purchaser, maintain an action on the debt where the amount of his bid was sufficient to extinguish it.⁴

d. SALES BY PUBLIC OFFICERS.—Where by statute the sheriff of a county is authorized or required to conduct foreclosure sales under powers, it seems that the mortgagee, even without express permission, may lawfully purchase at the sheriff's sale.⁵ But under a mortgage providing for a sale by either the mortgagee or marshal, it was held that they were co-trustees, and that the mortgagee could not, by refusing to conduct the sale in person, remove his disability to purchase at a sale by the marshal.⁶

The inhibition against the mortgagee's purchasing at his own sale, extends to all officers authorized or required by law to conduct mortgage sales.⁷

2. The Trustee.—The trustee in a trust deed is not allowed to become the purchaser at his sale under the power, either on his own behalf, or as agent for a third person. The law will not tolerate any attempt on his part to act in the double capacity of buyer and seller.⁸ It has been judicially intimated that a trustee might be allowed to purchase with the express consent of his beneficiary;⁹ but certainly the consent of the grantor would be

1. *Learned v. Geer*, 139 Mass. 31; *Wing v. Hayford*, 124 Mass. 249; *King v. Bronson*, 122 Mass. 122; *Matthews v. Daniels* (Ark. 1893), 21 S. W. Rep. 469.

2. *Dexter v. Shepard*, 117 Mass. 480; *Hood v. Adams*, 124 Mass. 481; *Gamble v. Caldwell* (Ala. 1893), 12 So. Rep. 424.

3. *Hall v. Bliss*, 118 Mass. 554; *Hood v. Adams*, 124 Mass. 481; *Marsh v. Hubbard*, 50 Tex. 203.

4. In *Hood v. Adams*, 124 Mass. 481, the court, by Endicott, J., said: "If, by virtue of the power in the mortgage, the mortgagee becomes the purchaser, he is bound to carry out and complete his purchase to the same extent as any other purchaser. The proper performance of his duty as purchaser is as imperative upon him as is

the proper performance of his duty as seller. The fact that he unites the two characters in his own person, cannot give him any additional rights; on the contrary, he is held to a stricter accountability when he undertakes to buy."

5. *Ramsey v. Merriam*, 6 Minn. 168; *Allen v. Chatfield*, 8 Minn. 435. See also *Bloom v. Van Rensselaer*, 15 Ill. 503.

6. *Gaines v. Allen*, 58 Mo. 537.

7. *Mapps v. Sharpe*, 32 Ill. 13.

8. *Stephens v. Beall*, 22 Wall. (U. S.) 329; *White v. Trotter*, 14 Smed. & M. (Miss.) 30; *Lawrence v. Hand*, 23 Miss. 103; *Lass v. Sternberg*, 50 Mo. 124.

9. *Lord Eldon*, in *Downes v. Grazebrook*, 3 Mo. 200.

equally essential; and there are grave reasons of public policy why he should not be allowed to purchase even with their joint consent. It has been held that a purchase by the trustee at his own sale, is so far a nullity that it cannot be considered an "alienation" of the title such as would defeat a policy of fire insurance.¹

The doctrine that a sale by the trustee to a third person secretly acting for the trustee, may be set aside, is carried to the extent that creditors not secured by the deed may demand an annulling of the transaction of the trust, even though all other parties interested in the disposition of the proceeds are satisfied with the trustee's conduct.²

There is nothing improper in the beneficiaries sending their bid to the trustee, and requesting him to sell the estate to them in case he does not procure a higher bid at the sale; and the trustee may do so without breach of trust, subject always to the limitation that he must do nothing, as their agent, toward obtaining the property at an unfair advantage.³

If the trustee in a second trust deed becomes the purchaser at a sale under the first trust deed, his beneficiaries are entitled to the benefit of his bargain, but they must first reimburse him in full.⁴ A purchase by the trustee on behalf of his beneficiary, but without previous authority, is not binding upon the beneficiary unless he ratifies it, as by accepting a deed.⁵

Where the trustee is also one of the secured creditors, who are empowered by the trust deed to bid at the sale, it is no objection that the sale was made to the trustee's attorney for the benefit of all the creditors.⁶

Though the debtor has a right to avoid a sale at which the trustee has become a purchaser, yet he ratifies it when, with full knowledge of all the facts, he arranges with the trustee for the privilege of procuring a third person to buy from the trustee, and afterwards stands by and sees the property improved in good faith.⁷

It is held in *Alabama* that after an acquiescence of several years, a mortgage sale will not be set aside at the instance of the mortgagor, on the grounds that the person who conducted the sale became the purchaser, that the mortgagee was not present, and that the auctioneer had no written authority for making the sale.⁸

After the trustee's sale has been closed, there is no reason why the trustee should not have as good a right as any one else to purchase the property from the successful bidder, provided there

1. *Commercial Union Assur. Co. v. Crutchfield v. Haynes*, 14 Ala. 49; *Scammon*, 126 Ill. 360.

2. *Elliott v. Pool*, 3 Jones Eq. (N. Car.) 17.

3. *Seesel v. Ewan*, 35 Ark. 127.

4. *Lass v. Sternberg*, 50 Mo. 124;

5. *Gunter v. Janes*, 9 Cal. 643.

6. *Ellsworth v. Harmon*, 101 Ill. 274.

7. *Kennedy v. Dunn*, 58 Cal. 339.

8. *Jenkins v. Pierce*, 98 Ill. 646.

8. *Welsh v. Coley*, 82 Ala. 363; Gar-

was no collusion or understanding between them to that effect at the time of sale.¹

3. Creditors in Trust Deeds.—One who is merely a creditor, secured by the trust deed, but occupying no relation of trust as to the property, may, if he acts in good faith, become the purchaser at the trustee's sale.² The relation of a creditor secured by trust deed to a sale by the trustee, has been likened to that of a mortgagee of property sold under judicial foreclosure. In either case, there is no danger to be apprehended from the creditor's bidding at the sale.³

To render a purchase by a beneficiary valid, it must be free from all suspicion of collusion with the trustee.⁴ The beneficiary's title as purchaser at the trustee's sale may be attacked collaterally by showing that the trust debt was paid before the sale.⁵

4. Junior Mortgagees.—A junior mortgagee, being a stranger to the prior mortgage, is under no disability to purchase at a sale under it.⁶ If, however, the junior incumbrancer also holds the equity of redemption in trust for others, he stands in the same position as any other trustee, and cannot prejudice the rights of

land *v. Watson*, 74 Ala. 323; *Cooper v. Hornsby*, 71 Ala. 62.

1. *Stephens v. Beall*, 22 Wall. (U.S.) 329.

2. *Richards v. Holmes*, 18 How. (U.S.) 142; *Smith v. Black*, 115 U. S. 308; *Easton v. German American Bank*, 127 U. S. 532; *Loveland v. Clark*, 11 Colo. 265.

3. *Easton v. German American Bank*, 127 U. S. 532.

4. *Bloom v. Van Rensselaer*, 15 Ill. 503.

In *Fishburne v. Smith*, 34 S. Car. 330, where at a trustee's sale the creditor bid a certain sum, but, upon a trustee's suggestion, he withdrew that bid, and afterwards became the successful bidder at a much lower price, the sale was set aside.

Creditor in Possession.—Where the creditor purchases at the trustee's sale, and the sale is set aside for irregularities, he will be treated as a mortgagee in possession after default, with the right to retain possession until the debt is fully paid. *Harper v. Ely*, 70 Ill. 581.

5. *Hancock v. Whybark*, 66 Mo. 672.

6. *Shaw v. Bunney*, 11 Jur. N. S. 99; 33 Beav. 494; 34 L. J. Ch. 257; *Kirkwood v. Thompson*, 34 L. J. Ch. 305, 2 De G. J. & S. 613; *Brown v. Woodhouse*, 14 Grant's Ch. (Ont.) 682; *Munsen v. Hauss*, 22 Grant's Ch. (Ont.) 279; *Harmon v. Yemen*, 3 Ont. Rep. 133; *Ten Eyck v. Craig*, 62 N. Y. 406. But see

Parkinson v. Hanbury, 2 De G. J. & S. 450, which seems to hold the contrary.

In *Watkins v. McKellar*, 7 Grant's Ch. (Ont.) 584, the right of a junior incumbrancer to acquire an irredeemable title by purchase at a sale under the prior mortgage, is asserted in the following language by the court: "The proposition that the defendants, being mortgagees, were incapable of acquiring an absolute interest in the property in question proceeds, I suppose, upon this, that a mortgagee is a trustee for the mortgagor, and incapable, therefore, of dealing with the estate for his own benefit. That a mortgagee is a trustee for the mortgagor, in some sense of that word, cannot be denied; but that he is not a trustee, in the sense implied in the argument, is equally clear. Had it been true that mortgagor and mortgagee stand to each other in the relation of trustee and *cestui que trust*, then all dealings between them in relation to the equity of redemption, must have been regulated by the rules applicable to dealings between trustee and *cestui que trust*; and upon the same assumption, every purchase of an incumbrance affecting the estate made by the mortgagee must have been held to be a purchase for the benefit of the mortgagor. But the falsity of both conclusions is apparent. And if it be true, as I apprehend it is, that a mortgagee is allowed to deal for the equity of redemption as a stranger; and if it

his beneficiaries by purchasing at the prior mortgage sale.¹ But the mere fact that the junior mortgagee is in possession, and is directed by his mortgage to pay over to other creditors of the mortgagor, any surplus after satisfying his own debt, does not make him a trustee in such sense that he cannot purchase the prior mortgage.²

5. **The Mortgagor.**—While, of course, there can be no objection to the mortgagor purchasing, yet he cannot thus obtain a title which would cut out subsequent incumbrances. On the contrary, it operates to their benefit.³ This is equally true of a purchase by the holder of the equity of redemption, subject to two or more mortgages.⁴

A director of a corporation mortgagor is not prevented by his office from purchasing at a sale under the mortgage, if he acts in good faith.⁵

The mortgagor's wife may purchase, take a deed from the mortgagee, and hold the estate as her separate property. The objection that the husband cannot convey directly to the wife does not apply.⁶

be clear, as it no doubt is, that a mortgagee who gets in the incumbrance affecting the mortgaged estate, is entitled to receive the full amount due upon such incumbrance, no matter how advantageous the terms upon which he may have acquired it, then I know of no principle upon which to hold a *puisne* incumbrancer incapacitated from purchasing the estate upon a sale by a prior mortgagee under his power."

1. *Parkinson v. Hanbury*, 2 De G. J. & S. 450; *Boyd v. Hawkins*, 2 Ired. Eq. (N. Car.) 304; *Taylor v. Heggie*, 83 N. Car. 244; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Bell v. Webb*, 2 Gill. (Md.) 163.

2. In *Kirkwood v. Thompson*, 34 L. J. Ch. 305; 2 De G. J. & S. 613, *Cranworth Ch.*, speaking of such a mortgage, said: "As between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he, taking possession, could be liable to account as mortgagee. It cannot be contradicted that, between the parties conveying and the parties to whom it was conveyed, it certainly was a mortgage. It is possible—I do not say whether that would be so—that there might have been different duties as between him and the mortgagor, if he had sold, than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount

and prior to the exercise of his duties as trustee; he can never sell, because persons having a paramount title to his, choose to exercise their right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees."

3. *Otter v. Vaux*, 6 De G. M. & G. 638; *Toulmin v. Steere*, 3 Mer. 210.

4. *Hilton v. Bissell*, 1 Sandf. Ch. (N. Y.) 407; *Stiger v. Mahone*, 24 N. J. Eq. 426; *Tompkins v. Halstead* 21 Wis. 118; *Plum v. Studebaker, etc., Co.*, 89 Mo. 162.

A purchaser of the equity of redemption, who has assumed, and agreed to pay two mortgages on the property, cannot obtain a title so as to cut out the rights of the second mortgagee, by bidding in the property at a sale under the first mortgage, collusively arranged between himself and the holder of the first mortgage. The payment of the amount of his bid operated to extinguish that mortgage, and made the second mortgage a first lien. *Thompson v. Heywood*, 129 Mass. 401.

5. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Bennett*, 146 Mass. 437; *Saltmarsh v. Spaulding*, 147 Mass. 224. Even if good faith were not shown, the sale could be avoided only by repayment of the purchase price. *Saltmarsh v. Spaulding*, 147 Mass. 224.

6. *Field v. Gooding*, 106 Mass. 310;

8. Co-Tenant of Mortgagor.—In the absence of fraud or collusion, the owner of an undivided interest in land covered by a mortgage or trust deed, may become the purchaser of his co-tenant's interest at a sale under the power; but the co-tenant may avail himself of the purchase by contributing his proportion of the purchase price.¹

XVIII. THE CONTRACT OF PURCHASE—1. Statute of Frauds.—Under the Statute of Frauds, the purchaser at a mortgagee's or trustee's sale cannot be compelled to complete the contract or be sued for damages, unless a memorandum of the sale was signed by him or by an auctioneer acting as the agent for both parties.² A memorandum signed by the sheriff, containing a description of the property sold, terms of sale, etc., is competent evidence of the sale, though not executed by the sheriff's deputy who personally conducted the sale.³

As long as the mortgagee and purchaser treat the contract of sale as binding, the mortgagor cannot take any advantage of their failure to comply with the Statute of Frauds.⁴

2. Rights of Purchaser; Caveat Emptor.—The doctrine of *caveat emptor* applies to sales by trustees and mortgagees, so as to charge the purchaser with notice of want of authority or of irregularities in the sale proceedings.⁵ The purchaser cannot avoid his purchase on the ground that the trustee ought not to have sold until the amount of prior liens had been ascertained; the rule of *caveat emptor* applies.⁶ Ordinarily, the purchaser is not bound to see to the application of the purchase-money by the trustee.⁷ The rule that one who purchases from a trustee with notice of the trust is charged with the same trust in respect to the property, does not apply to sales under trust deeds at public auction.⁸

It has been declared that the same reasons of public policy exist for giving favor and security to titles acquired under powers

Stetson v. O'Sullivan, 8 Allen (Mass.) 321; *Gantz v. Toles*, 40 Mich. 725.

1. *Burr v. Mueller*, 65 Ill. 258.

2. *Cook v. Hilliard*, 9 Fed. Rep. 4; *Doty v. Wilder*, 15 Ill. 408; *Burke v. Haley*, 7 Ill. 614.

3. *Barclay v. Bates*, 2 Mo. App. 139.

4. *Durden v. Whetstone*, 92 Ala. 480; *Cooper v. Hornsby*, 71 Ala. 62; *Newburn v. Bass*, 82 Ala. 622; *Welsh v. Coley*, 82 Ala. 363.

5. *Hamilton v. Lubukee*, 51 Ill. 415; *Stephens v. Clay*, 17 Colo. 489; *Thompson v. Heywood*, 129 Mass. 401; *Pierce v. Grimley*, 77 Mich. 273.

Mistake in Quantity.—The property to be sold was described in a trustee's notice of sale, and also announced at the sale, as consisting of eighty acres, and was sold *en masse* at a certain price per acre. It was subsequently ascer-

tained that the tract contained but twenty-three acres. It was held that the purchaser could not recover back from the trustee the amount per acre paid for the number of acres short, but that he would be entitled to have the sale set aside on the ground of mistake. *Coons v. North*, 27 Mo. 73.

Res Adjudicata.—A judgment rendered by a justice of the peace in an action of forcible entry, in favor of the purchaser at a trustee's sale, is no bar to an action to set aside the sale, the justice having no jurisdiction to determine questions involving the title. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

6. *Fleming v. Holt*, 12 W. Va. 143.

7. See, which is a well considered case and reviews the authorities generally, *Woodwine v. Woodrum*, 19 W. Va. 67.

8. *Wood v. Augustine*, 61 Mo. 46.

of sale in mortgages and trust deeds, as are recognized in respect to judicial sales.¹

If the purchaser dies before paying the purchase-money, his executors or administrators may pay it and take a deed to themselves as trustees for the heirs or devisees. Upon such title they can maintain ejectment for the land.² If the purchaser voluntarily pays taxes assessed on the land against a subsequent mortgagee in possession, he cannot sue the latter to recover back the amount paid.³

3. Rights Under Invalid Sale.—A foreclosure sale which, by reason of irregularities, is insufficient to convey the legal title to the purchaser, but which results in a payment of the debt secured, is generally held to operate as an assignment of the equitable title to the securities, to the extent necessary to reimburse the purchaser.⁴ Each subsequent conveyance by the purchaser also operates as an assignment of the securities.⁵ So, the purchaser acquires the rights of the mortgagee under an irregular statutory sale made by a sheriff or other officer, in place of the mortgagee himself.⁶ Even though the sale was wholly void, yet if the purchase-money has been used to extinguish the trust debt, the purchaser is entitled to be subrogated to the rights of the creditor, but he must assert his rights in a court of equity.⁷

The payment of a part of the amount bid at a sale under the power in a mortgage, if the sale fails of consummation, in consequence of the non-payment of the balance of the bid, operates in equity as an assignment of the mortgage debt to the extent of

1. Willard v. Boggs, 56 Ill. 163.

2. Lewis v. Wells, 50 Ala. 198.

3. Swan v. Emerson, 129 Mass. 289.

4. Jones v. Mack, 53 Mo. 147; Russell v. Whitely, 59 Mo. 196; Wilcoxon v. Osborn, 77 Mo. 621; Gilbert v. Cooley, Walk. (Mich.) 494; State Bank v. Chapelle, 40 Mich. 447; Dearnaley v. Chase, 136 Mass. 288; Burns v. Thayer, 115 Mass. 89; Brown v. Smith, 116 Mass. 108; Holmes v. Turner's Falls Co., 142 Mass. 590; Robinson v. Ryan, 25 N. Y. 320; Grosvenor v. Day, Clarke (N. Y.) 109; Johnson v. Robertson, 34 Md. 165; Clark v. Wilson, 56 Miss. 753; Rogers v. Benton, 39 Minn. 39; Ingle v. Culbertson, 43 Iowa 265; Taylor v. Agricultural, etc., Assoc., 68 Ala. 229.

So, if a mortgagee should enter into possession of the mortgaged premises and retain the same, in such a manner as to set the Statute of Limitations running in his favor as against the owner of the equity of redemption, or against any person who claimed the estate adversely from the mortgagee, and before the lapse of the statutory period of limi-

tation the mortgagee should convey the mortgaged premises to the purchaser, such conveyance would pass to a purchaser the benefit of the possession so held by the mortgagee, and would avail the purchaser in the same manner as if the possession throughout had been held by himself. Bright v. Murray, 1 Ont. Rep. 172.

5. Cooke v. Cooper, 18 Oregon 142; Niles v. Rausford, 1 Mich. 338.

6. Hoffman v. Harrington, 33 Mich. 392.

7. Bonner v. Lessley, 61 Miss. 392; Windett v. Hurlbut, 115 Ill. 403.

Void Sale.—In Hayes v. Lieulokken, 48 Wis. 509, where a foreclosure sale was made by a person purporting to act as the foreign executor of the mortgagee, but whose authority, as such, was not sufficiently established, and at the sale such person became the purchaser, it was held that the sale could not be treated as an equitable assignment to him of the mortgage and debt.

Damages For Irregularity.—Where a power of sale has been irregularly exercised, the person injured thereby may

the amount paid, and to that extent entitles the bidder to the benefits of the mortgage security.¹

As against the purchaser in possession under a defective sale, the mortgagor may redeem, but cannot maintain ejectment or a writ of entry.²

If the purchaser goes into possession in good faith, and with the assent of the mortgagor, he will be regarded as a mortgagee in possession, and as having acquired the legal title after the right of redemption has become barred.³ So, a beneficiary who purchases at an invalid sale by his trustee, acquires thereby the rights of a mortgagee in possession after default.⁴

The mortgagor or his successors in title who have received the surplus proceeds of an invalid sale under the power, cannot set the sale aside and recover the land, without first offering to restore such surplus to the purchaser, because by retaining the money they ratify the sale. The fact that they have spent the money and are too poor to replace it, does not excuse a failure to make the tender.⁵

An action by the purchaser for possession cannot be converted into a suit to foreclose the mortgage, upon his failure to establish a valid title under the sale.⁶

Where the purchaser in good faith makes valuable improvements upon the property while in possession, he is entitled to compensation therefor upon the sale being set aside,⁷ and is not accountable for the rents and profits, as enhanced by such improvements, during his occupancy.⁸

4. Non-Inquiry Clause.—In *England*, the precaution is frequently taken, of inserting in the mortgage a provision relieving the pur-

recover damages against the person guilty of the irregularity. *Hoole v. Smith*, 17 Ch. Div. 434.

1. *Atkins v. Tutwiler*, 98 Ala. 129.

2. *Jones v. Mack*, 53 Mo. 147; *Brown v. Smith*, 116 Mass. 108; *Wormell v. Nason*, 83 N. Car. 32; *Wilson v. South Park Com'rs*, 70 Ill. 46.

3. *Russell v. Akeley Lumber Co.*, 45 Minn. 376; *Rogers v. Benton*, 39 Minn. 39.

4. *Stallings v. Thomas*, 55 Ark. 326.

5. *Brewer v. Nash*, 17 R. I. 793.

6. *De Walt v. Kinard*, 33 S. Car. 522; *Johnson v. Johnson*, 27 S. Car. 309; *Simpson v. Simpson*, 107 N. Car. 552.

7. *Poole v. Johnson*, 62 Iowa 611; *Miner v. Beekman*, 50 N. Y. 337; *Bacon v. Cottrell*, 13 Minn. 194; *Queen City Perpetual Bldg. Assoc. v. Price*, 53 Md. 397; *Putman v. Ritchie*, 6 Paige (N. Y.) 390; *Wetmore v. Roberts*, 10 How. Pr. (N. Y. Supreme Ct.) 51; *Benedict v. Gilman*, 4 Paige (N. Y.) 58; *Mickles v. Dillaye*, 17 N. Y. 80; *Higginbottom v. Benson*, 24 Neb. 461;

Roberts v. Fleming, 53 Ill. 198; *Green v. Dixon*, 9 Wis. 532; *Harper's Appeal*, 64 Pa. St. 315; *Carroll v. Robertson*, 15 Grant's Ch. (Ont.) 173; *Fawcett v. Burwell*, 27 Grant's Ch. (Ont.) 445.

But where a mortgagee obtained a foreclosure decree, which was defective by reason of certain outstanding claims against the mortgaged estate, remaining unenclosed, and the mortgagee then sold the property to a purchaser with a notice of the outstanding claims, and the purchaser entered and made improvements upon the property, in a contest between the claimants and the purchaser, the latter failed to get any allowance for his improvements by reason of their having been made with a notice of the outstanding rights. *Russell v. Romanes*, 3 Ont. App. Rep. 635. And see *Romanes v. Herns*, 22 Grant's Ch. (Ont.) 469.

8. *Poole v. Johnson*, 62 Iowa 611; *Higginbottom v. Benson*, 24 Neb. 461; *Renard v. Brown*, 7 Neb. 449. See also *Bigler v. Waller*, 14 Wall. (U. S.) 297.

chaser at a sale under the power, from all necessity of inquiring as to the regularity of the sale proceedings.¹ Under such a clause, if the mortgagor suffers injury through the misconduct of the mortgagee in selling improperly, his only remedy would be against the mortgagee personally for damages, and not against the purchaser.² There are two kinds of these protection clauses: *first*, to the effect that if a sale is authorized according to the conditions of the power, the purchaser shall not be obliged to inquire into the regularity of the proceedings under it; *second*, to the effect that the purchaser is not only relieved from inquiring into the regularity of the proceedings, but also from inquiring into the existence of default or the right to exercise the power.³ Under a provision of the first class, the purchaser is not protected if, in fact, the power of sale had not become operative. He must look to that at his peril.⁴ The protection of clauses of this character extends only to *bona fide* purchasers, having no actual knowledge of irregularities or improprieties. While such a clause excuses non-inquiry, it does not waive the effect of actual notice.⁵

5. Innocent Purchasers.—The rule has been laid down that a *bona fide* purchaser at a sale under a power, without notice of any fraud, irregularities, or defects, is entitled to the same protection in his purchase as if the foreclosure had been by decree in equity.⁶

In respect to constructive notice, the purchaser at a sale under a power has the right to rely upon the record as it existed at the time of sale.⁷ His title cannot be affected by a collateral

1. See *Hunter's Sale under Mortg.* 147.

2. *Dicker v. Angerstein*, 3 Ch. Div. 602; *Prichard v. Wilson*, 10 Jur. N. S. 330.

3. See forms given in *Hunter's Sale under Mortg.*, Appendix B.

4. *Ford v. Heely*, 3 Jur. N. S. 1116.

5. *Selwyn v. Garfit*, 38 Ch. Div. 273; *Parkinson v. Hanbury*, 1 D. & S. 143; *Jenkins v. Jones*, 6 Jur. N. S. 391; *Thomas v. Davies*, 9 W. R. 831.

Protection Against Actual Notice.—It would seem to be competent for the parties to extend the protection still further, by providing in the mortgage that actual knowledge of irregularities shall not effect the title of the purchaser, and that the debtor's only remedy shall be for damages. Such a strong clause, however, is not commonly used. See *Prichard v. Wilson*, 10 Jur. N. S. 330; *Hunter's Sale under Mortg.* 151.

6. *Jackson v. Henry*, 10 Johns. (N. Y.) 185. See also *Jackson v. Dominick*, 14 Johns. (N. Y.) 435.

The rule stated in the text has been followed and applied in many cases: *Shillaber v. Robinson*, 97 U. S. 69; *Hosmer v. Campbell*, 98 Ill. 572; *Jenkins v. Pierce*, 98 Ill. 646; *Carey v. Brown*, 62 Cal. 373; *Holt v. Russell*, 56 N. H. 559; *Phillips v. Bailey*, 82 Mo. 639; *Penny v. Cook*, 19 Iowa 538; *Welsh v. Coley*, 82 Ala. 363; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Ledyard v. Chapin*, 6 Ind. 320; *Wade v. Harper*, 3 Yerg. (Tenn.) 383.

7. *Gibbons v. Hoag*, 95 Ill. 45; *Mullanphy v. Simpson*, 4 Mo. 319.

Notice of Lis Pendens.—Pending a bill to redeem land from a sale under a trust deed, a portion of the land was sold under a second trust deed. The bill in the suit to redeem set forth the claims of the debtor as to the transaction under which the second trust deed was executed, one defense being usury and payment. It was held that the pendency of the bill was a notice to the purchaser at the second sale, so as to preclude him from resisting the debtor's right to redeem. *Ryan v. Newcomb*, 125 Ill. 91.

agreement between the mortgagor and mortgagee, of which he had no notice, to defer the sale in consideration of payment of interest, or the like.¹ Nor is it affected by any unfair conduct on the part of the trustee not brought to the purchaser's notice;² nor by fraud in the consideration of the note secured;³ nor by the fact that a valid tender of the debt had been made before sale, and refused.⁴

Where the debt secured is tainted with usury, which by statute renders the contract and securities void, a *bona fide* purchaser without notice of the usury, takes a good title at a sale under the power.⁵

Even though the debt secured has been fully paid, yet, if the mortgage remains unsatisfied of record, a sale under it to a *bona fide* purchaser without notice of the fact of payment is held equivalent to a sale under decree in equity, and a complete bar, both as against the mortgagor and those claiming under him.⁶ This is especially true of a purchaser at a sale under a power which by its terms absolves bidders from making inquiry as to the existence

1. *Beatie v. Butler*, 21 Mo. 313. So held as to a promise not to sell without giving the mortgagor personal notice. *Randall v. Hazelton*, 12 Allen (Mass.) 412.

2. *Wade v. Thompson*, 52 Miss. 367.

3. *Mathews v. Lecompte*, 24 Mo. 545.

4. *Montague v. Dawes*, 12 Allen (Mass.) 397; *Hoit v. Russell*, 56 N. H. 559.

5. *Elliott v. Wood*, 53 Barb. (N. Y.) 285; *Jackson v. Dominick*, 14 Johns. (N. Y.) 435; *Hyland v. Stafford*, 10 Barb. (N. Y.) 558; *Penny v. Cook*, 31 Iowa 538; *Jordan v. Humphrey*, 31 Minn. 495; *Welsh v. Coley*, 82 Ala. 363.

In *Minnesota*, it is held that where a usurious note and mortgage are purchased before maturity for value, and without notice, and the purchaser forecloses under the power and buys in the land at the sale, but having at the time of the sale received notice that the defense of usury was raised, the mortgagor may have the foreclosure set aside and recover possession, without offering to redeem. *Scott v. Austin*, 36 Minn. 460, *overruling* *Scott v. Austin*, 36 Minn. 460. See also *Exley v. Berryhill*, 37 Minn. 182.

6. *Warner v. Blakeman*, 36 Barb. (N. Y.) 501. See a *dictum* to the contrary in the earlier case of *Cameron v. Irwin*, 5 Hill (N. Y.) 272.

In *Merchant v. Woods*, 27 Minn. 396, the court said, in holding the title of *bona fide* purchasers good, notwithstanding a previous payment of the mortgage debt: "The principle, and

the reason for it is this: Whenever the lien of a recorded mortgage containing a power of sale is in fact discharged, in whole, or in part, by payment or otherwise, the law makes it the duty of the mortgagor, or the holder of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record. A failure so to do leaves the mortgage, apparently, a subsisting security, and the mortgagee, apparently still clothed with the authority originally conferred by the power; and if, in the exercise of such apparent authority, a sale is affected, upon the faith of the appearances, the innocent purchaser will be protected in his title, if first recorded, as against the party through whose fault and negligence the apparently valid foreclosure and sale were rendered possible." In *Palmer v. Bates*, 22 Minn. 532, the court made a similar ruling, holding that an unrecorded release of a portion of the mortgaged premises was of no avail as against an innocent purchaser for value, whose title was acquired under a foreclosure sale of the entire tract, with a certificate of sale duly executed and recorded, and the usual statutory affidavits.

But, in *Illinois*, the position is taken that payment of the mortgage debt extinguishes the mortgage, and that a sale thereafter under the power, passes no title in equity, even as to an innocent purchaser. *Redmond v. Packen-*

of default, or as to the regularity or propriety of the sale.¹ If the purchaser be cognizant of, or a party to, any unfair conduct or actual fraud in connection with the sale, he is, of course, in no position to claim the immunities of a *bona fide* purchaser.² Though a sale may be open to attack as against the original purchaser, by reason of his having notice of some irregularity or defect in the proceedings, yet, if he conveys to a third person having no such notice, and acting in good faith, the title of such third person is not subject to be defeated on the ground of his grantor's notice.³ To entitle a subsequent purchaser to protection, the trustee's deed must contain nothing tending to show that the terms of the power were not properly complied with.⁴

6. Remedies Against Purchaser.—The mortgagee or trustee has two distinct remedies against a purchaser who wrongfully refuses to complete his contract, viz. : He may tender a proper deed and sue for the full purchase price, or he may make a new sale under the power, and sue the first purchaser for the resulting damage, including the cost of resale.⁵ Generally, it is the duty of the trustee, upon a sale at a fair price to a responsible bidder, to insist upon a completion of the purchase, and, if necessary, to proceed against the purchaser to enforce the contract; but by consent of all parties the bidder may be released.⁶ After the trustee has proceeded to make a second sale, he cannot maintain a suit for specific performance against the successful bidder at the first sale.⁷ Upon the failure of the purchaser to comply with a demand to complete his payments within the time allowed him for that purpose, the mortgagee or trustee has the right to treat the contract as abandoned.⁸

ham, 66 Ill. 434. The purchaser takes at the peril of a void sale if a condition precedent does not exist. Shippen v. Whittier, 117 Ill. 286.

1. Dicker v. Angerstein, 3 Ch. Div. 600.

2. Mann v. Best, 62 Mo. 491; Jackson v. Crafts, 18 Johns. (N. Y.) 110.

3. Thompson v. Heywood, 129 Mass. 401; Fairman v. Peck, 87 Ill. 156; Hamilton v. Lubukee, 51 Ill. 415.

Purchase by Mortgagee.—Thus, where the mortgagee in bad faith purchased at his sale through a third person, who subsequently conveyed to him, it was held that the sale could not be set aside as against a *bona fide* purchaser from the mortgagee without notice. Gibbons v. Hoag, 95 Ill. 45. To the same effect, Burns v. Thayer, 115 Mass. 89; Dexter v. Shepard, 117 Mass. 480.

4. Gunnell v. Cockerill, 84 Ill. 319.
5. Sherwood v. Saxton, 63 Mo. 78; Dover v. Kennerly, 38 Mo. 469; 44 Mo. 145; Gardner v. Armstrong, 31 Mo. 535.

6. Sherwood v. Saxton, 63 Mo. 78.

7. Fleming v. Holt, 12 W. Va. 143.

8. Atkins v. Tutwiler, 98 Ala. 129; Seabury v. Doe, 22 Ala. 207.

In Atkins v. Tutwiler, 98 Ala. 129, the court said: "It is well settled in this state that though the power in the mortgage expressly provides for a cash sale, an agreement by the mortgagee to allow time to the purchaser affords the mortgagor no ground of complaint. The payment of the purchase-money is a matter between the mortgagee and the purchaser. The mortgagor has no other interest than that he obtain credit and benefit of the amount bid." (Citing Mewburn v. Bass, 82 Ala. 622; Durden v. Whetstone, 92 Ala. 480; Cooper v. Hornsby, 71 Ala. 62.) "But it is clear that it is the right of the mortgagee either to insist upon the payment in cash of the amount of the bid, or to make the consummation of the sale dependent upon a compliance by the purchaser with the terms of credit agreed upon.

The purchaser will not be permitted to avoid his contract of purchase by showing that there was a secret understanding between him and the mortgagee that he was to have the property at the amount of his bid, regardless of what anyone else might be willing to bid, for, if there was any fraud, he was a party to it, and cannot take advantage of it.¹

If the purchaser has been misled by false statements made by the trustee or mortgagee as to the state of the title, by which he was induced to bid more than he would otherwise have bid, he cannot be compelled to complete the purchase, even though the amount required to remedy the defect might be deducted from the purchase price.²

XIX. THE PURCHASER'S DEED AND TITLE—1. Right to a Deed.—Except where otherwise provided by statute, a purchaser who has complied with all the terms of the sale, is entitled to receive from the trustee or mortgagee a deed of the property purchased, containing recitals sufficient to show that the deed is made by virtue of, and pursuant to, the power of sale.³

Until a deed has been executed and delivered to the purchaser, he does not acquire the full legal title, though the sale and payment of the purchase price vest in him the equitable title which he may perfect by proper proceedings.⁴ But a bill cannot be maintained by the purchaser to subject other property to his purchase in lieu of that sold under the power, on the ground that the mortgage by mistake covered the wrong property. He must take what was actually sold, or nothing.⁵

Before the purchaser can compel the delivery of a deed, he must tender to the mortgagee or trustee the full amount of his bid, even though the sale was made for an installment of the debt,

He is entitled, as against any bidder at the sale, to hold the title to the mortgaged property as mortgagee until a bid is made and paid in the manner prescribed by the power, or until he becomes bound by the terms of an agreement between him and the successful bidder to execute a conveyance under the power, and to become accountable to the mortgagor for the amount of the bid. The mortgagee's interest is to realize on the security to the extent of the debt due to him. The successful bidder is not entitled to the property as purchaser until he complies with the conditions of the sale. When he claims as the purchaser at a sale under the power which provides for a sale for cash, if his bid was not paid in cash, the burden is upon him to show that the mortgagee consented to accept a provision for future payment in lieu of the cash, and that the provision for such future payment has been made, or that there is some legal excuse for

the failure to make it in the manner agreed upon."

1. *Gross v. Jancsok* (C. Pl.), 10 N. Y. Supp. 541.

2. *Schaeffer v. Bond*, 70 Md. 480.

3. *Tripp v. Ide*, 3 R. I. 51; *Smith v. Henning*, 10 W. Va. 596.

Purchaser Entitled to Deed.—Where a trust deed provided that upon foreclosure the trustee should "execute a deed to the purchaser, pay all the amount herein secured, with interest and costs, and hold the same subject to my order," the word "same" was construed as referring to the surplus proceeds and not to the trustee's deed; and that the deed was properly delivered to the purchaser. *Huston v. Seeley*, 27 Iowa 183.

4. *Tripp v. Ide*, 3 R. I. 51; *Arnot v. McClure*, 4 Den. (N. Y.) 44; *Mowry v. Sanborn*, 68 N. Y. 153.

5. *Schwickerath v. Cooksey*, 53 Mo. 75. See also *Haley v. Bagley*, 37 Mo. 363.

and the purchase price was sufficient to pay the unmatured installments also. A tender of the amount of the first installment and costs, with a receipt from the debtor for the balance of his bid, is invalid.¹

The purchaser at a cash sale must make his payments to the trustee within a reasonable time, and if he fails to pay when a deed is tendered, equity will not compel the trustee to convey upon a subsequent tender of the amount bid.²

The purchaser takes the title as of the date of creating the power, divested of all subsequent incumbrances,³ the underlying principle being, that a deed in execution of the power is the conveyance, not only of the trustee, mortgagee, or assignee executing it, but also the conveyance of the mortgagor himself, relating back to the date of the mortgage.⁴

Authority to execute a deed to the purchaser at a sale under the power is a necessary incident of a power to sell, and need not be expressly conferred, though usually it is.⁵

There is no requirement of law that the deed to the purchaser shall be executed within a given time after the sale. The purchaser, of course, has the right to insist that there be no unreasonable delay.⁶

Where the grantor in a trust deed has sold his equity, it is not essential that the trustee's deed should purport to convey the interest of the grantor's vendee. A conveyance of all the estate, right, title, etc., of the grantor, operates to cut off the equity of redemption, by whomsoever held.⁷

The trustee or mortgagee may execute a second deed to the purchaser, to correct errors or omissions in the first deed.⁸

1. *Lewis v. Woods*, 4 How. (Miss.) 86; *Seabury v. Doe*, 22 Ala. 207.

The mortgagee must be in a position to put the purchaser in possession, but if he asserts that he is ready to give possession, the purchaser must perform his part of the contract in order to enable the mortgagee to perform his part. *Allen v. Martin*, 5 Jur. 239.

2. *Heuer v. Rutkowski*, 18 Mo. 216.

3. *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45; *Mullanphy v. Simpson*, 4 Mo. 319; *Sims v. Field*, 66 Mo. 111; *Sappington v. Oeschli*, 49 Mo. 244; *Bancroft v. Ashhurst*, 2 Grant's Cas. (Pa.) 513; *Donohue v. Chase*, 130 Mass. 137; *Aiken v. Bridgeford*, 84 Ala. 295.

4. *In re Bull*, 15 R. I. 534; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255; *Donohue v. Chase*, 130 Mass. 137; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45; *Matkin v. Marx*, 96 Ala. 501; *Doe v. Jones*, 10 B. & C. 459; 4 Kent's Com. 327; *Jones Mortg.* (4th ed.) 1897.

5. *Hunter v. Wooldert*, 55 Tex. 433; *Williams v. Otey*, 8 Humph. (Tenn.) 563; *Fogarty v. Sawyer*, 17 Cal. 589; *Valentine v. Piper*, 22 Pick. (Mass.) 85.

6. *Strother v. Law*, 54 Ill. 413.

Unexplained Delay in Making Deed.—A trustee's deed executed in 1878, showing upon its face the trustee's recognition of a sale made by him in 1866, and that the grantee was the purchaser at such sale and entitled at all times to a conveyance, is admissible as evidence of the purchaser's title, without explanation of the delay in its execution. *Jones v. Hagler*, 95 Ala. 529.

But where the mortgagee is not in a position to title himself, or to compel some third person to do so, he cannot hold the purchaser to his contract. *Forrer v. Nash*, 35 Beav. 167.

7. *Tyler v. Massachusetts Mut. L. Ins. Co.*, 108 Ill. 58.

8. *Parmlly v. Walker*, 102 Ill. 617.

Where the trustees advertised and sold an entire tract covered by the

2. Proper Parties Grantor.—Where the mortgagee is authorized by the power to foreclose and sell, and, as the attorney of the mortgagor, to convey to the purchaser, such conveyance must be in the name of the mortgagor as grantor; and a conveyance made in the name of the mortgagee or assignee only, does not pass the legal title.¹ Such defect in the purchaser's deed, however, does not render the sale invalid; the equitable title passes, which a court of equity will aid in establishing as a legal title.² Under a power authorizing the mortgagee to sell and "make, execute, and deliver to the purchaser, all necessary conveyances for the purpose of vesting in him the premises sold, in fee simple," the deed may be executed by the mortgagee, reciting the power and signed with his own name and seal.³

Where an administrator takes a mortgage in which he is described as administrator, he should execute the deed to the purchaser in his own name and not "as administrator." He does not act by virtue of his office, but under the power of sale.⁴

A married woman mortgagee with power of sale, may execute the deed to the purchaser at her sale, without having her husband join, as is required by statute in cases where she conveys her own property.⁵

Where the sale is conducted by a deputy sheriff, the deed to the purchaser may be executed by the successor of the deputy's principal, the act of the deputy in selling being the act of the sheriff.⁶

3. Proper Parties Grantee.—It is not necessary that the deed be made to the successful bidder as grantee. It may be made to any person he may designate, or to whom he has assigned his bid.⁷ Thus, in the absence of fraud, if the ostensible purchaser directs the trustee to execute the deed to a third person, a stranger to the sale cannot be heard to complain that the real purchaser did not make his bid in person.⁸ Where the mortgagee may lawfully purchase at his own sale, the deed may run directly to himself as purchaser.⁹

trust deed, but the purchaser, under the belief that he had purchased only a portion of the tract, caused the trustee to make him a deed of that portion, it was held that the trustee, on discovering the mistake, could convey the remaining portion to the purchaser by a second deed. *O'Day v. Vansant*, 3 Mackey (D. C.) 196.

1. *Speer v. Haddock*, 31 Ill. 439.

Unless excused by the terms of the power, the mortgagee is bound to furnish the purchaser with the evidence of his right to exercise the power. *Hobson v. Bell*, 3 Jur. 190.

Auctioneer's Deed.—A deed made in the name of the auctioneer, instead of the name of the donee of the power,

does not pass the legal title. *Sanders v. Cassady*, 86 Ala. 246.

2. *Gibbons v. Hoag*, 95 Ill. 45.

3. *Cranston v. Crane*, 97 Mass. 459.

4. *Wilkerson v. Allen*, 67 Mo. 502.

5. *Cranston v. Crane*, 97 Mass. 459; *Heath v. Withington*, 6 Cush. (Mass.) 497.

6. *Wilson v. Russell* (Dak. 1887), 31 N. W. Rep. 645.

7. *Johnson v. Watson*, 87 Ill. 535; *Massey v. Young*, 73 Mo. 260; *Bensieck v. Cook*, 110 Mo. 173; *Jones Mortg.* (4th ed.) 1896.

8. *Jones v. Hagler*, 95 Ala. 529.

9. *Hall v. Bliss*, 118 Mass. 554; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255.

4. **Recitals in Deed.**—While it is proper and advisable to recite, in a trustee's or mortgagee's deed, the power under which it is executed, as well as the proceedings had before sale, yet the omission to insert such recitals does not invalidate the conveyance. It can always be shown *aliunde* that the conveyance was made in execution of the power.¹

Though no mention be made of the name of the trustee in the body of his deed, yet, if the recitals furnish the means of identifying the grantor as the trustee, the description is sufficient;² and it is not essential for the trustee's deed to contain a recital of the exact date of his sale made in pursuance of the power.³ Recitals in a mortgagee's or trustee's deed to the purchaser are, at law, generally held to be *prima facie* evidence of the facts stated, even where the power itself does not provide that such recitals shall have that effect.⁴

In equity, a person claiming under a trustee's deed must be able to show that all the conditions precedent to the right to sell

The cases of *Dexter v. Shepard*, 117 Mass. 480, and *Jackson v. Colden*, 4 Cow. (N. Y.) 266, seem to assume, *arguendo*, that the mortgagee cannot make a deed directly to himself.

1. *Smith v. Henning*, 10 W. Va. 596; *Taylor v. Eatman*, 92 N. Car. 601.

Absence of Recitals.—A mortgagee gave to the mortgagee or his assigns a power to sell on default, at public or private sale, and to convey to the purchaser in fee simple absolute. After default, the assignee of the mortgage executed to a third person an ordinary warranty deed of the premises, containing no reference to the mortgage or power, and there was no assignment of the debt to the grantee. It was held that the deed was an execution of the power, and not an assignment of the mortgage. *Lanigan v. Sweany*, 53 Ark. 185. But in *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124, it was held that a simple conveyance by the mortgagee after default, without any reference to his power of sale, or the nature of his interest in the property, would convey only his mortgage interest, and could not be regarded as an execution of the power.

Contradictory Recitals.—Where a trustee, under a trust deed covering several lots, makes a sale and conveys to the purchaser all the lots covered by the trust, and in one part of his deed recites a sale by him of one particular lot, this will not defeat his deed as to the other lots, when from the whole deed it sufficiently appears that he actually sold all the lots conveyed. *Miller v. Shaw*, 103 Ill. 277.

2. *Jones v. Hagler*, 95 Ala. 529.

3. *Jones v. Hagler*, 95 Ala. 529.

A trust deed required the sale to be made in the city of P., and that the notice of sale should state the time of sale, and be published in some newspaper printed and published in that city. The trustee's sale purported to have been made in the town of P., but his deed did not recite that the sale was made at the time stated in the notice, nor did the affidavit of publication show that the newspaper was printed in the city of P. It was held that these matters did not render the trustee's deed incompetent as evidence of title. *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67.

4. *Ingle v. Jones*, 43 Iowa 286; *Beal v. Blair*, 33 Iowa 318; *Tyler v. Herning*, 67 Miss. 169; *Jesson v. Texas Land, etc., Co.* (Tex. 1893), 21 S. W. Rep. 624.

Recitals as to Creditor's Right to Bid.—Recitals in a trustee's deed are *prima facie* evidence of the fact that the power permitted the creditor to purchase, and it is not necessary that the trust deed should provide that the trustee's recitals shall be received as evidence. *Savings & Loan Soc. v. Deering*, 66 Cal. 281.

Recitals as to Notice of Sale.—The fact that the mortgagee's deed recites particularly certain essentials in respect to the giving of the notice, and is silent as to some other essentials, does not repel the presumption that the notice was sufficient. *Tartt v. Clayton*, 109 Ill. 579.

have arisen and been complied with.¹ At law, a trustee's deed purporting to be made in exercise of the power, cannot be impeached for fraud or misconduct in the proceedings prior to its execution. The deed passes the legal title and a court of equity must be applied to to set it aside.² But in equity, such recitals are no evidence of a regular and proper exercise of the power, unless so provided in the instrument creating the trust.³

If the power authorizes the trustee to make recitals in his deed *prima facie* evidence, the same effect must be given to the recitals in a substitute trustee's deed.⁴

A stipulation in a trust deed that the recitals in the trustee's conveyance under the power shall be conclusive evidence of default, right to sell, and regularity of sale, are binding upon the grantor as against a *bona fide* purchaser at such sale.⁵

A party claiming under a deed made in execution of a power of sale, is bound by a recital in it that the mortgage debt draws interest at a certain rate; and he cannot defeat redemption based upon a payment of the debt and such rate of interest, though in fact the debt bore a higher rate and the recital was erroneous.⁶

5. Trustee's Covenants.—The trustee is under no obligation to give any other covenant in his deed to the purchaser, than the ordinary trustee's covenant against his own acts. His deed is good and effectual without either warranty or personal covenants, and he has no implied power to make covenants, merely from a power to convey.⁷ Of course, if the trust deed empowers the trustee to sell and convey with full covenants of warranty, such covenants in the trustee's deed to the purchaser at his sale are as binding on the grantor in the trust deed, as if he had personally made them.⁸

6. Statutory Substitutes for Deed; Certificates.—In *New York*, no deed is necessary where the mortgagee becomes the purchaser; the affidavits required by law to be filed have the force and effect of a deed.⁹ So in *Wisconsin*.¹⁰

In *Minnesota*, all sales under powers in mortgages must be made by the sheriff of the county, and his certificate of sale operates as a deed after the expiration of the statutory period of redemption.¹¹ The failure of the person executing the power to file a

1. *Breit v. Yeaton*, 101 Ill. 242; *Tyler v. Herning*, 67 Miss. 169.

2. *Windett v. Hurlbut*, 115 Ill. 403; *Dryden v. Stephens*, 19 W. Va. 1; *Fulton v. Johnson*, 24 W. Va. 95; *Savings & Loan Soc. v. Deering*, 66 Cal. 281.

3. *Barman v. Carhartt*, 10 Mich. 338; *Hebert v. Bulte*, 42 Mich. 489; *Wood v. Lake*, 62 Ala. 489.

4. *White v. Stephens*, 77 Mo. 452.

5. *Cary v. Brown*, 62 Cal. 373.

6. *Dodge v. Kennedy*, 93 Mich. 547; *Botsford v. Murphy*, 47 Mich. 537.

7. *Barnard v. Duncan*, 38 Mo. 170.

8. *Thurmond v. Brownson*, 69 Tex. 597; 6 S. W. Rep. 778.

9. *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Mowry v. Sanborn*, 68 N. Y. 153; *Arnot v. McClure*, 4 Den. (N. Y.) 44.

10. *Nau v. Brunette*, 79 Wis. 664.

11. *Minnesota Gen. St.* 1878, ch. 81.
Recitals as to Redemption.—A sheriff's certificate of sale, reciting that the mortgagor's right to redeem will expire on a certain date, sufficiently complies with the statute requiring such certificate to so state, if the premises are subject to redemption. *Cable v.*

duplicate certificate of sale in the office of the register of deeds, as directed by statute, does not invalidate the sale.¹ A mere misstatement as to the date of executing the mortgage, or as to the amount of the note secured, does not invalidate the certificate.²

A recital in the certificate of sale that a deed would not be issued until two years (instead of one, the proper period) from the date of sale, is not prejudicial, and does not invalidate a deed issued after the expiration of two years.³

A sheriff's certificate, signed by him as such, is not fatally defective because it fails to recite that he made the sale as sheriff.⁴ Where the sale is conducted by a deputy sheriff, the fact that he executes the certificate in his own name as deputy, without using the sheriff's name, is at most a mere irregularity not affecting the validity of the sale.⁵

In *Minnesota*, it is held that where the sale is conducted by a deputy sheriff, the certificate of sale is properly executed by him in his own name.⁶ The statutory requirement that the certificate

Minneapolis Stock Yards, etc., Co., 47 Minn. 417.

A statement in the sheriff's certificate (dated) that the premises sold "are subject to redemption within the time and according to statute," is a sufficient compliance with the statutory requirement to state the time of redemption. *Wells v. Atkinson*, 24 Minn. 161.

Construction of Minnesota Law.—By *Minnesota Laws* 1883, ch. 112, a sheriff's certificate of sale, executed either before or after the passage of the act, is made *prima facie* evidence that all the requirements of law in executing the power, including the publication of the notice of sale, have been complied with. The act is merely one changing the rules of evidence, which it was competent for the legislature to make applicable to existing causes of action. It also applies to such certificates made by a deputy sheriff, who is authorized by law to make foreclosure sales. *Burke v. Lacock*, 41 Minn. 250.

1. *Johnson v. Day*, 2 N. Dak. 295; *Sanborn v. Petter*, 35 Minn. 449.

Where the statute fixes no limit within which the certificate shall be recorded, it is sufficient to record it ten months after the sale. *Ryder v. Hulett*, 44 Minn. 353.

2. *Cable v. Minneapolis Stock Yards, etc., Co.*, 47 Minn. 417.

Erroneous Description.—In *Minnesota*, the statute requires that the sheriff's certificate of sale (which must contain, among other things, a description of the property sold, the price paid for

each parcel, the name of the purchaser, and the date of sale) shall be executed and recorded within twenty days after the sale; and that when so recorded it shall, upon the expiration of the period of redemption, operate as a conveyance to the purchaser. Property was sold to D. at a foreclosure sale, and a sheriff's certificate given to him, which was duly recorded, and which recited that the sheriff sold all the property described in the mortgage, but describe the property in controversy as being in section twenty-two, instead of section fifteen, as in the mortgage. There was no redemption attempted by the mortgagor. In an action to quiet title, the court held that owing to this error in description the certificate was incompetent as evidence of the purchaser's title under the sale, and that in fact he had no title. *Smith v. Buse*, 35 Minn. 234.

3. *Hayes v. Frey*, 54 Wis. 503.

4. *Merrill v. Nelson*, 18 Minn. 366.

5. *Hodgdon v. Davis*, 6 Dakota 21.

6. **Certificate by Deputy Sheriff.**—In *Burke v. Lacock*, 41 Minn. 250, the court said: "The law authorizes the deputy sheriff, as such, to make the sale; and consequently, when he does so, it is proper for him to execute the certificate in his own name as deputy sheriff. His certificate stands on the same footing, and has the same force and effect, as that of the principal sheriff. Both are, in popular language, known and called 'sheriff's certificates;' both are equally within the purview of the act of 1883, the same

shall contain a description of the mortgage is sufficiently complied with by incorporating in the certificate a copy of the notice of sale, which contains a true description of the mortgage.¹

Although the statutory certificate becomes a muniment of title, it has been held that an omission to seal the certificate is not fatal to its validity.²

7. Deed Need Not Be Recorded.—The trustee's deed relates back to the date of the execution of the trust deed, and the record of the latter is sufficient to put all persons on inquiry as to whether a sale has been made in exercise of the power. Hence, as to attaching creditors, the trustee's deed need not be recorded.³

8. Right to Possession.—After the purchaser has received his deed, and the statutory period of redemption has expired, he need not give the party in possession notice to quit before bringing ejectment. The relation of landlord and tenant does not exist.⁴

The purchaser at trustee's sale is entitled to the growing crops, both as against the debtor and all persons claiming under him subsequent to the recording of the trust deed.⁵ He is also entitled to possession without paying the debtor or his privies for permanent improvements made since the creation or recording of the lien.⁶ It is presumed that the value of the improvements enhanced the purchase price paid at the sale, and hence that the owner of the equity has already received compensation for them.⁷

Where by statute a right of redemption is given for a specified period after sale, the mortgagor or owner of the equity is, as a general rule, not liable for the rents and profits during the period allowed for redemption.⁸

reasons existing why the one should be made *prima facie* evidence of a valid sale under the power as the other; and in the term 'sheriff's certificate,' the legislature evidently intended to include both."

1. *Golcher v. Brisbin*, 20 Minn. 453.

2. *Hayes v. Frey*, 54 Wis. 503.

3. *Farrar v. Payne*, 73 Ill. 82.

4. *Waters v. Butler*, 4 Cranch (C. C.) 371; *Lindenbower v. Bentley*, 86 Mo. 515.

5. *Sugden v. Beasley*, 9 Ill. App. 71; *Harmon v. Fisher*, 9 Ill. App. 22.

6. *Neal v. Hamilton* (Tex. 1887), 7 S. W. Rep. 672; *Childs v. Dolan*, 5 Allen (Mass.) 319.

7. In *Neal v. Hamilton* (Tex. 1887), 7 S. W. Rep. 672, where the mortgagor claimed the right, as against the purchaser at a foreclosure sale, to recover for improvements made before the sale, the court said: "We know of no rule of law which would entitle him to other compensation for the improvements, than such as he is presumed to have re-

ceived from the increased price which may have been paid for the land at the trustee's sale on account of the improvements. This is not a case in which a defendant, in an action of trespass to try title, is entitled to compensation for improvements made in good faith, nor is it a case in which a vendor of land, through an executory contract, is seeking to cancel it under circumstances which raise equities in favor of the vendee."

8. In *Minnesota*, where by statute the mortgagor is entitled to possession and the right to redeem for one year from the day of sale under a power in a mortgage, it is held that the purchaser at the sale cannot recover the rents and profits during that year, even though the mortgage purports to cover them. This decision is based upon the theory that from the time of foreclosure the mortgage ceases to be a security for the debt, and its provisions do not apply. *Pioneer Sav., etc., Co. v. Farnham*, 50 Minn. 315.

9. **Affidavit of Proceedings.**—In a number of states it is provided by statute that the preliminary proceedings in the exercise of a power of sale, and also the conduct of the sale, shall or may be proved by affidavits of the facts, made by the proper persons, and recorded in the registry of deeds. The prevailing doctrine is that in the absence of any such affidavits the fact of publication and other preliminary proceedings may be proved by common-law evidence.¹ And even though the affidavits are by statute made presumptive or *prima facie* evidence of the facts stated, they are subject to rebuttal by other proof.² It seems that to render the affidavit admissible as evidence it must be made within a reasonable time after the proceedings to which it relates. A delay of several years destroys its value.³ An affidavit, made on information and belief only, as to the service of the required notices, is of itself wholly insufficient, being no proof of the fact.⁴ Defects in the statutory affidavit of service of notice upon the mortgagor or other parties, may be supplied by parol proof.⁵

Unless expressly so declared by law, it is not necessary that the statutory affidavit of publishing and posting notices of sale, or of other proceedings, should be recorded in order to vest the title in the purchaser.⁶ Thus, neglect on the part of the mortgagee to file the affidavit of costs and disbursements as required by law cannot be allowed to affect the validity of the sale; a different rule could enable the mortgagee, by such neglect, to defeat the rights of a *bona fide* purchaser at the sale.⁷

In *Mississippi*, however, it is held that the right to the rents passed to the purchaser at the foreclosure sale, under a mortgage granting the premises and "hereditaments," etc. *Dunton v. Sharpe* (Miss. 1886), 11 So. Rep. 168.

In *North Dakota*, the purchaser at a foreclosure sale is entitled to recover rents from a tenant in possession, up to the time of redemption; and payment by the tenant to his lessor, after notice of the purchaser's rights, is no defense. *Clement v. Shipley*, 2 N. Dak. 430.

In *California*, the purchaser at mortgage sale is entitled to recover from the tenant in possession, the rents and profits or the value of the use and occupation, from the day of sale to the time of redemption. *California Code Civ. Proc.* 707; *Walker v. McCusker*, 71 Cal. 594.

1. *Arnot v. McClure*, 4 Den. (N. Y.) 41; *Mowry v. Sanborn*, 68 N. Y. 153; *Tuthill v. Tracy*, 31 N. Y. 157; *Frink v. Thompson*, 4 Lans. (N. Y.) 289; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Golcher v. Brisbin*, 20 Minn. 453; *Menard v. Crowe*, 20 Minn. 448; *Wil-*

kerson v. Allen, 67 Mo. 502; *Field v. Gooding*, 106 Mass. 310.

2. *Arnot v. McClure*, 4 Den. (N. Y.) 44; *Mowry v. Sanborn*, 62 Barb. (N. Y.) 223; 65 N. Y. 581; 68 N. Y. 153; 72 N. Y. 534; *Sherman v. Willett*, 42 N. Y. 146; *Maxwell v. Newton*, 65 Wis. 261.

3. *Mundy v. Monroe*, 1 Mich. 68.

4. *Mowry v. Sanborn*, 65 N. Y. 581.

5. *Mowry v. Sanborn*, 68 N. Y. 153, reversing *Mowry v. Sanborn*, 7 Hun (N. Y.) 380. See also *Tuthill v. Tracy*, 31 N. Y. 157; *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

Contents of Affidavit.—In *Massachusetts*, the affidavit of acts done, in selling under the power in a mortgage, is not required to contain any statement that the mortgagee has rendered an account to the mortgagor, or as to how he has disposed of the purchase-money. *Childs v. Dolan*, 5 Allen (Mass.) 319.

6. *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Tuthill v. Tracy*, 31 N. Y. 157; *Johnson v. Day*, 2 N. Dak. 295.

7. *Johnson v. Cocks*, 37 Minn. 530.

Failure to File Affidavit.—In *Smith v. Provin*, 4 Allen (Mass.) 516, the

Where the statute directs that the affidavit of publication shall be made by the "printer," an affidavit by a person describing himself as the "publisher" of the paper is sufficient; it will be presumed that the publisher is the printer, in the sense of being the person for whom, as principal, and by whose servants, the paper is printed.¹

XX. SEPARATE PARCELS SHOULD BE SOLD SEPARATELY.—Where the property covered by a mortgage or trust deed consists of separate tracts or parcels, it is, under ordinary circumstances, advantageous to the interests of the owner to sell each tract or parcel separately, as by that method a better price will usually be realized than by a sale *en masse*. It may be stated as the general rule, independently of statutory requirements, that it is the duty of the trustee or mortgagee to make a fair effort to sell the parcels separately before offering them all together.² A sale *en masse* will not be

court said: "The allegation on the part of the plaintiff is, that the conditions annexed to the power of sale have not been complied with. The defect particularly assigned is, that the affidavit required to be made by the party making such sale, and containing a statement of a compliance with the requirements of the deed in that behalf, was not made and recorded in the registry of deeds for the county of Hampton, within one year after the sale. It is admitted by the answer of the defendants, that no such affidavit had been made and filed for record in the registry of deeds prior to April 21st, 1892, nearly three years after the sale, and long after the filing of the present bill. There was, therefore, a failure to comply with the conditions annexed to the power of sale, and the sale must be treated as a nullity. This court has held the rule very strictly as to mortgage sales under power of attorney." *Citing Roarty v. Mitchell*, 7 Gray (Mass.) 244. The foregoing decision was based upon a requirement in the mortgage itself.

In the later case of *Field v. Gooding*, 106 Mass. 310, the court said: "It is further insisted that the statute provision, requiring that the mortgagee, in case he should proceed to sell without a decree of court, shall file a copy of the notice of sale, and an affidavit of his doings, within thirty days, in the registry of deeds, is peremptory, and, if not complied with, the sale, itself, becomes void, and no title passes. This is not, in the opinion of the court, a sound interpretation of the statute. The provision is intended to secure

the preservation of evidence that the conditions of the power of sale named in the deed have been complied with. It is for the protection of those claiming under the sale, and to prevent litigation. The title passes by the sale and deed, and immediately vests in the purchaser. It was not the intention to make it subject to a condition subsequent, and liable to be defeated by a failure of the mortgagee to perform an act which must follow the conveyance in point of time, and thus add to the conditions prescribed by the mortgagor in the deed. If this was the purpose of the statute, its language would have been more explicit. As it is, its provisions must be regarded as directory, and not precluding a resort to other evidence that the power of sale was duly executed. The mortgagor cannot complain if the conditions he has chosen to insert in the deed have been, in fact, complied with." *Followed in Burns v. Thayer*, 115 Mass. 89; *Learned v. Foster*, 117 Mass. 365.

1. *Menard v. Crowe*, 20 Minn. 448. See also *Sharp v. Daugney*, 33 Cal. 513. In *Bunce v. Reed*, 16 Barb. (N. Y.) 347, it is held that the terms "printer" and "publisher" are synonymous.

2. *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Wells v. Wells*, 47 Barb. (N. Y.) 416; *Lalor v. McCarthy*, 24 Minn. 417; *Curry v. Hill*, 18 W. Va. 370; *Durm v. Fish*, 46 Mich. 312; *Morse v. Byam*, 55 Mich. 594; *Cassidy v. Cook*, 99 Ill. 385; *Johnson v. Williams*, 4 Minn. 260; *Sumrall v. Chaffin*, 48 Mo.

disturbed, however, unless it is made to appear that the interests of the owner were prejudiced thereby.¹ If, in the exercise of a sound discretion, the trustee or mortgagee decides that a sale *en masse* is preferable, he may act accordingly and the court will not interfere.² And it will be presumed that the trustee will not attempt to sell any more of the property than necessary for the purposes of the trust.³ Even though the power confers upon the trustee the right to use his discretion as to selling *en masse* or in separate parcels, he must not act arbitrarily; and a sale *en*

402; *Chesley v. Chesley*, 49 Mo. 540; *Carter v. Obshire*, 48 Mo. 300.

"The criterion in all cases is, what mode of sale will realize the largest amount of money? If this object can be obtained by the sale of the whole mortgaged premises together, that is the proper mode to pursue, even if they are readily divisible. If the land is divisible into separate parcels, and is better adapted for use in parcels, then the presumption would seem to be that it would produce a larger amount of money if sold in that way, and the sale should be made accordingly." 2 Jones Mortg. (4th ed.), § 1858.

Request of Junior Mortgagee.—A mortgagee has no right to sell the whole premises in one parcel, where he has been duly requested to offer it in separate parcels by a junior mortgagee, who agrees to bid the entire amount of the first mortgage for a certain designated part of the tract, which is easily capable of division, even though the whole is described in the mortgage as one tract. Under such circumstances equity will set aside a sale *en masse*. *Ellsworth v. Lockwood*, 42 N. Y. 89.

For the rule in tax sales, see *TAXATION*, vol. 25, p. 384. For the rule in execution sales, see *JUDICIAL SALES*, vol. 12, 214.

1. *Cleaver v. Green*, 107 Ill. 67; *German Bank v. Stumpf*, 73 Mo. 311; *Michie v. Jeffries*, 21 Gratt. (Va.) 334.

It must be made to appear that the debtor's interests were prejudiced, or that there was some fraud or unfair advantage intended. *Gillespie v. Smith*, 29 Ill. 473; *Fairman v. Peck*, 87 Ill. 156; *Ross v. Mead*, 10 Ill. 171; *Ingle v. Jones*, 43 Iowa 286; *Shine v. Hill*, 23 Iowa 264; *Benkendorf v. Vincenz*, 52 Mo. 441; *Chesley v. Chesley*, 54 Mo. 347; *Ferry v. Fitzgerald*, 32 Gratt. (Va.) 843.

A sale of two parcels *en masse* will not be set aside where the price realized was not so inadequate as to excite

suspicion of fraud, and it appears that a sale of each parcel separately would not have brought more. *Keiser v. Gammon*, 95 Mo. 217.

A sale in gross is not void, but merely voidable; and where there is no evidence of fraud or unfair conduct, subsequent purchasers of separate portions of the tract from the mortgagors who have made no objection to the manner of sale at the time, nor shown any excuse for not doing so, are not entitled to have it set aside merely because a sale in parcels would have enabled them respectively to redeem the tracts in which they were interested. *Clark v. Kraker*, 51 Minn. 444.

2. *Loveland v. Clark*, 11 Colo. 265; *Ingle v. Jones*, 43 Iowa 286; *Cleaver v. Green*, 107 Ill. 67; *Hall v. Gould*, 79 Ill. 16; *Bales v. Perry*, 51 Mo. 449; *Kline v. Vogel*, 11 Mo. App. 211.

Duty of Trustee as to Parcels.—In *Michie v. Jeffries*, 21 Gratt. (Va.) 334, the court said: "We do not mean to say that he (the trustee) must sell precisely so much as may be sufficient to satisfy the purposes of the trust, and no more. It may be difficult or impossible to do this, and it may, in fact, be a breach of the trust to do it. He cannot so divide and sell the land as to do unnecessary injury to the owner. He is the agent of both parties, and must consult and respect the rights of both. The sale of a part of a tract of land may injuriously affect the sale or value of the balance; and it may be the duty of the trustee to sell the whole tract, or more of it than is required for the purposes of the trust, especially if desired by the owner of the land to do so. By duly considering the rights, interests and wishes of the parties, an intelligent and faithful trustee will rarely find any difficulty in the discharge of his trust."

3. *Muller v. Stone*, 84 Va. 834; *Cleaver v. Matthews*, 83 Va. 801; *Cleaver v. Green*, 107 Ill. 67; *Grover*

masse will be set aside where it is clear that a much better price would have been realized by selling in parcels.¹ In the exercise of a reasonable discretion, he may divide a tract of land and sell it in small lots,² and if it is easily susceptible of division and will bring more if sold in parcels, it becomes the duty of the trustee to so divide and sell it.³ When enough of the land has been sold to pay the secured debt, the trustee must stop the sale, unless he is also authorized to pay other liens out of the proceeds.⁴

Where the property consisted of a single tract at the time it was mortgaged, and was subsequently divided into small lots by the mortgagor, the mortgagee is not bound to notice such subdivision, but may offer the property for sale as one tract.⁵ And he may do this, even though the mortgagor has sold some of the subdivisions to third parties.⁶ Under some circumstances a sale in sep-

v. Fox, 36 Mich. 461; *Abbott v. Peck*, 35 Minn. 499.

1. *Cassidy v. Cook*, 99 Ill. 385.

2. *Gray v. Shaw*, 14 Mo. 341; *Bales v. Perry*, 51 Mo. 449.

The fact that the trustee sold only half of the land covered by the deed will not be presumed to be an abuse of discretion, where the portion sold brought enough to satisfy the debt, and the debtor did not request the trustee to sell more. *Miller v. Mann*, 88 Va. 212.

3. *Carter v. Abshire*, 48 Mo. 300; *Chesley v. Chesley*, 49 Mo. 540; *Tatum v. Holliday*, 59 Mo. 422.

Where an instrument constitutes, in effect, several separate and distinct mortgages upon several separate lots, to secure several separate and distinct sums of money, although for convenience all are consolidated in one writing, a sale of all the lots together as one tract for a gross sum is unauthorized and void. *Hull v. King*, 38 Minn. 349.

Dividing Railway Property.—A line of railway which cannot be divided and sold in pieces, may be sold as an entirety, before the maturity of the principal debt, on default of payment of interest. *Wilmer v. Atlanta, etc., R. Co.*, 2 Woods (U.S.) 447. See also *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. (U.S.) 254.

4. *Baker v. Halligan*, 75 Mo. 435.

In *Hall v. Gould*, 79 Ill. 16, where the deed contained such authority, it was held that the trustee might lawfully continue the sale for the purpose of paying both the secured debt and also a judgment subsequently acquired by the beneficiary in the trust deed.

5. *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *Ellsworth v. Lockwood*, 9

Hun (N. Y.) 548; 42 N. Y. 89; *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9; *Durm v. Fish*, 46 Mich. 312; *Shannon v. Hay*, 106 Ind. 589; *Kline v. Vogel*, 11 Mo. App. 211; *Meacham v. Steele*, 93 Ill. 135.

Where the mortgaged premises had been laid off into lots and streets, but had not been improved, and were cut into two parcels by a line of railroad, it was held that the mortgagee was not bound to offer each lot separately, but that he was bound to offer the premises in two parcels, according to the railroad division. *Patterson v. Miller*, 52 Md. 388.

Partial Release.—Where the mortgage covered a single tract, but subsequently the mortgagee released a portion of it, the remainder being in separate parcels, it was held that a sale of the remainder without recognizing the change of its condition, was void under the statute requiring separate tracts to be sold separately. (Comp. Laws *Michigan* 6915, 6918.) *Durm v. Fish*, 46 Mich. 311. See also *Lee v. Lason*, 10 Mich. 403; *Udell v. Kahn*, 31 Mich. 195.

6. **Rights of Subsequent Purchasers.**—Where at the time of giving a mortgage, the premises do not consist of two or more separate and distinct tracts, within the meaning of the statute, a foreclosure sale of the entire tract as one parcel, would not be invalid, even though by reason of a subdivision of the property subsequent to the giving of the mortgage, and an acquisition of interest by other persons in separate portions of it, such equities may have arisen that a court of equity, upon timely application, would have

arate parcels would not be desirable, and might even be unreasonable, as where two separate tracts are used as a single farm.¹

Where two deeds of trust are given to the same creditor to secure the same debt, each covering an undivided half of the same tract, the whole should be sold together under both deeds, and not one undivided half at one time, and the other half at another.²

By statute in several of the states, sales under powers are required to be made in separate parcels if the premises consist of such, or are easily susceptible of division. But it is generally held that a sale in violation of the statute is not void, but merely voidable, upon a showing that it was done fraudulently or that prejudice resulted therefrom to the owner;³ though the statute says that the sale "must" be so made, it is held to be directory and not mandatory.⁴

A sale, in one parcel, of the premises mortgaged, and also of another tract not covered by the mortgage, does not affect the validity of the sale as to the former. The irregularity cannot be said to have affected bidders, because they must be presumed to know what property the mortgage covered.⁵ The mortgagee himself cannot be heard to object that his own sale was not made in parcels as required by the statute.⁶

Upon a sale in parcels, the power becomes exhausted as soon as a sufficient number have been sold to satisfy the debt and costs; any further sales would be wholly void.⁷

The objection that the trustee should have sold in parcels must be made directly by proceedings to set aside the sale, and not by a collateral attack upon the purchaser's title.⁸

Laches on the part of the owner in complaining that the sale was not made in parcels will justify the court in denying his application for relief.⁹

It was held in one case that where a party had previously and

required the sale to be made in separate parcels. *Johnson v. Williams*, 4 Minn. 260; *Paquin v. Braley*, 10 Minn. 279; *Abbott v. Peck*, 35; Minn. 499; *Willard v. Finnegan*, 42 Minn. 476; *Ryder v. Hulett*, 44 Minn. 354; *Clark v. Kraker*, 51 Minn. 444.

1. *Maxwell v. Newton*, 65 Wis. 261; *Larzelere v. Starkweather*, 38 Mich. 96; *Yale v. Stevenson*, 58 Mich. 537; *Kellogg v. Carrico*, 47 Mo. 157; *Merrill v. Nelson*, 18 Minn. 366. And it is immaterial that the component tracts are separately described in the mortgage. *Worley v. Naylor*, 6 Minn. 192.

Row of Tenement Houses.—In *Sumrall v. Chaffin*, 48 Mo. 402, where a trust deed covered a number of tenement houses standing together, the side walls being so constructed that they could not be divided easily, it was declared to be the duty of the trustee to

offer them for sale separately, if persons present signified a desire to purchase in that manner.

2. *Coffman v. Scoville*, 86 Ill. 300.
3. *Willard v. Finnegan*, 42 Minn. 476; *Ryder v. Hulett*, 44 Minn. 353; *Swenson v. Halberg*, 1 McCrary (U. S.) 96.

4. *Wallace v. Feely*, 61 How. Pr. (N. Y. C. Pl.) 225.

5. *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125; *Lowry v. Tillyen*, 31 Minn. 500.

6. *Clark v. Stilson*, 36 Mich. 482.
7. *Grover v. Fox*, 36 Mich. 461; *Baker v. Halligan*, 75 Mo. 435; *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Curry v. Hill*, 18 W. Va. 370; *Pryor v. Baker*, 133 Mass. 460.

8. *Haeussler v. Missouri Glass Co.*, 52 Mo. 452.

9. *Kline v. Vogel*, 11 Mo. App. 211.

for a valuable consideration waived his right of redemption, he could not be heard to object that the sale was not made in parcels.¹

A person equitably entitled to have parcels covered by a power of sale mortgage sold in the inverse order of alienation, should apply to the court, as well as to the mortgagee, before the sale for that purpose; and if he does not, the sale will not be disturbed as against a *bona fide* purchaser.²

In giving notice of sale, a statement that the premises, "or so much thereof as may be necessary," will be sold, is the usual and proper form, and is not objectionable as failing to designate the precise parcels to be sold.³ Nor is there anything improper in advertising that the whole premises will be sold; it will be presumed that the trustee will sell no more than is necessary under all the circumstances, having regard to the interests of all parties.⁴

XXI. SALE FOR INADEQUATE PRICE.—The rule has long been settled that where a public sale under a power has been fairly conducted, it will not be disturbed on the sole ground that the purchase price realized was inadequate or greatly below the market value of the property. The sound principle upon which this rule rests is that when the grantor of the power authorized a public sale, he assumed the risk of sacrifice resulting from a lack of competition among bidders.⁵

The circumstance that the owner of the equity of redemption

1. *Clark v. Stilson*, 36 Mich. 482.

2. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 550.

Where one trust deed covered two lots, and another deed in favor of a different creditor covered only one of the lots, the trustee in the first deed very properly complied with a request from the holder of the second to offer for sale first the lot not covered by both deeds. *Sternberg v. Valentine*, 6 Mo. App. 176.

3. *Snyder v. Hemingway*, 47 Mich. 549.

4. *Cleaver v. Matthews*, 83 Va. 801.

Parcels in Different Towns.—A mortgage covered three separate parcels of land, situated in three different towns, and provided that on default the mortgagee might "sell the granted premises, or such portion thereof as may remain subject to this mortgage, in case of any partial release therefrom, in said town, on the premises." The mortgagee advertised and sold on the premises one of the lots, realizing less than the mortgage debt and subsequently he advertised and sold the other lots. It was held that the first sale was valid, the mortgagor having no ground of complaint that all the lots were not advertised at

the same time. *Pryor v. Baker*, 133 Mass. 459.

5. *Burns v. Middleton*, 104 Ill. 411; *Bowman v. Ash*, 36 Ill. App. 115; *Parmly v. Walker*, 102 Ill. 617; *Laclede Bank v. Keeler*, 109 Ill. 385; *Hoodless v. Reid*, 112 Ill. 105; *Cleaver v. Green*, 107 Ill. 67; *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601; *Horsev. v. Hough*, 38 Md. 130; *Bradford v. McConihay*, 15 W. Va. 732; *Lallance v. Fisher*, 29 W. Va. 512; *Robinson v. Amateur Assoc.*, 14 S. Car. 148; *Alexander v. Messervey*, 35 S. Car. 417; *McNair v. Pope*, 100 N. Car. 404; *Kennedy v. Dunn*, 58 Cal. 339; *King v. Bronson*, 122 Mass. 122; *Wing v. Hayford*, 124 Mass. 249; *Landrums v. Union Bank*, 63 Mo. 48; *Keiser v. Gammon*, 95 Mo. 217; *Kilne v. Vogel*, 11 Mo. App. 211; *Million v. McRee*, 9 Mo. App. 344; *Hudgins v. Morrow*, 47 Ark. 515; *Maxwell v. Newton*, 65 Wis. 261; *Cross v. Allen*, 141 U. S. 528; *Smith v. Black*, 115 U. S. 308; *Hitz v. National L. Ins. Co.*, 3 McArthur (D. C.) 170.

In *Loveland v. Clark*, 11 Colo. 265, the court stated the rule in the following terms: "One who sells and conveys his land to another and takes back a deed of

was insane at the time of sale, which was made for an inadequate price, is not sufficient to vitiate it.¹

Mere inadequacy of price furnishes even less ground to complain of the sale where a period of redemption is given by statute.² An application to set aside a sale on the ground of inadequacy will not be considered in any case, unless it is shown that a larger price can be realized upon a resale,³ and the objection that the price was inadequate can be made only by parties having an interest in the land or in the fund.⁴ If the property has been conveyed since the sale, to a *bona fide* purchaser without notice, even the grossest inadequacy of price will not induce the court to set the sale aside.⁵

The fact that in a trust deed the value of each parcel of land is inserted, following the description, imposes no duty upon the trustee to sell for at least such price.⁶

trust to secure the promised payment of the purchase price, as in this case, is entitled, upon default, to either his money or his land. If he enforce his contract fairly and without fraud, there is no warrant for sacrificing him upon the altar of strict construction. Creditor and debtor stand in *pari statu*; and their contracts, like other contracts, are to be construed fairly and with justice to all parties. The bill of complaint does not charge, nor does the evidence disclose, any fraud in fact. There is no suspicion of any want of fairness and good faith upon the part of the trustees or of either of them. Every reasonable effort appears to have been made to dispose of the property at the highest and best price for the benefit of the parties concerned. A fair price was obtained, all things being considered. The preponderance of testimony is to this effect. There certainly is no ground for saying that the price was grossly inadequate. The mortgagors and mortgagee were all present and bidders at the sale, and found nothing to object to or criticize. The lands in question, since the date of the trust sale, have largely appreciated in value. Hence this suit. In the absence of any fraud or irregularity affecting injuriously the rights of the complainants, the purchaser at the trustee's sale and his grantees should be protected in their title."

The mere fact that the trustee's sale brought only about one-half the market value, is no ground for setting it aside. "To set aside sales for such inadequacy" observes Brace, J., in a recent case, "would have a tendency to impair, if not destroy, the value of such

securities, to seriously embarrass business operations, be productive of incalculable injury, and is without precedent." *Maloney v. Webb*, 112 Mo. 575.

1. *Meyer v. Kuchler*, 10 Mo. App. 371.

2. *Johnson v. Cocks*, 37 Minn. 530; *Cameron v. Adams*, 31 Mich. 426; *Maxwell v. Newton*, 65 Wis. 261; *Sigerson v. Sigerson*, 71 Iowa 476; *Babcock v. Canfield*, 36 Kan. 437.

3. *Farmers' Bank v. Quick*, 71 Mich. 534.

4. In *Taylor v. Von Schraeder*, 107 Mo. 206, the rule stated in the text was applied as against the daughter of the grantor, notwithstanding the fact that the creditor, who bought at the sale, had previously agreed with the daughter to convey to her and take back a new trust deed.

Who May Raise Question of Inadequacy.—One who has made a fraudulent sale of a note and mortgage cannot, when sued by his purchaser for damages for the fraud, set up in defense that if the plaintiff had waited until a more favorable time, he would have realized a better price at his foreclosure sale. *Franklin v. Greene*, 2 Allen (Mass.) 519.

A *cestui que trust* who has received his share of the proceeds of the trustee's sale, cannot, while not attempting to set aside the sale, sue the purchaser on the ground that he was one of the parties to a fraudulent scheme to procure the property at an inadequate price. *Richter v. Jerome*, 123 U. S. 233.

5. *Dryden v. Stephens*, 19 W. Va. 1.
6. *Parsons v. Rhodes*, 22 Hun (N. Y.) 80.

Upon the question of the trustee's good faith, evidence is admissible to show the prices realized at former sales, and that the market value had not increased in the meantime.¹

The fact that the price realized for the property at private sale several years previous to the trustee's sale, or several years afterwards, was two or three times as large as that obtained by the trustee, is not alone sufficient to prove that the latter was grossly inadequate.² Even though the mortgagee or *cestui que trust* becomes the purchaser, mere inadequacy of price will not vitiate the sale, if it appears to have been in all respects fairly and honestly conducted.³ But a mortgagee is held to a higher degree of care and diligence in obtaining bidders than would be required of a trustee, in cases where he purchases the property at his own sale.⁴

To justify the court in setting a sale aside, on the ground of inadequacy of price, there must be some evidence of fraud, unfair conduct, or mistake.⁵ If the inadequacy is so gross as to indicate bad faith, or the want of reasonable judgment and discretion on the part of the trustee or mortgagee, the court will interfere;⁶

1. Keiser v. Gammon, 95 Mo. 217.

2. Parmly v. Walker, 102 Ill. 617.

3. Glide v. Dwyer, 83 Cal. 477; Robinson v. Amateur Assoc., 14 S. Car. 148; Hitz v. National L. Ins. Co., 3 McArthur (D. C.) 170; Landrum v. Union Bank, 63 Mo. 48.

4. Horsey v. Hough, 38 Md. 130.

In Loeber v. Eckes, 55 Md. 1, where property, which was worth between \$6,000 and \$7,000, was sold for \$4,550, and, at least one bona fide bidder, who was anxious to buy, and would have been willing to bid a much higher figure, was induced to stay away by certain representations made by the mortgagee, the court vacated the sale.

Failure to Adjourn Sale.—A leasehold interest in city property, consisting of a new house, located on a fashionable avenue, and worth, in the market, at least \$3,500, was sold, under a power of sale mortgage, for \$2,500. The day of sale was extraordinarily cold and disagreeable, no one being present but the mortgagor, auctioneer, and the assignees of the mortgage, who also owned the ground rent. There was but one bid made, which was cried for about two minutes, and struck off to the assignees. It was held that, under the circumstances, the holders of the mortgage did not exercise reasonable judgment in going on with the sale on that day, and that, in view of the inadequacy, the sale would be set aside. Chilton v. Brooks, 69 Md. 584.

Sale in Parcels.—At a foreclosure sale, at which the holders of the mortgage became the purchasers, one parcel was sold for a fair price, but the two remaining parcels, which were covered by a stone building, and really constituted but one parcel, were sold separately, and brought a grossly inadequate price. It was held that the entire sale should be set aside. Lalor v. McCarthy, 24 Minn. 417.

5. Loeber v. Eckes, 55 Md. 1; Briggs v. Briggs, 135 Mass. 306; Hoodless v. Reid, 112 Ill. 105; Cleaver v. Green, 107 Ill. 67; Runkle v. Gaylord, 1 Nev. 123; Hope v. Valley City Salt Co., 25 W. Va. 789; Millon v. McRee, 9 Mo. App. 344; Meyer v. Jefferson Ins. Co., 5 Mo. App. 245; Martin v. Swofford, 59 Miss. 328.

Violation of Promise.—Where a trustee had agreed with the debtor upon a minimum bid, which was the amount of the debt, a sale by the trustee to the beneficiary for less than the minimum bid, was held to be subject to the debtor's disaffirmance, although the beneficiary, in fact, regarded the trust debt as paid in full by the sale. Helm v. Yerger, 61 Miss. 44.

6. Horsey v. Hough, 38 Md. 130; Magnusson v. Williams, 111 Ill. 450; Hoyt v. Pawtucket Sav. Inst., 110 Ill. 300; Learned v. Geer, 139 Mass. 31; Latch v. Furlong, 12 Grant's Ch. (Ont.) 303.

Inadequacy of price is significant only when taken in connection with

but the price must have been so inadequate as to "shock the moral sense, and create a suspicion of fraud."¹

It is a circumstance of fraud, that the notice of sale was published in a newspaper having no circulation in the vicinity of the property, in consequence of which no one was present but persons acting for the mortgagee.² An erroneous statement in the notice of sale to the effect that there are outstanding adverse claims to the property, in consequence of which bidding is deterred and the sale made at a sacrifice, will vitiate the sale.³ The same is true where it appears that bidding was prevented by the fact that the beneficiary claimed to hold a tax title to the property.⁴

No rule can be laid down by which to determine, in all cases, whether the inadequacy is so gross as to raise the presumption of fraud. Each case must necessarily depend upon its attendant circumstances.⁵ It has been decided that one-half the estimated value of the property is not grossly inadequate.⁶

XXII. PAYMENT AND DISPOSITION OF PROCEEDS—1. In General.—The purchaser at a trustee's or mortgagee's sale is not bound to see to the application of the proceeds. When he has paid the purchase price to the trustee or mortgagee, he is under no obligation to see what becomes of it.⁷

It is no ground for setting aside a sale that the proceeds were

other circumstances "tending to show bad faith, mistake, or undue advantage taken of the ignorance or weakness of the persons whose property rights will be affected by the sale, or some other grounds of equitable relief." *Hudgins v. Morrow*, 47 Ark. 515; *Fry v. Street*, 44 Ark. 502; *King v. Bronson*, 122 Mass. 122; *Graffam v. Burgess*, 117 U. S. 839; *Klein v. Glass*, 53 Tex. 37; *Kline v. Vogel*, 11 Mo. App. 211.

1. *Bailor v. Daly*, 7 Mackey (D. C.) 175.

2. *Briggs v. Briggs*, 135 Mass. 306.

3. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

4. *Martin v. Swofford*, 59 Miss. 328.

5. **Gross Inadequacy.**—A sale for about one-tenth of the value of the property was held invalid in *Vail v. Jacobs*, 62 Mo. 130. And in *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245, a sale for about one-fifth the cash value, made by a trustee who was the managing officer of the creditor corporation, and who knew that the corporation would have willingly bid much more, was held fraudulent. So, in *Stoffel v. Schroeder*, 62 Mo. 147, where property worth at least \$8,500 was sold under a trust deed for \$5,000, at a sale occurring at eleven o'clock instead of twelve (the usual hour), and no one was present but the

debtor and the beneficiary, who became the purchaser, and at whose solicitation the trustee had been induced to make the sale at that hour, the court set it aside as fraudulent.

In *Vail v. Jacobs*, 62 Mo. 130, a sale by the trustee to the creditor, of property worth from \$5,000 to \$8,000, for the sum of \$1,000, he being the only bidder present, was set aside.

In *Runkle v. Gaylord*, 1 Nev. 123, a sale by the mortgagee for about one-third the market value, without making any attempt to obtain a higher bid, was set aside as against a purchaser with knowledge of the facts.

Where property worth \$8,000 would have brought nearly its full value if sold in parcels, a sale in gross by the mortgagee for much less, was set aside, *Hubbard v. Jarrell*, 23 Md. 66; and where property was bid in by the trust creditor for \$6,100, and on the same day resold by him for \$21,000, it was held that the trustee's sale was at a grossly inadequate price, justifying the court in setting it aside on the ground of fraud. *Hope v. Valley City Salt Co.*, 25 W. Va. 789.

6. *Bradford v. McConihay*, 15 W. Va. 732; *Lallance v. Fisher*, 29 W. Va. 512.

7. *Conover v. Stothoff*, 38 N. J. Eq. 55; *Wood v. Augustine*, 61 Mo. 46.

not actually indorsed upon the note secured. Such indorsement is merely evidence of the payment.¹

Several debts secured by the same trust deeds and held by the same persons, but with different sureties, stand on equal footing as liens, and should be paid out of the proceeds ratably, in the absence of some intervening equities.²

The fact that a creditor secured by a trust deed has reduced his claim to judgment, does not, in equity, preclude him from sharing in the proceeds of the trustee's sale.³

Unless restricted by the terms of the power, the mortgagee has the right to sell the property for cash, and a court of equity will not restrain him from so doing.⁴ But he must act in good faith; and if the purchaser offers to pay a large deposit in cash, and to give security for payment of the balance as soon as the sale is ratified by the court, the mortgagee cannot arbitrarily reject the bid and purchase the property for himself, at a lower price.⁵ He has a right to insist upon a reasonable cash deposit by the purchaser, even though the notice does not state the terms of sale, and though such a requirement might prevent a person present from bidding.⁶ Where the terms of sale are prescribed by the mortgage to be cash, a tender by the purchaser, of a note against the party entitled to the purchase-money, is not a compliance with the terms of sale;⁷ but under a mortgage authorizing the mortgagee to sell for cash or on credit, he may make a valid sale for a portion of the price in cash and the balance on credit.⁸ Under a mortgage providing that the terms of sale should be the amount of the debt in cash, and the balance on time, the mortgagee is not bound to realize at least the amount of the debt. He may sell for less, and sue for the deficiency.⁹

1. *Lake v. Brown*, 116 Ill. 83.

2. A debtor, to secure advances, assigned to the defendant four notes and a trust deed which secured the four notes and also secured an earlier note then held by the defendant. The deed provided for a sale on default in payment of any of the notes, the proceeds to be applied to the amount unpaid on the notes. At a sale under the power, the property brought less than the whole amount then due. It was held that the first note was entitled to receive only its *pro rata* of the proceeds. *Kitchin v. Grandy*, 101 N. Car. 86.

3. *Dodge v. Stanhope*, 55 Md. 113.

4. *Powell v. Hopkins*, 38 Md. 1.

Discretion of Court.—Though a trust deed provides that the trustee shall sell for cash, the court on a bill to foreclose, may direct a sale on credit. *Mitchell v. McKinney*, 6 Heisk. (Tenn.) 83. But it should not do so without the consent of all the parties interested. *Wood v. Krebs*, 33 Gratt. (Va.) 685.

5. *Horsley v. Hough*, 38 Md. 130.

6. *Pope v. Burrage*, 115 Mass. 282.

Payment Assumed by Auctioneer.—The purchaser at a foreclosure sale, being unable to make the required cash payment, arranged with the auctioneer to advance the amount for him, whereupon the auctioneer informed the mortgagee that the purchaser had paid the cash, and that it was ready for the mortgagee. It was held that this was equivalent to a cash payment to the auctioneer. *Muhlig v. Fiske*, 131 Mass. 110.

Payment by Check.—Under a sale advertised to be for cash, a bidder who gives his check for the amount of his bid, which would have been paid upon presentment, sufficiently complies with the terms of sale. *McConneaughey v. Bogardus*, 106 Ill. 321; *Carey v. Brown*, 62 Cal. 373.

7. *Pursley v. Forth*, 82 Ill. 327.

8. *Markey v. Langley*, 92 U. S. 142.

9. *Shepherd v. May*, 115 U. S. 505;

If the holder of the notes secured by a trust deed or mortgage, becomes the purchaser at a sale under the power, the indorsement on the notes of the amount of his bid is a sufficient compliance with a requirement that the sale shall be for cash.¹ Even though the sale be advertised or required by the power to be for cash, the fact that the mortgagee gives the purchaser a term of credit for payment of the amount of the mortgagee's debt is not prejudicial to the mortgagor.² And the fact that the purchaser pays no money to the mortgagee, but the amount bid is credited upon a debt due from the latter to the former, in pursuance of a previous arrangement, will not invalidate the sale.³ So long as the mortgagee applies the purchase-money to the satisfaction of his debt, and pays over the surplus in cash to the parties entitled to it, no one interested in the sale has any just ground to complain of the fact that the purchaser was not required to pay cash; usually the granting of time for payment, insures a more advantageous sale.⁴

If the holders of subsequent incumbrances are willing to accept notes from the purchaser at a sale under the prior mortgage, the mortgagor would have no reason to complain that such notes were taken at the sale in lieu of cash.⁵

Where a sale is made for part cash and part credit, as authorized by the terms of the power, interest continues to run on the balance of the mortgage debt, after deducting the cash payment, up to the time of receiving the deferred payments.⁶

2. Surplus Proceeds.—When a sale has been made under a power, the proceeds are first to be applied in payment of the costs and expenses of foreclosure, and then in payment of the debt secured; and whatever remains of the purchase-money after those items have been paid is usually termed the "surplus."

The question of the proper disposition of the surplus is an important, and sometimes difficult, one; and must be decided by the party executing the power, at his peril. In case of doubt, he should refer the determination of the question to the court, in a proceeding to which the various claimants of the fund are made parties.⁷ Ordinarily, the mortgage or trust deed itself provides

May v. Shepherd, 1 Mackey (D. C.) 430.

1. *Jacobs v. Turpin*, 83 Ill. 424.

2. *Sawyer v. Campbell*, 130 Ill. 186; *Waterman v. Spaulding*, 51 Ill. 425; *Burr v. Borden*, 61 Ill. 389; *Jones v. Hagler*, 95 Ala. 529; *Mewburn v. Bass*, 82 Ala. 622; *Cooper v. Hornsby*, 71 Ala. 62; *Mahone v. Williams*, 39 Ala. 202; *Markey v. Langley*, 92 U. S. 142.

3. *Tartt v. Clayton*, 109 Ill. 579.

4. *Cox v. Wheeler*, 7 Paige (N. Y.) 248; *Bailey v. Aetna Ins. Co.*, 10 Allen (Mass.) 286; *Parker v. Banks*, 79 N. Car. 480; *Davey v. Durrant*, 1 De G. & J. 535.

A mortgagee with the power of sale may give the purchaser credit for part of the purchase-money, and take a new mortgage on the property as security, though the power makes no mention of such privilege. *Thurlow v. Mackeson*, 38 L. J. Q. B. 57; L. R., 4 Q. B. 97.

5. *Mead v. McLaughlin*, 42 Mo. 198.

6. *Stanford v. Andrews*, 12 Heisk. (Tenn.) 664.

7. 2 *Jones Mortg.* (4th ed.), § 1927.

In *Michigan*, it is provided by statute that any claimant of the surplus may file his claim with the officer making the sale, and that a reference may be ordered to take proofs. It is held

for the disposition of the proceeds; but it is clear that if such a provision should be contrary to the just and equitable rights of any person having a claim in, or lien upon, the property, the direction in the deed must yield.¹

The most approved form of provision, in a mortgage or trust deed, for the disposition of the surplus proceeds of sale, is that they shall be paid over to the mortgagor or grantor, his heirs, and assigns.² Though the power provides that the surplus shall go to

that a petition for such reference must show the relation of the parties cited to the mortgaged property, and that notice must be given to all parties interested in the equity of redemption. *Allen v. Wayne Circuit Judges*, 57 Mich. 198.

E. mortgaged two adjoining tracts to I. and subsequently deeded one tract, subject to the mortgage, to A., who gave a mortgage back to E. to secure a note for purchase-money, agreeing in that mortgage to pay one-half of the I. mortgage. E. transferred said note to M., and also handed him the A. mortgage, but did not then formally assign it. Afterwards E. mortgaged the other tract to H., with full covenants of warranty, and H. took an assignment of the I. mortgage covering both tracts. M. then procured an assignment of the A. mortgage which he already held. All the conveyances were duly recorded. H. then sold both tracts under power of sale in the I. mortgage, realizing more than the debt and costs. At the time of sale, the value of the tract mortgaged to H. was greater than that of the other tract. In a suit by M. against H. for an account of the surplus proceeds of the sale, it was held that M. occupied the same position as if the A. mortgage had been assigned to him in the first instance; that the difference between the values of the two tracts, should be deducted from the surplus, and that M. was entitled to recover of H. one-half the remainder. *Mayo v. Merrick*, 127 Mass. 511.

1. 2 Jones Mortg. (4th ed.), § 1927.

2. *Wright v. Rose*, 2 S. & S. 323; *Bourne v. Bourne*, 2 Hare 35; *In re Smith*, 7 Jur. N. S. 903; *Chatterton v. Watney*, 16 Ch. Div. 378.

"Objection has also been made to the direction that the surplus shall be payable to the mortgagor, his heirs, or assigns, because, if the sale should be made in his lifetime, but his death should occur before the payment of the surplus, this would then go to his

personal representatives, because the land had been converted into personalty at the time of his death. This form is also open to the objection of not being strictly correct in the case of a sale made after the death of the mortgagor, when he has, by his will, directed his executor to convert his real estate into personalty. The terms of the mortgage in these cases would have to yield to these circumstances under which they do not meet the equities of the parties. Although the direction that the surplus shall be paid to the mortgagor, his heirs, or assigns, does not fully meet these exceptional cases, no harm can come from this, because the surplus is, in all cases, bound by the actual rights and equities of the parties interested. No form of words can be used which will, in every case, fully point out to the mortgagee the persons to whom he is to pay the surplus; and that form which is correct generally, and is the most concise, is the best." 2 Jones Mortg. (4th ed.), § 1927.

The English statutory power of sale directs that the surplus be paid to the mortgagor, his heirs, executors, administrators, or assigns, according to their respective rights and interests.

Rights of Heirs.—Mortgagees are not entitled to retain the surplus for their own use, as against the heirs of the mortgagor, though the latter had some years previously agreed to release all interest in the premises to the mortgagees, but had never done so nor surrendered possession. *Rushbrook v. Lawrence*, 39 L. J. Ch. 93.

When trustees are adjudged to have made an unauthorized sale, and are ordered to pay into court the fair value of the property at the time of sale, the surplus remaining after discharging the debt belongs to the estate of the debtor. *Mosley v. Johnson*, 86 Va. 429.

Interest of Husband and Wife in Surplus.—Where a wife gave a trust deed of her own property to secure a debt of

the mortgagor, and does not name his assigns, yet his assignee in bankruptcy will be entitled to it.¹

In *England*, and also in some of the states, the rule prevails that in case of a sale after the mortgagor's death, the surplus belongs to his heirs or devisees and not to his personal representatives, and that the latter cannot sue therefor unless the money is needed to pay debts of the estate.² In *Massachusetts*, however, it is held that the executor or administrator is entitled to sue for the surplus in such cases, but that he holds the money, when recovered, in trust for the widow and heirs.³

Courts of equity, whenever applied to for directions as to the disposition of the surplus arising from a sale by a first mortgagee, consider the land as converted into money, and the lien of junior incumbrancers transferred from the land to the surplus; and the fund is applied to the payment of these liens in the order in which they existed upon the land. Accordingly, a second mortgagee will be entitled to the surplus, or so much of it as may be necessary, in preference to the owner of the equity of redemption.⁴ The surplus is held in trust by the trustee or mortgagee for the use of subsequent incumbrancers, and he should retain it until their rights are settled.⁵

A first mortgagee, upon sale under his power, becomes a trustee for all subsequent incumbrancers and parties in interest, and must act in good faith, with an eye to the best interest of all concerned.

her husband, and the deed provided that the surplus should be paid to the parties of the first part (the husband and wife), it was held that the wife alone was entitled to receive such surplus. *Kinner v. Walsh*, 44 Mo. 65. On the other hand, where a wife joins in a trust deed merely to release her dower, she has no interest in the surplus, which is personal property of which she is not dowerable. *Kauffman v. Peacock*, 115 Ill. 214.

1. *Calloway v. People's Bank*, 54 Ga. 441.

2. *Wright v. Rose*, 2 S. & S. 323; *Polley v. Seymour*, 2 Y. & C. 708; *Bourne v. Bourne*, 2 Hare 35; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; *Sweezy v. Thayer*, 1 Duer (N. Y.) 286; *Chaffee v. Franklin*, 11 R. I. 578; *Allen v. Allen*, 12 R. I. 301; *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165.

Unless, it is held, there is a clear intention expressed in the power to convert the property out and out. *Van v. Barnett*, 19 Ves. 102.

3. *Varnum v. Merve*, 8 Allen (Mass.) 158.

4. *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Andrews v. Fiske*, 101 Mass. 422; *Cook v. Basley*, 123 Mass.

396; *Ballinger v. Bourland*, 87 Ill. 513; *Astor v. Miller*, 2 Paige (N. Y.) 68; *Bartlett v. Gale*, 4 Paige (N. Y.) 503; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *DeWolf v. Murphy*, 11 R. I. 630; *Douglass' Appeal*, 48 Pa. St. 223; *Fry's Appeal*, 76 Pa. St. 82; *Fowler v. Johnson*, 26 Minn. 338; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; *Ayer v. Stewart*, 14 Minn. 68; *Nichol v. Ewin*, 7 P. R. (Ont.) 331; *West London, etc., Bank v. Reliance, etc., Soc.*, 27 Ch. Div. 187; *Re Kingsland*, 15 Can. L. J. N. S. 85; *Re Keelers*, 1 N. R. 44.

5. *O'Reilly v. Hendricks*, 2 Smed. & M. (Miss.) 388; *Mead v. McLaughlin*, 42 Mo. 198; *Yarborough v. Wise*, 5 Ala. 292; *Hayes v. Woods*, 72 Ala. 92; *Bleeker v. Graham*, 2 Edw. Ch. (N. Y.) 647.

Judgment liens, existing at the time of the sale, must be paid out of the surplus before the owner of the equity can claim any part of it. *Hall v. Gould*, 79 Ill. 16; *Eddy v. Smith*, 13 Wend. (N. Y.) 488.

Subsequent Judgment.—Where a trust deed authorizes the trustee to make a sale and pay the debt secured, and also "all liens" on the property, the holder of the judgment against the

After paying his own lien, he must apply the surplus to the other liens in their respective order.¹

It has been decided in *England*, that a mortgagee with power of sale is liable to junior mortgagees for damages caused by a misstatement, in his notice of the sale, as to the condition of the premises, in consequence of which the purchaser insisted upon, and obtained, a deduction from his bid, before he would complete it.²

In *Minnesota*, where by statute the surplus is directed to be paid to the mortgagor, "his legal representatives or assigns," it is held that a junior mortgagee is an "assign," and entitled to the surplus in the hands of a prior mortgagee.³

The consent of a subsequent incumbrancer that his share of the surplus may be paid to a purchaser of the equity of redemption, will not justify such payment as against the mortgagor, because he is entitled to have the mortgage debts discharged before his grantee, under a deed subject to the mortgages, receives anything.⁴

Notice of the incumbrances under which the surplus is claimed, should be given to the mortgagee or trustee making the sale, in order to hold him responsible for failing to pay them out of the fund.⁵

The levy of an attachment upon mortgaged lands does not give the plaintiff any vested interest in the equity of redemption, nor entitle him to share in the surplus proceeds of a mortgage sale consummated before he has reduced his claim to judgment; and a sale of the land under his execution subsequently levied, at which he becomes the purchaser, gives him no claim or lien upon the surplus, either at law or in equity,⁶ unless he files a bill within the statutory period of thirty days after the rendition of his judgment, and while the surplus remains in the hands of the mortgagee.⁷

As against subsequent lienors, the trustee or mortgagee cannot

grantor, whether it existed at the date of the deed or not, can compel the trustee to apply the surplus of sale to the payment of his judgment. *Hall v. Gould*, 79 Ill. 16.

1. *Markey v. Langley*, 92 U. S. 142; *Fielder v. Varner*, 45 Ala. 429; *Beard v. Fitzgerald*, 105 Mass. 134.

In *Russell v. Duffon*, 4 Lans. (N. Y.) 399, the view is taken that a mortgagee with the power of sale is not in any proper sense a trustee for subsequent incumbrancers, and is not accountable to them for any surplus until it has actually been paid over to him by the purchasers.

Where a mortgagor and a first mortgagee concurred in making a sale which realized a surplus, and such surplus was paid over to the mortgagor, it was

held in an action against the second mortgagee by the first mortgagee that the latter was bound to account to the second mortgagee for the amount of such surplus. *West London, etc., Co. v. The Reliance Soc.*, 27 Ch. Div. 187.

2. *Tomlin v. Luce*, 43 Ch. Div. 191.

3. *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; *Fuller v. Langum*, 37 Minn. 74; *Nopson v. Horton*, 20 Minn. 239; *Ayer v. Stewart*, 14 Minn. 68. See also *Cuillerier v. Brunelle*, 37 Minn. 71.

4. *Andrews v. Flske*, 101 Mass. 422.

5. *McLean v. Lafayette Bank*, 4 McLean (U. S.) 430.

6. *Gardner v. Barnes*, 106 Mass. 505.

7. *Wiggin v. Heywood*, 118 Mass. 514; *Judge v. Herbert*, 124 Mass. 330.

retain the surplus to pay an unsecured claim of his own.¹ Nor can he do this as between himself and the mortgagor.² If the mortgagor or grantor has sold his equity of redemption to a third person, the latter is entitled to receive whatever surplus would have belonged to the former.³

The trustee or mortgagee cannot refuse to pay over the surplus to a purchaser of the equity of redemption, on the ground that his purchase was without consideration and in fraud of creditors.⁴

When the mortgagee becomes the purchaser, his failure to pay over the surplus to the proper persons does not prevent the title from vesting in him.⁵ When he bids in the property for himself, for an excessive amount claimed in his notice of sale as due, and costs, he is personally liable to the mortgagor for the difference between that amount and the amount actually due.⁶

While the mortgagee would be chargeable with interest on the surplus during the time he wrongfully refused to pay it over to the party entitled to it,⁷ yet he is not so chargeable where the surplus has remained unproductive in his hands, awaiting the determination of adverse claims thereto, made upon him by different persons.⁸

A contemporaneous oral direction by the grantor in a trust deed, as to the application of the surplus to certain favored creditors, cannot be allowed to qualify, enlarge, or change

1. *Major v. Hill*, 13 Mo. 247.

2. *Vick v. Smith*, 83 N. Car. 80.

3. *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Cook v. Basley*, 123 Mass. 396; *Ballinger v. Bourland*, 87 Ill. 514; *Brown v. Crookston Agr. Assoc.*, 34 Minn. 545; *Shillaber v. Robinson*, 97 U. S. 967; *Foster v. Potter*, 37 Mo. 525; *Reid v. Mullins*, 43 Mo. 306.

Inchoate Title.—The purchaser of the premises at an execution sale, who at the time of a sale under a trust deed is not entitled to a conveyance, the time for redemption from the sheriff's sale not having expired, is entitled to share in the surplus held by the trustee only to the extent of his bid at the sheriff's sale, and the grantor is entitled to the balance. *Hart v. Wingart*, 83 Ill. 282.

Reimbursement of Surety.—A, the owner of land on which were four trust deeds, conveyed it to one who was a joint surety on A's debts. The surety paid part of the first three secured debts, but took no assignment of them. When the conveyance was made in 1851, the property was worth more than the amount of the secured debts, and the debts for which the grantee was surety; but during the war, it was greatly injured and impaired in value by the

Union forces. In 1871, the trustee in the first two trust deeds sold the land under them, for a sum more than sufficient to pay the balance due on those debts. It was held that the surplus should not be applied to reimburse the surety, but should be applied first to the balance due on the third secured debt and then to the fourth secured debt. *Gayle v. Wilson*, 30 Gratt. (Va.) 166.

4. *Reid v. Mullins*, 48 Mo. 344; *Reid v. Mullins*, 43 Mo. 306.

5. *Damon v. Deeves*, 62 Mich. 465; *Sinclair v. Learned*, 51 Mich. 339. But see *Hunter v. Wooldert*, 55 Tex. 433, where it was held that until the mortgagee had paid over the surplus, with interest from the day of sale, he could claim the benefits of the sale.

6. *Seiler v. Wilber*, 29 Minn. 307.

7. *Hunter v. Wooldert*, 55 Tex. 433.

8. *Mathison v. Clark*, 25 L. J. Ch. 29.

Computation of Interest.—In taking an account against a mortgagee who has retained the proceeds of sale beyond the accrued interest and costs, under a sale of part of the premises, a rest must be made at the time of his receiving the proceeds, even though he may have entered into possession when the interest was in arrear. *Thompson v. Hudson*, 10 L. R. Eq. 497; 40 L. J. Ch. 28.

the trustee's authority and duty as expressed in the trust deed.¹

Purchasers at the sale are chargeable with notice of a provision in the power directing the disposition of the surplus, and have no right to rely upon contrary representations made by the mortgagee or trustee.²

The purchaser at a foreclosure sale has no personal interest in the surplus or its disposition after the incumbrances have been paid, and hence he cannot sue to recover it from one who has wrongfully appropriated it. That right belongs solely to the mortgagor or his assigns.³

As between a purchaser by warranty deed from the mortgagor, and a subsequent incumbrancer with notice of such conveyance, the former is entitled to the surplus arising from a sale under the prior mortgage.⁴ The mortgagee's liability for the surplus does not depend upon his having actually received it from the purchaser. If he gives the latter credit for the purchase price, he must account for the surplus the same as if he had received cash.⁵

Though not expressed in the deed, a resulting trust arises, in favor of the grantor or those claiming under him, as to the surplus after satisfying the secured debt.⁶

Unless authorized by the terms of the power, a trustee or mortgagee has no right to use any part of the proceeds of sale in discharging taxes or prior incumbrances, because the price realized is for the title subject to all incumbrances existing at the time of sale.⁷ But in an action by the mortgagor against the mortgagee to recover an alleged surplus, parol evidence is admissible to show that the consideration named in the mortgagee's deed to the purchaser, included the amount of a prior mortgage, and that the actual purchase price was smaller by that amount.⁸

Surplus proceeds arising from a sale upon default in payment of a portion of the debt secured, should be applied to the portion not due rather than returned to the mortgagor or owner of the

1. *Gair v. Tuttle*, 49 Fed. Rep. 198.
2. *Gair v. Tuttle*, 49 Fed. Rep. 198; *Schmidt v. Smith*, 57 Mo. 135; *Shear v. Robinson*, 18 Fla. 379; *Ledyard v. Phillips*, 32 Mich. 13.

3. *Day v. New Lots*, 107 N. Y. 148.
4. *Johnson v. Wilson*, 77 Mo. 639.
5. *Bailey v. Aetna Ins. Co.*, 10 Allen (Mass.) 286.

6. *Hargadine v. Henderson*, 97 Mo. 375.

7. *Helweg v. Heitcamp*, 20 Mo. 569; *Scott v. Shy*, 53 Mo. 478; *Schmidt v. Smith*, 57 Mo. 135; *Tanner v. Taussig*, 11 Mo. App. 534; *Skilton v. Roberts*, 129 Mass. 306.

8. **Payment of Taxes.**—If a trust deed expressly provides that in case of sale the trustee may pay out of the pro-

ceeds all money advanced for taxes on the land, he may, out of such proceeds, redeem the land from tax titles. *Gormley v. Bunyan*, 138 U. S. 623.

8. *O'Connell v. Kelly*, 114 Mass. 97. See also *Story v. Hamilton*, 20 Hun (N. Y.) 133, where the mortgagee bid in the property for a sum which included the amount of a prior mortgage, which he then paid, and it was held that this amount was not surplus.

In an action by the mortgagor against the mortgagee, to recover an alleged surplus, the mortgagee is not estopped, by a statement in his affidavit of sale as to the amount of the purchase price, from showing that the sale in fact realized less than the whole amount of incumbrances, which were included in

equity, unless a contrary intention can be drawn from the terms of the power.¹ And even though there be no direction as to surplus, or provision that the whole debt shall become due on default in payment of an installment, yet the mortgagee has a right to retain the surplus, subject to the same lien as the property, to satisfy the remaining installment.²

The sale of the entire property upon default in payment of an installment, exhausts the power, unless otherwise provided by statute, and no new sale can be made for a subsequent installment. The proceeds of the first sale represent the entire title.³

The word trustee is often applied to a mortgagee with power of sale; but it is held that he is not a trustee in such sense that the surplus in his hands constitutes a trust fund as between the mortgagor and himself. On the contrary, an action at law may be maintained against him for the surplus, to which he has the right to plead the ordinary Statute of Limitations.⁴ It is also held that the remedy against the trustee for recovery of the surplus is at law, and not in equity.⁵ *Assumpsit* for money had and received, is the proper form of action by the mortgagor or by other incumbrancers against the mortgagee, to recover the surplus.⁶

The mortgagor or grantor is the real party in interest, and may sue in his own name, or in the name of the mortgagee or trustee,

the nominal purchase price, and that he received less than the amount of his own mortgage. *Alden v. Wilkins*, 117 Mass. 216.

1. *Fryar v. Fryar*, 62 Miss. 205; *Fowler v. Johnson*, 26 Minn. 338; *Standish v. Vosberg*, 27 Minn. 175; *Heath v. Hall*, 60 Ill. 344; *Princeton Loan & T. Co. v. Munson*, 60 Ill. 371.

2. *Huffard v. Gottberg*, 54 Mo. 271; *Olcott v. Bynum*, 17 Wall. (U. S.) 44.

3. *Brown v. Brown*, 47 Mich. 385; *Fowler v. Johnson*, 26 Minn. 338; *Standish v. Vosberg*, 27 Minn. 175; *Jones Mortg.* (4th ed.), 1937. But if a mortgage sale for an installment is annulled by redemption by the mortgagor, the mortgage may be again foreclosed to enforce the payment of the remaining installments. *Standish v. Vosberg*, 27 Minn. 175.

4. *Re Alison*, 11 Ch. Div. 254; *Reynolds v. Hennessy*, 15 R. I. 215. See also *Vick v. Smith*, 83 N. Car. 80.

A mortgagee does not hold such a surplus upon an express trust, within the meaning of that term as used in the well known rule, that no lapse of time will bar the right of action against a trustee in respect to an express trust. *Banner v. Berridge*, 18 Ch. Div. 254.

Payment of Interest by Mortgagee.—

If the surplus lie unproductive in the hands of the mortgagee, pending the ascertaining of the rights of adverse claimants, the mortgagee will not be charged with interest thereon. *Matheson v. Clark*, 4 W. R. 30.

5. *Ballinger v. Bourland*, 87 Ill. 514.

6. *Hayes v. Wood*, 72 Ala. 92; *Webster v. Singley*, 53 Ala. 208; *Johnson v. Cobleigh*, 152 Mass. 17; *Cook v. Basley*, 123 Mass. 396; *Stoeber v. Stoeber*, 9 S. & R. (Pa.) 434; *Laughlin v. Heer*, 89 Ill. 119; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69; *Bevier v. Schoonmaker*, 29 How. Pr. (N. Y. Supreme Ct.) 411; *Cope v. Wheeler*, 41 N. Y. 303.

Pleading.—A statement in the complaint, in an action to recover an alleged surplus, that on the day of sale a certain amount and no more was due on the mortgage, is controlled, on demurrer, by other allegations from which the amount due can be ascertained by computation. *Perry v. Reynolds*, 40 Minn. 499. As to the necessary allegations of the complaint, in an action by a junior mortgagee to recover the surplus arising from a foreclosure sale under a prior mortgage, see *Aultman v. Siglinger*, 2 S. Dak. 442.

to recover from the purchaser the surplus remaining after paying the debt secured.¹

Where, by statute, the sheriff is the proper officer to make the sale and receive the proceeds, a payment of the surplus to him by the mortgagee buying in the property at the sale, is a complete defense to an action against the latter by the mortgagor.²

An interested party who makes application to the court to have the surplus proceeds of sale paid to him, thereby ratifies the sale and all the preliminary proceedings.³

3. Dower in Surplus.—Where a mortgage is effectual against the inchoate dower right of the mortgagor's wife, she has no dower claim to the surplus proceeds of a sale made during the life of the mortgagor, either as against him or his assignee in bankruptcy.⁴ But if the sale is made after the death of the mortgagor, the widow's dower right having thereby become vested, she is entitled to her share of the surplus.⁵

XXIII. COMPENSATION AND EXPENSES.—A mortgagee with power of sale is not, in the absence of agreement, entitled to any compensation for his personal attention and services in the execution of the power. Whatever he does is done as much for his own benefit as for that of the mortgagor.⁶ Obviously, this reasoning does not apply to a trustee in a trust deed, who has no personal interest in the debt, and who acts as the agent of both parties. He should be allowed a reasonable compensation for his time and labor in the discharge of the trust.⁷ It has been held, however, that the appointment of a trustee in a deed of trust creates no implied promise to pay him for his services in executing the power.⁸

Under a trust deed providing that the grantor shall pay the

1. *Gair v. Tuttle*, 49 Fed. Rep. 198; *Reynolds v. Hennessy*, 15 R. I. 215; *Flanders v. Thomas*, 12 Wis. 410; *Balinger v. Bourland*, 87 Ill. 513; *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Covenant Mut. L. Ins. Co.*, 56 Mo. 575; *Fitzgerald v. Barker*, 70 Mo. 687; *Bailey v. Merritt*, 7 Minn. 159.

2. *Bailey v. Merritt*, 7 Minn. 159.

3. *Chase v. Williams*, 74 Mo. 429.

4. *Newhall v. Lynn Sav. Bank*, 101 Mass. 428; *Kuffman v. Peacock*, 115 Ill. 214; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Bell v. New York*, 10 Paige (N. Y.) 49.

Dower as Against Purchase-Money Mortgage.—A sale under the power in a purchase-money mortgage, bars the dower right of the mortgagor's wife, though she did not join in the mortgage. *Brackett v. Baum*, 50 N. Y. 8. As to the rule in *Canada*, see 42 Vict. ch. 22 O; *Martindale v. Clarkson*, 6 Ont. App. Rep. 6.

5. *Chaffee v. Franklin*, 11 R. I. 578.

See *De Wolf v. Murphy*, 11 R. I. 630, to the effect that the wife's inchoate dower right should be recognized and protected by investing one-third of the surplus, to await the contingency of her surviving, or by paying her in cash the present value of her prospect of surviving the husband. See *SURPLUS MONEY, Dower in Surplus*, vol. 24, p. 960.

6. *Allen v. Robbins*, 7 R. I. 33; *Sugden on Vendors*, p. 55; 2 *Jones Mortg.* (4th ed.), § 1923.

7. Trustee's Commissions.—Three trustees in a mortgage of railroad property, secured bonds to the amount of \$2,600,000, and successfully defended a suit brought to attach the validity of the mortgage. It was held that they should be jointly allowed the sum of \$26,000 as compensation and \$17,000 as counsel fees. *Dow v. Memphis, etc., R. Co.*, 23 Blatchf. (U. S.) 84.

8. *Catlin v. Glover*, 4 Tex. 151.

trustees for their services, they must look to him personally, and cannot claim a lien on the trust property or proceeds of sale, unless there is a surplus.¹

The trustee has no right to withhold a deed from the purchaser who has complied with his bid, merely because the trustee's commissions have not been paid. His compensation is a matter with which the purchaser has no concern.²

In *Maryland*, the trustee selling under a power is usually allowed a commission of five per cent. of the proceeds; but in case he consents to an adjournment of the sale at the instance of the debtor, he cannot claim an extra allowance for commissions.³ If there is no provision, express or implied, in the deed, for an allowance of commissions to the mortgagee, the *Maryland* courts, in distributing the fund, will not allow any.⁴

It is usually provided in mortgages and trust deeds that all costs and expenses of executing the power shall first be deducted from the proceeds. Even if the instrument were silent on that point, the necessary and reasonable expenses would be allowed out of the fund produced by the sale.⁵ But if the sale is invalid, the mortgagor or debtor cannot be made to pay the expenses of it.⁶

XXIV. ATTORNEYS' FEES.—The general rule is, that stipulations in mortgages and trust deeds for payment of attorneys' fees in case

1. *Mercantile Trust, etc., Co. v. Atlantic, etc., R. Co.*, 99 N. Car. 139.

2. *Atherton v. Hull*, 12 W. Va. 171.

3. *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334.

4. *Rappanier v. Bannon* (Md. 1887), 8 Atl. Rep. 555.

5. *Morton v. Hall*, 118 Mass. 511; *Thomas v. Jones*, 84 Ala. 302; *Phillips v. Bailey*, 82 Mo. 639; *Marsh v. Morton*, 75 Ill. 621; *Lime Rock Bank v. Phetteplace*, 8 R. I. 56; *Collins v. Standish*, 6 How. Pr. (N. Y. Supreme Ct.) 493; *Allen v. Robbins*, 7 R. I. 33.

Expenses of Trust.—A provision authorizing the trustee on foreclosure to pay certain specific claims and also "all other expenses of this trust," does not justify the trustee in paying \$260 for an abstract of title, and procuring data before bringing a suit to foreclose. *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279.

Taxes Paid.—The grantor in a trust deed reserved the right to make sales and pay over the proceeds to the trustee, after deducting the expenses of executing the trust. It was held that the expenses in connection with such sales by the grantor were properly classed as expenses of the trust, and that the grantor was entitled to deduct from the proceeds the amount of taxes paid on

the land. *Nickerson v. Atchison, etc., R. Co.*, 3 McCrary (U. S.) 455; 17 Fed. Rep. 408.

Reimbursement for Permanent Improvements.—If a mortgagee, selling under his power of sale, has reasonably expended money in permanent works and improvements on the property, he is entitled, on *prima facie* evidence to that effect, to an inquiry whether the outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And, in such case, it is immaterial whether the mortgagor had notice of the expenditure. *Shepard v. Jones*, 21 Ch. Div. 469.

6. *Clark v. Stilson*, 36 Mich. 482; *Collar v. Harrison*, 30 Mich. 66; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334; *In re Ellerhorst*, 2 Sawy. (U. S.) 219; *Sutton v. Rawlings*, 18 L. J. N. S. Exch. 249.

Costs of Abortive Sale.—The custom of auctioneers to accept on sale of large properties, a check in lieu of cash for the deposit, is reasonable, and a mortgagee vendor was held to be justified in acting on it and not to be guilty of negligence in the conduct of the sale, although the check was dishonored. And in such a case, a mortgagee who

of foreclosure are to be construed strictly in favor of the debtor.¹ Unless expressly provided for in the instrument, no charge for an attorney's fee in foreclosing under the power can be made, either against the proceeds of sale or against the debtor, nor is such a charge warranted under a provision relating to the "expenses of sale."²

If a trust deed does not provide for an attorney's fee, none will be allowed in a suit to foreclose.³ A stipulation for an attorney's fee in case of sale under the power, is held not to warrant the allowance of such fee where, instead of executing the power, foreclosure is had by action;⁴ and if the stipulation is for an attorney's fee on foreclosure by the trustee, such fee should not be allowed on suit to foreclose brought by the beneficiary.⁵

In *Michigan*, it is held that stipulations in mortgages for the allowance of a specified attorney's fee, in case of foreclosure, fixed without regard to the extent or value of the attorney's services, are contrary to public policy.⁶ Redemption has been allowed because an excessive attorney's fee was included in the sum for which the property was bid in at the sale.⁷

has endeavored to sell under his powers, is entitled to add the costs of the abortive sale to his security. *Farrer v. Lacy*, 25 Ch. Div. 636.

1. *Cheltenham Beach Imp. Co. v. Whitehead*, 26 Ill. App. 609; 128 Ill. 279; *Payette v. Free Home, etc., Assoc.*, 27 Ill. App. 307; *Sage v. Riggs*, 12 Mich. 313; *Thomas v. Jones*, 84 Ala. 302.

Where a mortgage provides for payment of "all attorney's or solicitor's fees," out of the proceeds of sale, and the mortgage notes also provide for the payment of ten per cent. additional for collection after default, the mortgagee is not entitled to retain ten per cent. out of the proceeds, but only a reasonable attorney's fee. The provision in the notes does not govern in the case of collection by sale under the power. *Tompkins v. Drennen*, 95 Ala. 463.

2. *Thomas v. Jones*, 84 Ala. 302.

In *Varnum v. Meserve*, 8 Allen (Mass.) 158, where the power provided that the mortgagee might retain out of the proceeds "all costs and expenses of sale," the trial court, in an action to recover a surplus in the hands of the mortgagee after sale, allowed him to retain the sum of \$30 for legal advice and services in making a deed to the purchaser. On exceptions to the supreme judicial court, this point seems to have been but slightly considered, the court saying merely that "the expenses for which the defendant asks allowance do not seem objectionable."

3. *Jefferson v. Edrington*, 53 Ark.

545. See also *Adams v. Kehlor Milling Co.*, 38 Fed. Rep. 281.

4. *Danforth v. Charles*, 1 Dakota 273; *Bynum v. Frederick*, 81 Ala. 489; *Sage v. Riggs*, 12 Mich. 313; *Myer v. Hart*, 40 Mich. 517; *Van Marter v. McMillan*, 39 Mich. 304; *Hardwick v. Bassett*, 29 Mich. 17.

Fee For Judicial Foreclosure. — In *Speakman v. Oaks*, 97 Ala. 503, it is held that a provision in a power of sale mortgage for the payment of "attorney's fees incurred in collecting the debt or in foreclosing the mortgage," is equally available to the mortgagee whether the debt be collected by a foreclosure under the power, or by a decree of court.

5. *Payette v. Free Home, etc., Assoc.*, 27 Ill. App. 307.

A provision in a trust deed that upon a sale by the trustee under the power, all costs, charges and expenses shall first be paid, does not authorize the allowance of a solicitor's fee in a foreclosure suit, rendered necessary by the trustee's refusal to execute the power. *Fowler v. Equitable Trust Co.*, 141 U. S. 408.

6. *Vosburgh v. Lay*, 45 Mich. 455; *Louder v. Burch*, 47 Mich. 109; *Millard v. Truax*, 47 Mich. 251; 50 Mich. 343; *Damon v. Deeves*, 62 Mich. 465; *Emmons v. Van Zee*, 78 Mich. 171. See also *Bullock v. Taylor*, 39 Mich. 137; *Myer v. Hart*, 40 Mich. 517.

7. *Millard v. Truax*, 50 Mich. 345. But a sale under the power is not neces-

Under a provision for an attorney's fee, in case of foreclosure, no fee can be charged where the advertisement of sale, being defective, was withdrawn after a single publication, and a tender of the amount due was then made.¹ But after the mortgage has been placed in an attorney's hands for foreclosure, and he has drawn the notice of sale, and caused it to be set in type by the printer, the mortgagor cannot stop the foreclosure without paying, in addition to the mortgage debt, the reasonable value of the attorney's services, within the limit fixed by the mortgage, and also the printer's charges.²

A stipulation in a mortgage or trust deed for a "reasonable attorney's or solicitor's fee, not exceeding five per cent.," does not, of itself, render the contract usurious.³

XXV. REDEMPTION FROM SALES UNDER POWERS.—The power to sell, unless restricted by its terms, embraces the entire estate of the donor; and when the power has been executed in a valid manner, no right of redemption remains in the donor or his privies, except in those states where such right is expressly conferred by statute.⁴ Subsequent incumbrancers and lienors, as well as the donor and his assigns, are effectually cut off by the sale, and can resort only to the surplus proceeds, if there be any.⁵

sarily invalid because an attorney's fee was included in the amount bid, particularly where such fee was claimed in good faith, and a subsequent mortgagee who has acquiesced in the sale for fourteen years cannot set it aside for such cause. *Emmons v. Van Zee*, 78 Mich. 171.

1. *Collar v. Harrison*, 30 Mich. 66.

2. *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335.

3. *Fowler v. Equitable Trust Co.*, 141 U. S. 411; *Barton v. Farmers', etc., Nat. Bank*, 122 Ill. 352; *McIntire v. Yates*, 104 Ill. 491; *Haldeman v. Massachusetts Mut. L. Ins. Co.*, 120 Ill. 390; *Telford v. Garrels*, 132 Ill. 550; *Clawson v. Munson*, 55 Ill. 394. See also *Usury*.

4. *Kinsley v. Ames*, 2 Met. (Mass.) 29; *Paschal v. Harris*, 74 N. Car. 335; *Lowe v. Grinnan*, 19 Iowa 193; *Hyde v. Warren*, 46 Miss. 13; *Dibrell v. Carlisle*, 48 Miss. 691; *Nippel v. Hammond*, 4 Colo. 211; *Turner v. Johnson*, 10 Ohio 204; *Brisbane v. Stoughton*, 17 Ohio 482; *Ferguson v. Soden*, 111 Mo. 208; *Plum v. Studebaker*, 89 Mo. 162; *Robards v. Brown*, 40 Ark. 423; *Hudgins v. Morrow*, 47 Ark. 515; *Odd Fellows' Sav., etc., Bank v. Harrigan*, 53 Cal. 229; *Miller v. Mann*, 88 Va. 212; *Cooper v. Hornsby*, 71 Ala. 62; *Harris v. Miller*, 71 Ala. 26; *Bailey v. Timberlake*, 74 Ala. 221; *Comer v. Sheehan*, 74 Ala. 452; *Gassenheimer v.*

Molton, 80 Ala. 521; *Mewburn v. Bass*, 82 Ala. 622.

The fact that the creditor, after selling the land under the power, and, realizing therefrom a portion of the secured debt, obtains and collects a judgment for the balance, does not operate to open the sale so as to enable the debtor to redeem. *Weld v. Rees*, 48 Ill. 428.

Extinguishment of Easement.—A mortgage with power of sale in fee simple contained a reservation to the mortgagors of the right to release certain easements over adjoining land, created by a former owner of both tracts. The mortgagors were, at the date of the mortgage, tenants of the servient estate. The mortgage description included "all the rights and easements," etc. Upon default, the power of sale was executed, and the premises conveyed to the purchaser in fee simple. It was held that the sale under the power extinguished the right reserved, and the mortgagor's subsequent release of the easement was null and void; also, that a building, in the nature of an obstruction of the easement, erected by the mortgagors on the servient estate while they were in possession, was an infringement, which the purchaser was entitled to have removed. *Bull's Petition*, 15 R. I. 534.

5. *Lowe v. Grinnan*, 19 Iowa 193; *Plum v. Studebaker*, 89 Mo. 162.

A regular and valid sale under the power is equivalent to a strict foreclosure by bill in equity in which the mortgagor and all subsequent purchasers and incumbrancers are joined.¹ But if a mortgage or trust deed with power of sale is foreclosed by proceedings in equity, the decree of foreclosure should provide for redemption, as in ordinary cases.²

If the foreclosure is attended by serious irregularities, the debtor, as is more fully explained elsewhere in this article, is given the right to disaffirm the sale and recover his property by paying the amount due; and this right is sometimes spoken of as the right to redeem; but it may more properly be called the right of disaffirmance.³

The fact that the debt secured was infected with usury does not entitle the debtor to redeem from a sale under the power; he should have tendered the amount legally due, before foreclosure.⁴

In any action to disaffirm or redeem, the purchaser at the sale is a necessary party.⁵

In a number of the states, it is now provided by statute that the owner, his assigns, and lien creditors, may redeem from the sale at any time during a certain period thereafter, by paying the amount realized from the sale, together with interest and costs of foreclosure. The effect of such statutes is, of course, to put a limitation upon all powers of sale in the states where they exist, and to render the purchaser's title defeasible during the statutory period.⁶

It is held that infancy or other disability cannot extend the

1. *Aiken v. Bridgeford*, 84 Ala. 295.

2. *Jones v. Ramsey*, 3 Ill. App. 303; *Warner v. DeWitt County Nat. Bank*, 4 Ill. App. 305.

3. When the beneficiary in a trust deed containing a power of sale filed a bill to foreclose, and a decree was entered directing the trustee to sell the property upon giving a specified notice, and to report his proceedings for approval, it was held that the sale was not by virtue of the power, but under the decree, and that the right of redemption existed as in cases of mortgages without power of sale. *Fitch v. Wetherbee*, 110 Ill. 475.

4. *Stinson v. Pepper*, 47 Fed. Rep. 676; *Askew v. Sanders*, 84 Ala. 356; *McCall v. Mash*, 89 Ala. 487; *Williamson v. Stone*, 27 Ill. App. 214; 128 Ill. 129.

5. The beneficiary in a trust deed agreed with the grantor that the property should be sold by the trustee, and bought in by the beneficiary and then conveyed in fee to the grantor, who was to give a mortgage back as upon an extension of the loan. The sale was

accordingly made, and the property bought in by the beneficiary, who refused to carry out the arrangement, and quit-claimed the property to a third person having notice. It was held that the transaction was in effect a mortgage, and the grantor was entitled to redeem, as against such purchaser with notice. *Union Mut. L. Ins. Co. v. Slee*, 123 Ill. 57.

4. *Ryan v. Sanford*, 25 Ill. App. 571; *affirmed* 133 Ill. 291; *Ferguson v. Soden*, 111 Mo. 208. See also *USURY*.

5. *Chowning v. Cox*, 1 Rand. (Va.) 306; 10 Am. Dec. 530.

6. For the substance of such statutes and their construction, see the following cases: *Nopson v. Horton*, 20 Minn. 268; *Todd v. Johnson*, 50 Minn. 310; *Lowry v. Akers*, 50 Minn. 508; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Hoover v. Johnson*, 47 Minn. 434; *Cable v. Minneapolis Stock Yards, etc., Co.*, 47 Minn. 417; *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223; *Lehman v. Moore*, 93 Ala. 186; *Fields v. Helms*, 82 Ala. 449; *Powers v. Andrews*, 84 Ala. 289; *Childress*

right of redemption beyond the period allowed by statute.¹ But an agreement, for a valuable consideration made during the statutory period, to extend the time for redemption, is regarded as superseding the foreclosure sale and deed.²

The right of redemption from a sale under a power is governed by the statute in force when the mortgage was executed, and is not affected by a subsequent act extending the time, or making it run from the date of filing notice of the sale.³ So, if there is no redemption after sale, allowed by the statute in force at the time of execution, a subsequent act conferring the right cannot apply to any mortgage or trust deed previously executed.⁴

Where the redemption is required to be made through the sheriff, and he accepts a certain amount as sufficient, which sum is enough to satisfy the purchaser's claim, it is a good redemption, and any shortage must be deducted from the sheriff's fees.⁵

Taxes voluntarily paid by the purchaser after the foreclosure sale cannot be tacked to the amount required to be paid by a redemptioner.⁶

The equitable rule that a mortgagor cannot be bound by a clause in the mortgage waiving his right of redemption, applies as well to power of sale mortgages as to any other kind.⁷

In respect to trust deeds, unless the statutory right of redemption is made to apply to them, the grantor may stipulate in the deed that there shall be no redemption from the trustee's sale.⁸

v. Monette, 54 Ala. 317; *Dodge v. Brewer*, 31 Mich. 227; *Cameron v. Adams*, 31 Mich. 426.

Missouri.—The *Missouri Rev. St.*, § 3298, provides that where land is sold under a trust deed and bought in by the *cestui que trust* or his assigns, the sale shall be subject to redemption during one year from the date of sale. Section 3299 provides that no one shall have the benefit of the preceding section until he shall have given security for the payment of interest accruing after the sale. The court holds that such security must be given either at the date of the sale, or within a reasonable time thereafter; and that a delay of four months is fatal. *Udike v. Merchants' Elevator Co.*, 96 Mo. 160; *Dawson v. Egger*, 97 Mo. 36.

Alabama.—It is now held that the statute does not authorize a redemption from foreclosure under a power, in favor of a purchaser of the equity of redemption. He is not within any of the classes named in the act. *Powers v. Andrews*, 84 Ala. 289, *overruling* *Bailey v. Timberlake*, 74 Ala. 221.

In that state it is held that this statutory right to redeem is a personal privilege of the mortgagor which does not

pass to the purchaser of the mortgaged property at an execution sale thereof. *Childress v. Monette*, 54 Ala. 317.

1. *Mewburn v. Bass*, 82 Ala. 622; *Carlin v. Jones*, 55 Ala. 624; *Searcey v. Oates*, 68 Ala. 111; *Otis v. McMillan*, 70 Ala. 47; *Bailey v. Timberlake*, 74 Ala. 221; *Caldwell v. Smith*, 77 Ala. 157; *Cameron v. Adams*, 31 Mich. 426; *Fraker v. Houck*, 36 Fed. Rep. 403.

2. *Dodge v. Brewer*, 31 Mich. 227.

A part payment, made after foreclosure, upon the understanding that redemption is to be completed by paying the balance during the statutory period, is an affirmation of the sale, and the acceptance of such payment is not a waiver. *Cameron v. Adams*, 31 Mich. 426.

3. *Smith v. Green*, 41 Fed. Rep. 455.

4. *Robards v. Brown*, 40 Ark. 423; *Hudgins v. Morrow*, 47 Ark. 515.

5. *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223.

6. *Nopson v. Horton*, 20 Minn. 268.

7. *Fields v. Helmes*, 82 Ala. 449; *Armstrong v. Sanford*, 7 Minn. 49.

8. *Knox v. McCain*, 13 Lea (Tenn.) 197; *Nippel v. Hammond*, 4 Colo. 211.

Where the trust deed recites a waiver by the grantor of his statutory

XXVI. EQUITABLE JURISDICTION—1. Injunction to Restrain Sale.—To warrant a court of equity in restraining a sale under a trust deed or power of sale mortgage, a state of facts must be shown which would render the proposed sale clearly inequitable, oppressive, and unjust. A stronger case must be made out than upon an application to set aside a consummated sale.¹

The decisions are not entirely harmonious upon the question as to what circumstances will justify an injunction, some courts being more reluctant to interfere than others. Clearly, if the threatened sale would be absolutely void, even as against a *bona fide* purchaser, the party aggrieved has an adequate remedy at law, and is not entitled to have the sale enjoined.²

The fact that the mortgagor has become insolvent is not sufficient ground for restraining a sale;³ nor is the fact of a pendency of an action to redeem.⁴

In one case, where the complainant purchased land subject to a mortgage which had not then been recorded, and which he supposed was in the common form without a power of sale, the court restrained a sale under the power for a reasonable time, to enable him to raise the amount necessary to redeem.⁵

The trustee being the agent of both parties, and bound to act impartially between them, and to use every reasonable effort to sell the estate to the best advantage, the rule prevails in some courts that before proceeding to exercise the power of sale, in all cases where there is a cloud upon the title, a doubt or uncertainty as to the amount to be raised, or as to the relative amounts or priorities of the respective liens, or where the aid of a court of equity may be necessary to remove some impediment to the fair and proper execution of his trust, it is his duty to apply to the court for directions; and that if he fails or refuses to do so, the party threatened with injury by his default may have equita-

right of redemption in case of sale, and that, in consideration of such waiver, the grantee agrees to make the property bring, at the sale, at least \$4,000, the grantee is not bound to sell for that minimum unless he makes the sale free from the equity of redemption. *Ordway v. White*, 3 Lea (Tenn.) 537.

1. *Kershaw v. Kalow*, 1 Jur. N. S. 974; *Warner v. Jacob*, 20 Ch. Div. 220; *Struve v. Childs*, 63 Ala. 473; *Brower v. Buston*, 101 N. Car. 419; *Bedell v. McClellan*, 11 How. Pr. (N. Y. Supreme Ct.) 172; 2 *Jones Mortg.* (4th ed.), § 1801.

2. *Bolles v. Carl*, 12 Minn. 113; *Armstrong v. Sanford*, 7 Minn. 49; *Prichard v. Wilson*, 10 Jur. N. S. 330.

Power of Sale Must be Alleged.—An application to enjoin a foreclosure sale, alleging merely that the mort-

gagors "made their certain mortgage, and by the terms thereof mortgaged to the defendant the aforesaid premises," is insufficient to show that such mortgage contained any power of sale, and therefore a preliminary injunction should be denied, because if there was no power of sale, the threatened sale would be a nullity and create no cloud upon the plaintiff's title. *Grant County v. Colonial, etc., Mortg. Co.* (S. Dak. 1892), 53 N. W. Rep. 746.

3. *Gordon v. Ross*, 11 Grant's Ch. (Ont.) 124.

4. *Adams v. Scott*, 7 W. R. 213.

5. *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151. Referring to this decision, Mr. Jones says: "It is conceived that in those parts of the country in which power of sale mortgages are now the usual and common form, an injunction would not now be granted on like

ble relief.¹ The mere fact that the trust estate is incumbered by other trust deeds and judgment liens is no reason for interfering with the trustee's sale, unless the amount or priority of such liens is in dispute;² and the fact that the trustee is insolvent is not alone sufficient to justify the court in restraining him from executing the power. He may be in every respect qualified to perform the trust, and yet be insolvent.³ Also, the probability that owing to the state of the weather, or the scarcity of money, the property will have to be sold for less than its real value, furnishes subsequent lienors no ground for restraining the trustee's sale.⁴

A trustee's sale will be enjoined where the secured notes were given without consideration,⁵ and this notwithstanding the conveyance was executed in fraud of the grantor's creditors.⁶

Payment of the entire debt secured affords ground for injunction;⁷ and a sale will be enjoined where all remedy under the trust deed has become barred by limitation, as in case of ten years adverse possession.⁸

A showing that after a tender of the mortgage debt had been twice made, the mortgagee filed a bill of foreclosure, and then dismissed it, and proceeded to advertise a sale under his power,

grounds." 2 Jones Mortg. (4th ed.), § 1814.

1. Shultz v. Hansbrough, 33 Gratt. (Va.) 567; Hoge v. Junkin, 79 Va. 220; Muller v. Stone, 84 Va. 834; White v. Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233; Rossett v. Fisher, 11 Gratt. (Va.) 492; Bryan v. Stump, 8 Gratt. (Va.) 241; Miller v. Trevilian, 2 Rob. (Va.) 1; Miller v. Argyle, 5 Leigh (Va.) 460; Wilkins v. Gordon, 11 Leigh (Va.) 572; Gay v. Hancock, 1 Rand. (Va.) 72; Lane v. Tidball, Gilm. (Va.) 130; More v. Calkins, 85 Cal. 177; Sanford v. Flint, 24 Mich. 26.

Where the trustee is attempting to sell the property subject to conflicting and disputed liens, the parties interested are entitled to an injunction and an order in equity to administer the fund and ascertain the liens. Draper v. Davis, 104 U. S. 347.

In Drayton v. Chandler, 93 Mich. 383, the court said: "That the statutory foreclosure by advertisement is not adapted to cases where there are conflicting equities, which can only be properly considered and protected in a court of chancery, was clearly held by this court in Dohm v. Haskins, 88 Mich. 144, and we consider that as the settled law of this state."

Disputed Ownership of Mortgage.—B. and R. separately advertised to sell a parcel of land under a power in a mort-

gage which they both claimed to own. A preliminary injunction was granted restraining R. from selling under the power. At the hearing, it appeared that R. had the legal title to the mortgage, but that both were entitled to share in the proceeds. It was held that the injunction was properly dissolved, and that B. should be allowed to proceed with the sale and R. be admitted to share in the proceeds. Rappanier v. Bannon (Md. 1887), 8 Atl. Rep. 555.

2. Lallance v. Fisher, 29 W. Va. 512.

3. Tooke v. Newman, 75 Ill. 215.

4. Muller v. Bayley, 21 Gratt. (Va.) 521; Caperton v. Landcraft, 3 W. Va. 540.

An injunction will not be granted to restrain a trustee's sale upon allegations made by subsequent lienors, that a sale would be prejudicial and illegal "inasmuch as it is notorious that real estate in this section of Virginia brings but a proportion of its true value when sold on deferred payments, and if sold for cash, as is proposed by the trustee, at a time of great financial depression, will not approximate near its true value, but must be necessarily disposed of at an unnecessary sacrifice." Muller v. Stone, 84 Va. 834.

5. Ryan v. Gilliam, 75 Mo. 132.

6. Devlin v. Quigg, 44 Minn. 534.

7. Green v. Englemann, 39 Mich. 460.

8. Gardner v. Terry, 99 Mo. 523.

his purpose being to coerce the mortgagor into paying another and unsecured claim, presents a proper case for an injunction.¹

A sale under a trust deed will be enjoined where the beneficiary, contrary to his agreement, has failed to procure a discharge of certain judgment liens upon the property.²

A sale about to be made in violation of an agreement, supported by a valuable consideration, for an extension of time of payment, will be enjoined;³ but it is no ground for enjoining a mortgagee's or trustee's sale, that the beneficiary owes the grantor, on a separate account, more than the amount of the secured debt.⁴ A claim by the mortgagee in his notice of sale, of a larger amount than the mortgagor claims is actually due, will sometimes warrant an injunction to restrain the sale until the amount due can be ascertained.⁵ But if there is no substantial question as to the amount of the beneficiary's debt, a sale under the power will not be enjoined for the taking of an account.⁶

Unless the insolvency of the mortgagee, or some other special circumstance, be shown, a sale under his mortgage will not be enjoined because of a pending suit to settle partnership accounts between the mortgagor and mortgagee, which are not connected with the mortgage debt.⁷

Where a sale under a trust deed, given to indemnify a surety, is advertised in pursuance of the agreement of the parties, it will

1. *McCalley v. Otey*, 90 Ala. 302; affirmed in (Ala. 1893) 12 So. Rep. 406. See also *Struve v. Childs*, 63 Ala. 473.

2. *Richardson v. Donehoo*, 16 W. Va. 685.

3. *Grinnan v. Platt*, 31 Barb. (N. Y.) 328.

An injunction will not be allowed against a trustee's sale on the ground that the creditors had agreed to let the notes run if the debtor would pay the interest promptly, where there is a strong doubt as to whether the debtor has fully complied with his part of the agreement. *Bramlett v. Reily* (Miss. 1888), 3 So. Rep. 658.

4. *Gregg v. Hight*, 6 Mo. App. 579; *Robertson v. Hogsheads*, 3 Leigh (Va.) 667; *Koger v. Kane*, 5 Leigh (Va.) 606.

In *Frieze v. Chapin*, 2 R. I. 429, a mortgagor was refused an injunction against a sale by the mortgagee, where the former alleged a balance in his favor upon a disputed counterclaim.

5. *Cole v. Savage, Clarke Ch.* (N. Y.) 361; *Bidwell v. Whitney*, 4 Minn. 76; *Armstrong v. Sanford*, 7 Minn. 49; *Stringham v. Brown*, 7 Iowa 33; *Sloan v. Coolbaugh*, 10 Iowa 31; *Van Bergen v. Demarest*, 4 Johns. Ch. (N. Y.) 37.

Where there have been mutual dealings between the parties and the balance due from the mortgagor is in dispute, a sale advertised under the power in the mortgage should be enjoined until the balance due is ascertained and declared by a decree of court. *Capehart v. Biggs*, 77 N. Car. 261; *Purnell v. Vaughan*, 77 N. Car. 268.

Recovery of Excessive Sum Paid.—Where an excessive sum for costs, or otherwise, is demanded by the mortgagee as a condition precedent to restraining proceedings, and the money is paid under protest to prevent a sale, the over-payment may be recovered by action as having been paid under duress. *Close v. Phipps*, 7 M. & G. 586; *Frazer v. Pendlebury*, 10 W. R. 104.

6. *Curry v. Hill*, 18 W. Va. 370. See also *Hinson v. Brooks*, 67 Ala. 491.

7. *Glover v. Hembree*, 82 Ala. 324.

Fraud in Account Stated.—In *Pritchard v. Sanderson*, 84 N. Car. 299, where fraud was alleged against the beneficiary in a trust deed in obtaining an account stated with the grantor, a sale by the trustee was enjoined until the amount justly due could be ascertained.

not be enjoined merely because the surety has not actually paid the debt.¹

Where the mortgaged property greatly exceeds, in value, the amount of the debt, equity may interfere and confine the exercise of the power to a sale of such portion as will be sufficient to pay the debt and expenses.²

An attempted sale of a greater estate in the land than is authorized by the power, will not be enjoined, because such sale would be void, and adequate relief could be had at law.³

A vendee who has given a trust deed on the property to secure the purchase price, upon showing that the title is doubtful, is entitled to have the trustee enjoined from selling.⁴

A creditor secured by trust deed upon the landlord's interest in growing crops, is entitled to enjoin their removal by the tenant, contrary to the terms of his agreement with the landlord.⁵

A failure to give the notice prescribed by statute, or the terms of the power, is no reason for enjoining the sale, because purchasers are bound to take notice of such requirements, and if the proper notice is not given, the right of redemption is not cut off by the sale.⁶

Relief by injunction must be sought before the sale has been made, otherwise, the party injured cannot have further proceedings under the sale enjoined. He should have attended the sale and given bidders notice of his equities.⁷

A preliminary injunction will be continued in force until a hearing upon the merits, where the facts upon which it was granted are not clearly disproven, especially when the security will remain unimpaired.⁸

Under a statute requiring an application to enjoin a sale under mortgage to be made "immediately" after receiving notice of the sale, a delay of a month after such notice is not fatal to the application, in the absence of a showing of prejudice to the mortgagee by the delay.⁹

1. *Brower v. Buxton*, 101 N. Car. 419, wherein it appeared that a former action had been brought for the purpose of having the land sold, but a consent decree of dismissal had been made and the parties entered into an agreement of record that the trustee might sell the land if the debt were not paid on or before a day fixed.

2. *Johnson v. Williams*, 4 Minn. 260.

3. *Armstrong v. Sanford*, 7 Minn. 49.

4. *Miller v. Argyle*, 5 Leigh (Va.) 460.

5. *Valentine v. Washington*, 33 Ark. 795.

6. *Prichard v. Wilson*, 10 Jur. N. S. 330; *Anonymous*, 6 Madd. 10; *Parkinson v. Hanbury*, 1 D. & S. 143; *Ford v. Heely*, 3 Jur. N. S. 1116; *Forster v.*

Hoggart, 15 Q. B. 155; 69 E. C. L. 154; 2 *Jones Mortg.* (4th ed.), § 1810.

7. *Pender v. Pittman*, 84 N. Car. 372; *Johnson v. Williams*, 4 Minn. 260.

8. *Whittaker v. Hill*, 96 N. Car. 2; *Turner v. Cuthrell*, 94 N. Car. 239; *Harrison v. Bray*, 92 N. Car. 488.

9. *O'Brien v. Oswald*, 45 Minn. 59.

Ex Parte Application.—In *South Dakota*, under a statute authorizing application to be made to a district judge for an order enjoining foreclosure by advertisement, and directing that all further proceedings be had in the district court, it is held that the application is *ex parte* by the mortgagor, and that no resisting affidavits can be allowed. *Commercial Nat. Bank v. Smith*, 1 S. Dak. 28.

It is no answer to an application for a preliminary injunction against a threatened sale, that the filing of a notice of *lis pendens* would charge purchasers with notice of the applicant's rights.¹

The bill for an injunction must set out fully and distinctly the grounds upon which the complainant relies, and must present the facts in such manner that the court can determine upon the face of the bill the extent of the complainant's rights and the nature of the injury threatened. Mere conclusions or inferences will not be considered.²

The maxim that he who seeks equity must do equity, applies to cases where the debtor seeks to have the execution of a power of sale perpetually enjoined. He must be willing to pay the amount justly due under the mortgage.³

A grantee of a mortgagor cannot restrain an assignee of the mortgagee from selling, on the ground of fraud practised by the mortgagee upon the mortgagor in obtaining the mortgage, unless the plaintiff is willing to pay the entire mortgage debt, although the mortgage was assigned to the defendant as security for a smaller sum,⁴ or even though he took it with notice of the fraud.⁵

Payment or tender of the amount justly due, with legal interest, is a condition precedent to obtaining an injunction against a sale upon the ground of usury, even though by statute the effect of usury is to avoid the contract.⁶

Where the mortgage, though not technically usurious, provides for an unconscionably high rate of interest after default, equity will, it seems, interfere and enjoin the mortgagee from selling for more than the debt and lawful interest.⁷

In case of wrongful injunction, the mortgagee is entitled to

1. Conkey v. Dike, 17 Minn. 457. But see Mills v. Mills, 21 How. Pr. (N. Y. Supreme Ct.) 437; Grant County v. Colonial, etc., Mortg. Co. (S. Dak. 1892), 53 N. W. Rep. 746.

2. Vaughan v. Marable, 64 Ala. 60; Security Loan Assoc. v. Lake, 69 Ala. 456; Montgomery v. McEwen, 9 Minn. 103; Foster v. Reynolds, 38 Mo. 553; Bedell v. McClellan, 11 How. Pr. (N. Y. Supreme Ct.) 172; Whittaker v. Hill, 96 N. Car. 2.

3. Vechte v. Brownell, 8 Paige (N. Y.) 212; Powell v. Hopkins, 38 Md. 1; Walker v. Cockey, 38 Md. 75; Sloan v. Coalbaugh, 10 Iowa 31; Casady v. Bosler, 11 Iowa 242; Meysenburg v. Schlieper, 46 Mo. 209; Eslava v. Crampton, 61 Ala. 507; Paynter v. Carew, 18 Jur. 417.

In McLeod v. Jones, 24 Ch. Div. 289, it was held that this rule did not apply to a case where the mortgagee, at the time of taking the mortgage, was the solicitor of the mortgagor. In

such a case the court will look to all the circumstances, and will make such offer as will save the mortgagor from oppression without injuring the security of the mortgagee.

4. Foster v. Wightman, 123 Mass. 100.

5. Fairfield v. McArthur, 15 Gray (Mass.) 526.

6. Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122; Burnett v. Dennison, 5 Johns. Ch. (N. Y.) 35; Hyland v. Stafford, 10 Barb. (N. Y.) 558; Bidwell v. Whitney, 4 Minn. 76; Tooke v. Newman, 75 Ill. 215; Powell v. Hopkins, 38 Md. 1; Walker v. Cockey, 38 Md. 75; Warfield v. Ross, 38 Md. 85; Gantt v. Grindall, 49 Md. 310; Casady v. Bosler, 11 Iowa 242; Eslava v. Crampton, 61 Ala. 507; Haggerson v. Phillips, 37 Wis. 364; Komegay v. Spicer, 76 N. Car. 95; Manning v. Elliott, 92 N. Car. 48.

7. Bidwell v. Whitney, 4 Minn. 76; Banker v. Brent, 4 Minn. 521.

recover, in addition to the usual costs, interest on the debt during the time the injunction was in force, and in case of a deficiency after the sale, the value of emblements removed by the owner.¹

A sale made under the power in violation of an injunction would be void.²

Having once acquired jurisdiction, equity will grant full relief, and if necessary, direct a sale of the trust property.³ But the substantial terms of sale as prescribed by the power cannot be disregarded or altered by the court without consent of all the parties interested.⁴ If deemed necessary in order to secure a fair sale, the court may order the sale to be conducted by its own commissioner, instead of the mortgagee or trustee.⁵

Jurisdiction to decree a trustee's sale of railroad property is not affected by the fact that a portion of the road lies outside the territorial limits of the judicial district. A sale under such decree passes title to the entire line.⁶

2. Setting Aside Sale.—Whenever it is made to appear to a court of equity that a trustee or mortgagee has acted fraudulently, unfairly, or oppressively in executing his power of sale, or has failed to comply with the essential requirements of the power, and that some party in interest has been prejudiced thereby, relief will be afforded by setting the sale aside and allowing an opportunity to redeem.⁷

Where it is shown that as to some of the tracts sold under the power the sale was grossly unfair, the entire sale should be set aside, rights of innocent parties not being involved, notwithstanding the fact that no unfairness is shown as to another tract sold

1. *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Goodrich v. Foster*, 131 Mass. 217; *Foster v. Goodrich*, 127 Mass. 176.

2. *Lash v. McCormick*, 14 Minn. 482.

3. *Kraft v. DeForest*, 53 Cal. 656.

Where the mortgagor seeks to enjoin a sale on the ground of usury, and offers, in his bill, to pay whatever may be found due, and submits himself to the jurisdiction of the court, a sale may be decreed without the filing of a cross-bill. *Mooney v. Walter*, 69 Ala. 75.

In a suit to restrain a trustee's sale on the ground of usury, the amount of usury having been deducted, the injunction was dissolved, and the trustee ordered to sell and report to the court. There were other liens on the property, some prior, and others subsequent, to the trust deed in question, and their amounts were not ascertained. It was held that the court erred in ordering the sale before having an account taken of all such liens. *Alexander v. Howe*, 85 Va. 108. See also *Cole v. M'Rae*, 6 Rand. (Va.) 644.

4. *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272; *Hoff v. Crafton*, 79 N. Car. 592.

5. *More v. Calkins*, 85 Cal. 177; *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272.

6. *Wilmer v. Atlanta, etc., R. Co.*, 2 Woods (U. S.) 447.

7. *Matthie v. Edwards*, 2 Coll. 465; *Jones v. Matthie*, 11 Jur. 504; *Orme v. Wright*, 3 Jur. 19; *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Leet v. McMaster*, 51 Barb. (N. Y.) 236; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51; *Soule v. Ludlow*, 3 Hun (N. Y.) 503; 6 *Thomp. & C.* (N. Y.) 24; *Benkendorf v. Vincenz*, 52 Mo. 441; *Longwith v. Butler*, 8 Ill. 32; *Weld v. Rees*, 48 Ill. 428; *Waller v. Arnold*, 71 Ill. 350; *Webber v. Curtiss*, 104 Ill. 309; *Ventres v. Cobb*, 105 Ill. 33; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Grover v. Fox*, 36 Mich. 461; *Wicks v. Westcott*, 59 Md. 270; *Chappell v. Gould*, 42 Md. 466; *Montague v. Dawes*, 14 Allen (Mass.)

at the same time.¹ Though the sale was regular in form and fairly conducted, it will be set aside on proof that the mortgage was without any consideration.² Unimportant irregularities or defects in the sale proceedings, which are not shown to have caused injury, will not be allowed to affect the purchaser's title.³

369; *Hood v. Adams*, 124 Mass. 481; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306; *Littell v. Grady*, 68 Ark. 584.

(The doctrine of equitable interference with sales under powers will be found frequently illustrated throughout this article, in connection with the treatment of its various sub-titles. Accordingly, the general discussion of the doctrine and its applications under this head is not intended to embrace all the cases of equitable relief, for a large number of which the reader is referred to those sub-titles of this article dealing with the execution of powers by trustees and mortgagees.)

Literal Compliance.—In *Thompson v. Heywood*, 129 Mass. 401, *Soule, J., citing Montague v. Dawes*, 14 Allen (Mass.) 369, said: "One who undertakes to execute a power of sale is bound to the observance of good faith, and to a careful regard for the interests of his principal. A mere literal compliance with the terms of the power is not enough. And though a stranger to his proceedings, finding them regular in form, and purchasing in good faith, and who has paid value for the premises, might not be affected by his unfaithfulness, no one who participates with him in attempting to execute the power without regard to the interests of the principal, is entitled to reap any benefit from such fraudulent conduct." *Drinan v. Nichols*, 115 Mass. 353.

Sale of More Land Than Necessary.—An order dissolving an injunction against a trustee's sale, directed that only so much of the property should be sold as might be necessary to pay the debt as stated in the creditor's answer, without prejudice to the debtor's rights on final hearing. It was proved on final hearing, after the sale, that the debt was considerably less than the amount claimed by the creditor in his answer and at the sale. It was held that a resale should be ordered. *Meyers v. Jones*, 2 Lea (Tenn.) 159.

A court of equity will, where land mortgaged greatly exceeds in value the amount of the debt, interfere at the instance of the owner of the equity of re-

demption, and confine the sale to such portion of the land as will be sufficient to pay the debt and costs. And while such application should be made before the sale takes place, yet, where the mortgagor was absent on a foreign voyage as a naval officer at the time of the sale, and knew nothing of it, it was held that such absence was a sufficient excuse for failing to apply before the sale, and that the court would set the sale aside and order a resale of enough to satisfy the debt and costs. *Johnson v. Williams*, 4 Minn. 260.

Misrepresentations.—Where the mortgagee's agent at a sale under his mortgage stated that certain prior incumbrances on the property were much larger than the facts justified, and also represented a certain judgment and mortgage to be independent liens; whereas, in fact, they were merely additional securities for the other claims, the sale was set aside, though the mortgagee was not personally present, and the purchasers were relatives of the mortgagor, and there was testimony that the property brought its full market value. *Wicks v. Wescott*, 59 Md. 270.

The complainants gave a trust deed to L. and a second one to P., and afterward received an offer for the land which was more than sufficient to pay both debts, but L. dissuaded them from selling, by representing that the land would bring a better price at trustee's sale; that he would bid it in, buy up P.'s debt, and allow the complainants to remain in possession and redeem the land. In pursuance of a scheme between L. and P. to get the land and divide the profits, it was sold under both trust deeds at the same time, but in different places, and L. got possession as purchaser, whereupon he repudiated his agreement with the complainants. It was held that equity had jurisdiction to annul the sale and title so acquired. *Long v. McGregor*, 65 Miss. 70.

1. *Lalor v. McCarthy*, 24 Minn. 417.

2. *Walker v. Carleton*, 97 Ill. 582.

3. *Corrothers v. Harris*, 23 W. Va. 177.

A trustee's sale will not be set aside merely because of an announcement made by the trustee that the title would

Equity will not interfere with a sale made or about to be made on default in payment of interest under a power giving the right to declare the whole debt due upon such default, merely on the ground of relieving against a forfeiture.¹ And a sale will not be set aside merely because a larger attorney's fee was claimed in the notice of sale than was authorized by the terms of the mortgage, where it is not shown that any prejudice resulted.² Nor can a sale, made in full compliance with the terms of the power, be set aside on the ground that its provisions were severe and the rate of interest high;³ nor that the mortgagor, through his own mistake or carelessness, did not attend the sale or protect his interests.⁴

A sale having been fairly conducted, it is no ground for setting it aside that the debtor was very ill at the time of the sale and soon afterwards died.⁵

It is incumbent upon the party who applies to a court of equity to set aside a sale on the ground that it was not properly advertised or fairly conducted, to establish such grounds by clear and satisfactory evidence.⁶ It will not be presumed merely from the relationship of the parties, that the purchaser at the sale exercised any undue influence over the person who executed the power.⁷

If the owner of the equity of redemption, with knowledge of irregularities in the sale, leads an intending purchaser from the holder of the trustee's deed to believe that the power was properly executed, he will not be allowed, as against such purchaser, to disturb the sale.⁸ Only persons interested in the trust estate at the time of sale are allowed to complain of irregularities in respect to giving notice of the sale. Thus a subsequent purchaser from the mortgagor, with knowledge of the sale, cannot raise the objection.⁹

be subject to a lease executed subsequent to the trust deed, where it appears that the mortgagor, the lessor, was present and assented to the announcement. *Woerther v. Backhoff*, 12 Mo. App. 586.

1. *Hoodless v. Reid*, 112 Ill. 105.

2. *Swenson v. Halberg*, 1 Fed. Rep. 444.

3. *Robinson v. Amateur Assoc.*, 14 S. Car. 148. See also *Learned v. Geer*, 139 Mass. 31.

4. *Weld v. Rees*, 48 Ill. 428; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443. And see *King v. Bronson*, 122 Mass. 122, where the court said that "A mortgagor who knows there is a breach in the condition of a mortgage given by him, and that there is to be a sale of the premises for some reason, and has not been misled by any act or want of good faith on the part of the mortgagee, and who carelessly assumes without inquiry that the sale is not under his mortgage, and fails to attend,

is not entitled in equity to have the sale set aside. A court of equity will not assist a party who has lost his rights through his own negligence."

5. *Bowles v. Brauer* (Va. 1893), 16 S. E. Rep. 356.

6. *Tartt v. Clayton*, 109 Ill. 579; *Bush v. Sherman*, 80 Ill. 160; *Lallance v. Fisher*, 29 W. Va. 512; *Burke v. Adair*, 23 W. Va. 139; *Fulton v. Johnson*, 24 W. Va. 95; *Graham v. Fitts*, 53 Miss. 307; *McNew v. Booth*, 42 Mo. 102; *Forrester v. Scoville*, 51 Mo. 268; *Kennedy v. Kennedy*, 57 Mo. 76; *Forrester v. Moore*, 77 Mo. 651; *Jackson v. Wood*, 88 Mo. 77; *Keiser v. Gammon*, 95 Mo. 217; *Hayes v. Frey*, 54 Wis. 503. But see *Bartlett v. Jull*, 28 Grant's Ch. (Ont.) 140.

7. *Dempster v. West*, 69 Ill. 613.

8. *Hess v. Dean*, 66 Tex. 663. See also *Giddens v. Byers*, 12 Tex. 75.

9. *Wade v. Thompson*, 52 Miss. 367; *Wormell v. Nason*, 83 N. Car. 32.

The defendants, in a suit to establish

As stated elsewhere, mere inadequacy of price is no ground for setting aside a sale under a power;¹ but when it is also made to appear that the inadequacy was caused by a failure on the part of the mortgagee or trustee to perform his duty in respect to obtaining the best possible price, or by his misconduct in any other respect, equity will set aside the sale if it can be done without disturbing the rights of innocent parties.² So if the successful bidder induces others present not to bid, or to withdraw their bids, and thus gets the property for less than its value, his conduct is a fraud against which equity will relieve.³

an equitable lien upon land pending the suit, transferred to the complainant certain notes secured by trust deeds on the land, which notes he agreed to collect, and to credit the proceeds upon his claim. The suit, however, was not dismissed, nor was the agreement filed until after the complainant had procured a sale of the land under the trust deeds for his benefit. It was held that the sale could not be set aside at the instance of the purchasers of the land subject to the trust deeds, and who had assumed the debt secured by them. *Sawyer v. Campbell*, 130 Ill. 186.

Rights of Unsecured Creditors.—A trustee's sale made on the request of the beneficiary, and consummated by a deed in which the debtor joins, is valid as against a creditor of the beneficiary, though the trustee had not given the bond or taken the oath required by statute. *Ferris v. Eichbaum*, 4 Baxt. (Tenn.) 70.

1. See *supra*, this title, *Sale for Inadequate Price*.

2. *Jackson v. Crafts*, 18 Johns. (N. Y.) 110; *King v. Bronson*, 122 Mass. 122; *Thompson v. Heywood*, 129 Mass. 401; *Vail v. Jacobs*, 62 Mo. 130; *Mann v. Best*, 62 Mo. 491; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Newman v. Ogden*, 82 Wis. 53; *Mapps v. Sharpe*, 32 Ill. 13; *Runkle v. Gaylord*, 1 Nev. 123; *Meath v. Porter*, 9 Heisk. (Tenn.) 224. For other cases of fraud or collusion, by which the rights of the mortgagor were sacrificed, see the following: *Banta v. Maxwell*, 12 How. Pr. (N. Y. Supreme Ct.) 479; *Murdock v. Emple*, 19 How. Pr. (N. Y. Supreme Ct.) 79; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Soule v. Ludlow*, 6 Thomp. & C. (N. Y.) 24; *Leet v. McMasters*, 51 Barb. (N. Y.) 236; *Howard v. Ames*, 3 Met. (Mass.) 308; *Norton v. Tharp*, 53 Mich. 146; *Culbertson v. Young*, 50 Mich. 190; *Webber v. Curtiss*, 104 Ill. 309; *Equitable Trust Co. v. Fisher*, 106

Ill. 189; *Pestel v. Primm*, 109 Ill. 353; *Stoffel v. Schroeder*, 62 Mo. 147; *Enckling v. Simmons*, 28 Wis. 272; *Maxwell v. Newton*, 65 Wis. 261; *Martin v. Swoford*, 59 Miss. 328; *Loeber v. Herring*, 55 Md. 1; *Ferrand v. Clay*, 1 Jur. 265.

Where a trust deed provided for a sale at public auction, and the trustee privately fixed the price at which the property should be sold, and got his attorney to bid it in at that price, which was much less than its value, for the benefit of the creditor, no other bidders being present, it was held that it was a mere private sale, though in form a public auction, and that the grantor could redeem. *Williamson v. Stone*, 27 Ill. App. 214; 128 Ill. 129.

Where the trustee agreed with the owner of the property to postpone the sale for an hour to enable him to procure a certified check with which to pay the entire debt, but, instead of waiting, the trustee sold the property within the hour for less than the debt, it was held that his conduct was fraudulent, and that the sale should be set aside. *Ventres v. Cobb*, 105 Ill. 33.

Fraud by Mortgagee.—A mortgagee with the power of sale, purposely published a notice of foreclosure in a newspaper published in a city distant from that where the mortgaged premises were situated, whereby the mortgagor and intending bidders were kept in ignorance of the sale. He refrained from demanding payment, discouraged at least one probable bidder from attending, claimed in the notice a portion of the debt which was not due—including an exorbitant attorney's fee, made no effort to get bidders, and bid in the property himself for about one-sixth of its value. It was held that his conduct was fraudulent, and the sale should be set aside. *Newman v. Ogden*, 82 Wis. 53.

3. *Dover v. Kennerly*, 44 Mo. 145; *Fenner v. Tucker*, 6 R. I. 551.

Generally, any secret agreement between the mortgagee or trustee and others, which tends to prevent competition in bidding, and which was carried out at the sale, entitles the holder of the equity of redemption to have the sale set aside.¹

A purchaser with actual knowledge of irregularities is not protected by a provision in the power that the purchaser shall not be bound to make any inquiries.²

A trustee's sale made in violation of an agreement between the parties to extend the time for paying the note until the debtors were notified by the holder that he desired payment, is a fraud against which equity will relieve.³ But a mere voluntary assurance to the holder of the equity that the property would not be sold so long as he paid the interest promptly, is not binding, even in equity.⁴

In proceedings to set aside the sale, the original purchaser and his successors in title are necessary parties.⁵

The defects or irregularities relied upon must be clearly and specifically set forth in the bill.⁶

Some refinements have been made by the courts in respect to the proper form of proceeding to test the validity of a sale under the power, it being suggested that the complainant should bring a bill to redeem, rather than one to set the sale aside.⁷ Practically, this is of little importance, as the relief afforded under a bill to set aside the sale is based upon similar principles, and subject to like conditions as govern a bill to redeem. The owner of the equity of redemption who succeeds in vacating the sale does not thereby extinguish the debt or the mortgage lien. He is simply restored to his right of redemption, as if there had been no sale.⁸

Where the court holds that no valid sale has been made, a decree may be entered, vacating the sale and allowing complainant

1. *Mapps v. Sharpe*, 32 Ill. 13; *Williamson v. Stone*, 27 Ill. App. 214; 128 Ill. 129; *Bradley v. Tyson*, 33 Mich. 337.

2. *Jenkins v. Jones*, 2 Giff. 99; *Cranston v. Crane*, 97 Mass. 459; *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 350; *Grover v. Hale*, 107 Ill. 638.

3. *Rounsavell v. Crofoot*, 4 Ill. App. 671. It was also held in this case that, inasmuch as the holder of the note had been receiving payments of interest at a place other than that designated in the deed, good faith required that, before demanding payment at the place designated, he should have notified the debtors that he would no longer collect at the other place as he had previously done.

4. *Booth v. Wiley*, 102 Ill. 84. See also *Randall v. Hazelton*, 12 Allen (Mass.) 412.

Promise of Personal Notice.—A judgment creditor, whose lien is subordi-

nate to a trust deed, cannot attack the title of a purchaser at a sale by the trustee, on the ground that a former owner of the trust note had promised the judgment creditor to give him notice of the sale, but which he had refrained from doing, at the instance of the purchaser, and by reason of which the creditor did not learn of the sale and was thus prevented from bidding. The public advertisement was all the notice to which the creditor was entitled. *Tisomingo Sav. Inst. v. Duke* (Miss. 1887), 1 So. Rep. 165.

5. *Candee v. Burke*, 1 Hun (N. Y.) 546; 4 *Thomp. & C.* (N. Y.) 143; *Fairman v. Peck*, 87 Ill. 156.

6. *Sawyer v. Bradshaw*, 125 Ill. 440.

7. *Schwarz v. Searn. Walk.* (Miss.) 170; *Tuthill v. Lupton*, 1 *Edw. Ch.* (N. Y.) 564. See *Jones Mortg.* (4th ed.), § 1921.

8. *Myer v. Jefferson Ins. Co.*, 5 Mo.

to redeem within a specified time, by paying the amount found due; or, upon default of such payment, a decree that the bill be dismissed. There is no error in refusing to decree a sale.¹ If the sale was fraudulent, and the purchaser was a party to the fraud, the owner of the equity of redemption will not be required to pay the amount of the purchase price as a condition of setting the sale aside.²

Where the complainant's bill does not show a willingness to pay defendant the amount properly chargeable against the property, and defendant stands ready and willing to reconvey upon payment of such amount, the bill may be dismissed.³

Upon failure by the debtor to comply with the condition of payment imposed by the court in setting aside the sale, the decree becomes inoperative, and is no defense to an action of ejectment by the purchaser.⁴

3. Ratification and Laches.—In respect to irregularities in a sale under a power, equity will not permit the complaining party to remain inactive after he has learned of the defects, and still retain the privilege at some time in the future of letting the sale stand or setting it aside, according as it may then be found for his interest to do. He must act promptly, and within a reasonable time, or he will be barred by his own laches.⁵ There is no fixed period within which the suit to avoid the sale must be commenced. The question of laches depends upon all the circumstances of each particular case. The facts that the property has greatly increased in value during the period of delay, and that the rights of third parties have intervened, are often of controlling weight in determining the question.⁶

App. 245; *Stackpole v. Robbins*, 47 Barb. (N. Y.) 212; *Goldsmith v. Osborne*, 1 Edw. Ch. (N. Y.) 560; *Candee v. Burke*, 1 Hun (N. Y.) 546.

1. *Massachusetts Mut. L. Ins. Co. v. Boggs*, 121 Ill. 119; *Decker v. Patton*, 120 Ill. 464.

2. *Littell v. Grady*, 38 Ark. 584; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245. But, if the sale be set aside, the purchaser may be subrogated to the lien of the creditor. *Littell v. Grady*, 38 Ark. 584.

3. *Kline v. Vogel*, 11 Mo. App. 211.

4. *Cupples v. Galligan*, 6 Mo. App. 62.

5. *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 145; *Learned v. Foster*, 117 Mass. 89; *Hamilton v. Lubukee*, 51 Ill. 415; *Dempster v. West*, 69 Ill. 613; *Bush v. Sherman*, 80 Ill. 160; *McHany v. Schenk*, 88 Ill. 357; *Maier v. Farwell*, 97 Ill. 56; *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill. 390; *Irish v. Antioch College*, 126

Ill. 474; *Butterfield v. Farnham*, 19 Minn. 85; *Fowler v. Lewis*, 36 W. Va. 112; *Helm v. Yerger*, 61 Miss. 44.

Where property was sold under a trust deed while the grantor was confined in the penitentiary, and was purchased for its full value and paid for by third persons acting in good faith, and who made valuable improvements upon the faith of their title, and the grantor made no effort to impeach the sale for over eleven years after his release from prison, his claim that the sale was void under the *Kansas* statute because made during his imprisonment, was held stale. *Fraker v. Houck*, 36 Fed. Rep. 403.

6. See cases cited in the preceding note. See also *Massachusetts Mut. L. Ins. Co. v. Boggs*, 121 Ill. 122.

What Constitutes Laches.—Four years delay was held to constitute inexcusable laches in *Cornell v. Newkirk*, 144 Ill. 241.

In *Learned v. Foster*, 117 Mass. 365, a delay of thirteen years by the holder of the equity, in bringing suit to redeem,

In regard to notice of the defects complained of, knowledge by the mortgagor of the fact that a foreclosure sale has been made, is presumptively sufficient to put him on inquiry as to the regularity of the foreclosure proceedings.¹ If the sale was absolutely void, no acquiescence for a period short of that prescribed by statute will be considered as a waiver of the invalidity, or a confirmation of the sale.²

As against infants, there can be no ratification of an irregular and voidable sale under the power.³

4. Parties in Equity.—The general rule is, that in a bill to foreclose a mortgage the only necessary or proper parties are the mortgagor, the mortgagee or trustee holding the power of sale, and such persons as have acquired any interests from them subsequent to the mortgage. One who claims title from a stranger, or even from the mortgagor, anterior to the date of the mortgage, should not be brought in as a party defendant.⁴

While the *cestui que trust* is a very proper party to a bill by the trustee to foreclose, it is held that he is not ordinarily a necessary one.⁵ But the *cestuis que trustent* are necessary parties in proceedings against the trustee affecting the subject-matter of the trust.⁶

was held unreasonable, the complainant having lived within a mile of the property and known of the purchaser's possession, though he had no actual knowledge of the sale. So of a delay of nearly ten years in bringing suit to set aside a sale on the sole ground that the mortgagee became the purchaser. *Askew v. Sanders*, 84 Ala. 356.

In *Bausman v. Eads*, 46 Minn. 148, a neglect for eight years after a mortgage sale to make any objection to it, was held to justify a subsequent purchaser in relying upon the foreclosure as valid.

1. *Marcotte v. Hartman*, 46 Minn. 202; *Depew v. Dewey*, 46 How. Pr. (N. Y. Supreme Ct.) 441.

Diligence in Discovering Irregularities.—In *Bush v. Sherman*, 80 Ill. 160, the court, in discussing the question of laches, said: "The principle that lies at the foundation of all the cases in this court upon this subject is: The party who challenges a sale on account of irregularities that may have intervened must be diligent in discovering that which he alleges will avoid the sale, and diligent in his application for relief." This language was quoted with approval in the recent case of *Cornell v. Newkirk*, 144 Ill. 241. See also *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill. 399; *McDonald v. Stow*, 109 Ill. 40; *Breit v. Yeaton*, 101 Ill. 242; *Nichols v. Otto*, 132 Ill. 91; *Maher v. Farwell*,

97 Ill. 571; *McHany v. Schenk*, 88 Ill. 365.

2. *Sloan v. Frothingham*, 65 Ala. 593.

The mortgagor cannot be required to bring his action to set aside a void sale before the expiration of the statutory period of redemption. *Hull v. King*, 38 Minn. 349.

Statutory Limitation.—A failure to state separately, in a notice of sale, the amount due on separate lots covered by a single mortgage, is a "defect in the notice," within the meaning of Gen. Laws Minnesota 1883, ch. 112, limiting to five years the commencement of actions to set aside foreclosure sales on account of defects in the notice of sale. *Bitzer v. Campbell*, 47 Minn. 221. The act of 1883 does not apply to a foreclosure sale, absolutely void on account of an absence of authority to execute the power, as where the mortgagee was dead at the time of sale, and the foreclosure was made in his name. *Bausman v. Kelley*, 38 Minn. 197.

3. *Tatunn v. Holliday*, 59 Mo. 422.

4. See FORECLOSURE, vol. 8, p. 185. See also *Randle v. Boyd*, 73 Ala. 282; *Lyon v. Powell*, 78 Ala. 351; *McHany v. Ordway*, 82 Ala. 463; *Hambrick v. Russell*, 86 Ala. 199.

5. *Harlem Co-operative Bldg. Assoc. v. Quinn*, 10 N. Y. Supp. 682.

6. *Benjamin v. Loughborough*, 31 Ark. 210; *Wolff v. Ward*, 104 Mo. 127.

Where the validity of the trust deed is involved, the trustee is not, by virtue of his office, a proper representative of the *cestuis que trustent*; they must be brought into court.¹

The trustee, as well as the owners of the equity of redemption, is a necessary party to a bill for foreclosure.² And it has been held that he is an indispensable party, and that the objection of non-joinder may be raised at any stage of the proceedings.³

One of three trustees may sue alone for foreclosure, upon a showing that one of his co-trustees is dead, and that the other is claiming an adverse interest in the estate.⁴ In proceedings to remove the trustee, or to appoint a successor, the grantor of the trust, and also purchasers from him, are necessary parties.⁵

XXVII. EXTINGUISHMENT AND DISCHARGE.—A trust deed or mortgage, unless in some way separately extinguished, remains in force until the debt has been satisfied, and is not impaired by a renewal or change in the form of the debt.⁶ Reducing the mort-

The beneficiary is not bound by a decree in partition to which he was not a party, though the trustee was joined. *Vogle v. Brown*, 120 Ill. 344.

1. *Ridenour v. Shideler*, 5 Ill. App. 180.

2. *Tucker v. Silver*, 9 Iowa 261; *Walsh v. Truesdell*, 1 Ill. App. 126; *Harlow v. Mister*, 64 Miss. 25.

Parties Plaintiff.—The purchaser at an invalid sale under a trust deed, who has expended money for repairs and taxes, and given a new trust deed on the property, together with the creditor in such new deed and the trustees in both trust deeds, are proper parties plaintiff in a bill to foreclose the original deed. *Wolff v. Ward*, 104 Mo. 127.

3. *Hambrick v. Russell*, 86 Ala. 199; *Comer v. Bray*, 83 Ala. 217; *Lawson v. Alabama Warehouse Co.*, 73 Ala. 290; *Prout v. Hoge*, 57 Ala. 28.

4. *Robinson v. Alabama, etc., Mfg. Co.*, 48 Fed. Rep. 12.

5. *Holden v. Stickney*, 2 McArthur (D. C.) 141; *Clark v. Wilson*, 53 Miss. 149.

6. *Christian v. Newberry*, 61 Mo. 446; *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19.

Foreclosure After Release by Mistake.—Defendant's grantor purchased land from plaintiff by a warranty deed, and gave plaintiff a purchase-money mortgage, with power of sale. These were duly recorded. Subsequently, to correct an alleged defective description, plaintiff gave defendant's grantor a quit-claim deed of the land, which was not intended by the parties as a release of the mortgage. This was also recorded.

Thereafter defendant bought the land, with notice of the purpose for which the quit-claim deed was given. Plaintiff proceeded to foreclose the mortgage by advertisement and sale under the power, and bought in the land at the sale. No redemption was ever made from this sale. In an action brought by plaintiff to have the effect of the quit-claim deed limited so as not to release the mortgage, and for other relief, the trial court held that the legal effect of the quit-claim was to discharge the mortgage; that, therefore, the foreclosure under the power was null and void; but that, inasmuch as the quit-claim was not intended by the parties to have that effect, plaintiff was entitled to a decree limiting its effect as to the mortgaged property, and reinstating the mortgage, and directing judicial foreclosure. From so much of the decree as held the foreclosure by advertisement void, plaintiff appealed. The decree was affirmed, the court saying: "To entitle one to foreclose a mortgage by advertisement, he must have a legal mortgage in which is a power of sale. It must have been duly recorded, Gen. St. 1878, ch. 81, § 2. The statute authorizing this method of foreclosure, evidently designs that there shall be of record a legal mortgage, and that the record shall be so complete as to satisfactorily show the right of the mortgagee or his assigns to invoke its aid. There can be no foreclosure under this statute, of an equitable mortgage, and that was all plaintiff had after the record of the deed, which operated to release and discharge

gage debt to judgment, so long as the judgment remains unsatisfied, does not suspend or extinguish the power of sale.¹ On the other hand, payment of the debt before sale, absolutely extinguishes the power.² Such, also, is the effect of a valid tender of the amount due.³ Any sale under the power after its extinguishment by payment in full, is a nullity,⁴ but as to *bona fide* pur-

the previously existing incumbrance. At least, not until the entry of the judgment appealed from." *Benson v. Markoe*, 41 Minn. 112. It may be seriously questioned whether this decision does not proceed upon erroneous views. The statute cited merely required the mortgage to be recorded, and this had been done. If the quit-claim deed was not intended by the parties to operate as a discharge of the mortgage, it is difficult to see how the court could hold that that was its legal effect, but even if it were technically discharged, the mortgage was still of record, had not in equity or in fact been satisfied, and the defendant had purchased with full knowledge of the intention of the parties. It would seem that the power of sale given by the mortgage was thus left in full force and operation, as against all parties interested, and having been exercised by the mortgagee upon default, and the statutory formalities complied with, the sale under it was entirely valid as against the defendant who had notice of the facts. Yet here the court, sitting in equity, declares a power of sale wholly extinguished by reason of a mere technicality, contrary to the intention of any of the parties interested, and in the absence of any statute forbidding the exercise of the power so long as it actually existed.

As said in *Fergusond v. Glassford*, 68 Mich. 36, "It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained."

A deed of trust was given to a husband and wife on lands of the wife. She having died, the husband and her heirs conveyed the land to a third person and took the purchase-money notes, secured by vendor's lien, payable to the trustee, one of them being given to the *cestui que trust* in payment of the trust debt. Subsequently, the vendee, without the knowledge of the *cestui que trust*, reconveyed to the husband, who, in consideration of the surrender of the note held by the *cestui que trust*, deeded him a part of the land, from which he was afterwards ejected by the wife's

heirs. It was held that as against the heirs, he had not lost his superior title under the trust deed. *McKinney v. Matthews* (Tex. 1888), 6 S. W. Rep. 793.

Rights of Other Creditors.—A conveyed land to a trustee to secure a debt to B, with power to sell on default. After default, A conveyed absolutely to B, who indorsed on the trust deed that it was satisfied by the purchase of the land. After such indorsement, but before recording A's deed to B, a creditor of A levied on the land and it was sold by the sheriff. B then procured and recorded a deed from the trustee. It was held that his title was superior to that of the purchaser at the sheriff's sale. *Scruggs v. Williams*, 5 Lea (Tenn.) 478.

1. *Hewitt v. Templeton*, 48 Ill. 357; *Ross v. Worthington*, 11 Minn. 438; *Bank of Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19; 2 *Jones Mortg.* (4th ed.), § 924.

Power Not Affected by Judgment.—

The rule is well established in *Virginia* that the power of sale in a mortgage or trust deed is not in any way affected by obtaining judgment for the debt secured. *Hanna v. Wilson*, 3 Gratt. (Va.) 232; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Bowle v. Poor School Society*, 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190; *Paxton v. Rich*, 85 Va. 378; *Gibson v. Green*, 89 Va. 524.

2. *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Redmond v. Packenham*, 66 Ill. 434.

Under the *Missouri* statutes, payment of the debt to the trustee in a deed of trust is valid and operates to discharge the deed. *Whelan v. Reilley*, 61 Mo. 565.

Conveyance by Debtor to Creditor.—A quit-claim deed from the grantor in a trust deed to the beneficiary, will not be treated as a satisfaction of the debt, in the absence of evidence that such was the intention of the parties. *Collins v. Stocking*, 96 Mo. 240.

3. *Thornton v. National Exch. Bank*, 71 Mo. 221.

4. *Misener v. Gould*, 11 Minn. 166; *Warner v. Blakeman*, 43 N. Y. 477.

chasers, a mortgagor who stands by and allows the sale to be made without giving notice of the extinguishment of the debt, will be estopped from questioning the validity of the sale.¹

The party aggrieved by the refusal of a trustee or mortgagee to discharge the incumbrance of record upon payment in full of the debt, has his remedy either by an action for damages, or by suit in equity to remove the cloud upon his title.²

Trust deeds are so essentially mortgages, that they may be discharged by an entry of satisfaction upon the margin of the record, where the statute provides for such method of satisfying mortgages. A reconveyance by the trustee is not necessary.³

A release of a trust deed, duly executed and acknowledged, is *prima facie* valid, and the mere fact that the debt remained unpaid when the release was given is not sufficient to raise a presumption of fraud, accident, or mistake.⁴

One who purchases property from the original owner, after the trustee has executed and recorded a release of the trust deed, is not bound to search the records to see if any conveyance has been made under the power after its release.⁵

A release, or conveyance, by the mortgagee, of a portion of the mortgaged premises, does not impair his right to sell the remainder under the power.⁶

Whenever all the parties in interest so request, the trustee is bound to discharge the trust deed, even though the evidences of debt are not actually canceled.⁷ A discharge, to be valid, must be with the consent of all the secured creditors; and the rights of one who does not authorize it, and whose claim has not been paid, are in no wise affected by putting it on record.⁸

1. Warner v. Blakeman, 36 Barb. (N. Y.) 501; Swan v. North British, etc., Co., 2 H. & C. 181; McArthur v. Eagleson, 43 U. C. Q. B. 416; Mason v. Bickle, 2 Ont. App. Rep. 291.

In *Minnesota*, the court holds, "that when a mortgage containing a power of sale has been in fact discharged, it is the duty of the mortgagor or owner of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record; that a failure so to do leaves the mortgagee apparently still clothed with power to foreclose; and that, upon a foreclosure under such apparent authority, an innocent purchaser, if his evidence of title be first recorded, will be protected. The mortgagor or owner of the equity of redemption cannot rest on the fact that the mortgage has been paid and the power to foreclose extinguished, and cannot assume that no attempt will be made to exercise the power, if

he permits it to appear by the record to be in full force. As between him and innocent purchasers for value under the power, he will be bound by the record." Gilfillan, C. J., in *Bausman v. Eads*, 46 Minn. 148, following *Merchant v. Woods*, 27 Minn. 396. And see *Bausman v. Faue*, 45 Minn. 412.

2. *Verges v. Giboney*, 47 Mo. 171; *Sherwood v. Wilson*, 2 Sweeney (N. Y.) 684.

3. *Ingle v. Culbertson*, 43 Iowa 265; *Smith v. Doe*, 26 Miss. 291; *McGregor v. Hall*, 3 Stew. & P. (Ala.) 397; *Woodruff v. Robb*, 19 Ohio 212; *Crosby v. Huston*, 1 Tex. 239.

4. *Battenhausen v. Bullock*, 8 Ill. App. 312.

5. *Porter v. McNabney*, 77 Ill. 235.

6. *Durm v. Fish*, 46 Mich. 312; *Wilson v. Troup*, 2 Cow. (N. Y.) 195.

7. *Pearce v. Bryant Coal Co.*, 25 Ill. App. 51.

8. *Gottschalk v. Neal*, 6 Mo. App. 596.

Where certain of the beneficiaries under a trust deed released the grantor

The trustee, though nominally possessed of the legal title, has no right to release the trust deed without payment of the debt, or authority from the beneficiary; and if he wrongfully executes a release without such payment or authority, it is void in equity, and the deed remains in full force.¹ A purchaser of the property, with notice of the trustee's want of authority to release, takes subject to all the rights of the beneficiaries.²

A personal action by the beneficiaries against the trustee, for damages caused by his wrongful release of the deed, will not bar an action to set aside the release.³ If the discharge was wholly unauthorized and void, an action to set it aside is not necessary before proceeding to foreclose.⁴ But it is the duty of a creditor, upon learning of an unauthorized release by the trustee, to promptly repudiate it; if he does not, and permits others to deal with the property upon the faith of the release, he becomes estopped to deny the trustee's authority.⁵ It is not necessary that the beneficiary's consent to the trustee's reconveying the property to the grantor should be in writing. A release of the trust by such conveyance is effectual if the beneficiary consent to it by parol.⁶

XXVIII. RECORDING ACTS.—Statutes regulating the recording of mortgages are generally held to apply to trust deeds without special mention.⁷

In *Louisiana*, a trust deed becomes extinguished as to third persons, if not reinscribed within ten years from the date of its

in consideration of his conveying to them a portion of the property covered by the trust, it was held that the beneficiaries not parties to the arrangement were not bound by it, and did not lose their right to enforce the trust deed. *Barcroft v. Lessieur*, 48 Mo. 418.

1. *Lakenan v. Robards*, 9 Mo. App. 179; *Armstrong v. Robards*, 81 Mo. 445; *DeLaurel v. Kemper*, 9 Mo. App. 77; *Carpenter v. Bowen*, 42 Miss. 28.

2. *Connecticut Gen. L. Ins. Co. v. Eldredge*, 102 U. S. 545; *Stiger v. Bent*, 111 Ill. 328; *Browne v. Davis*, 109 N. Car. 23; *Carpenter v. Bowen*, 42 Miss. 28.

Purchase by Trustee.—A trustee cannot, by obtaining title to the property in his own name and then executing a release of the trust deed and giving another to secure his own debts, cut off the rights of the beneficiary in the first trust deed which was duly recorded. *Swift v. Smith*, 102 U. S. 442.

3. *Chicago, etc., Land Co. v. Peck*, 112 Ill. 433.

4. *Stiger v. Bent*, 111 Ill. 328; *Browne v. Davis*, 109 N. Car. 23.

5. *Barbour v. Scottish-American Mortg. Co.*, 102 Ill. 121.

6. *First Nat. Bank v. Kreig*, 21 Nev. 404; *Ackla v. Ackla*, 6 Pa. St. 328; *Howard v. Gresham*, 27 Ga. 347; *Griswold v. Griswold*, 7 Lans. (N. Y.) 72; *Southerin v. Mendum*, 5 N. H. 420; *Leavitt v. Pratt*, 53 Me. 147; *Wallis v. Long*, 16 Ala. 738; 3 Pom. Eq. § 1183; 2 *Reed St. of Frauds* 453.

7. *Sheffey v. Bank of Lewisburg*, 33 Fed. Rep. 315; *Wilkins v. Wright*, 6 McLean (U. S.) 340; *Fogarty v. Sawyer*, 23 Cal. 570; *Magee v. Carpenter*, 4 Ala. 469; *Bank of Commerce v. Lananhan*, 45 Md. 396; *Woodruff v. Robb*, 19 Ohio 212; *Thibodaux v. Anderson*, 34 La. Ann. 797. See also **RECORDING ACTS**, vol. 20, p. 534.

Priority; Recitals.—A recital in a trust deed that certain land covered by it had been previously "conveyed by deed in trust to secure payment of a debt to" plaintiff, gives plaintiff's trust deed priority over the other, though otherwise, owing to a failure to record it, it would have been a subordinate lien. *Hinton v. Leigh*, 102 N. Car. 28. See also, as to the effect of recitals, *United States Mortg. Co. v. Gross*, 93 Ill. 483.

original registry,¹ but neither the mortgagor nor his heirs can take advantage of the failure to reinscribe.²

In some states, a failure to record the power, when required by statute, prevents its being executed, and limits foreclosure to a suit in equity.³

TRUSTEE PROCESS.—(See FOREIGN ATTACHMENT, vol. 8, p. 288; GARNISHMENT, vol. 8, p. 1097.)

1. *Louisiana Rev. Code*, § 3363; *Pickett v. Foster*, 36 Fed. Rep. 514; *Succession of Gagneux*, 40 La. Ann. 701; *Marks v. Martin*, 27 La. Ann. 527; *Leonard v. Smith*, 28 La. Ann. 811.

2. *Shields v. Shiff*, 124 U. S. 351.

3. *Fry v. Martin*, 33 Ark. 203; *Thorp v. Merrill*, 21 Minn. 336. In the case last cited, the mortgage was duly delivered to the register of deeds for record, but by his mistake in copying the description into the record, it was made to read the "N. E. quarter" instead of the southeast. The court held that a sale under the power was invalid. The court said: "The effect of the error in the record is that the mortgage is not recorded; and as to entitle any party to foreclose a mortgage by advertisement, it is 'requisite' that the same should have been 'duly recorded' (Gen. Stat., ch. 81, §§ 1, 2), it follows that the attempted foreclosure under which the plaintiff claims title, is invalid and wholly ineffectual, the mortgage sought to be foreclosed not having been so recorded. . . .

We do not at all assent to the doctrine of the authorities cited by counsel for plaintiff, to the effect that the statute, in requiring a mortgage to be recorded before foreclosure by advertisement, has in mind the protection and benefit of the purchaser at the foreclosure sale only. The requirement is for the benefit of all parties interested, and, among others, of the mortgagor and those who claim under him. That the record should correctly show the authority of the mortgagee or his assigns to sell, is important to the mortgagor, because it is for his interest that the title should be as marketable as it may be, since he may be liable for a deficiency; and it is important to the mortgagor, or those claiming under him, because they may be entitled to a surplus." The court further held that the register's certificate

upon the back of the mortgage that it had been "duly recorded" in a certain book, was not conclusive on the point.

Material Alteration Must be Recorded.

—An agreement signed by sureties and secured by trust deed, to the effect that they will not foreclose except in case of actual loss on account of their suretyship, materially alters the conditions of the trust deed, and must be recorded. *Munson v. Ensor*, 94 Mo. 504.

Assignment Need Not be Recorded.—

"The law in this state is well settled that an assignment of a debt secured by mortgage operates as an assignment of the mortgage. It is not necessary in such cases that there should be an assignment of the mortgage to entitle the assignee to the benefit of the same, and where an assignment is made there is no reason why it should be recorded. In equity, the mortgage is but a security of the debt, and the assignment of the latter necessarily carries with it the former, unless there is some statutory provision in this state contravening this well-established rule in equity. The appellant, however, contends that, under the act of 1868 (chapter 373), it was necessary that the assignment should have been recorded, in order to perfect his title to the mortgage lien as against a subsequent assignee, claiming under an assignment executed and recorded. Such is not our opinion of the proper construction to be placed upon the act in question. It was not the purpose of the act in question to affect in any manner the equitable assignment of mortgages by the mere assignment of the mortgage debt, nor to impair the rights of assignees thereunder." *Robert, J.*, in *Western Maryland R., etc., Co. v. Goodwin* (Md. 1893), 26 Atl. Rep. 319, citing *Byles v. Tome*, 39 Md. 464; *Harnickell v. Orndorff*, 35 Md. 343.

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